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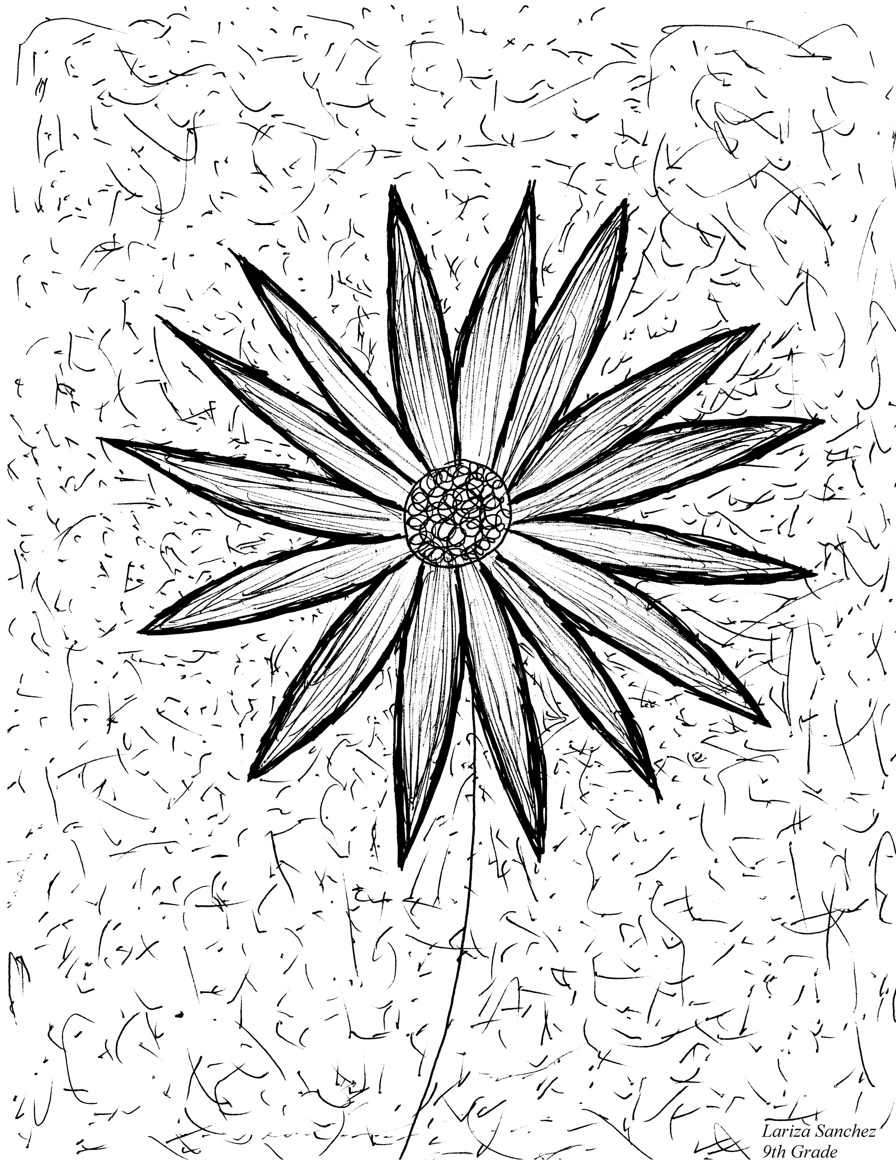

Lariza Sanchez
9th Grade

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

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

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TEXAS REGISTER

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Open Meetings

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

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

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

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

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

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

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

Additional information about state government may be found here:
http://www.state.tx.us/

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

THE GOVERNOR

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

Appointments

Appointments for May 4, 2009

Appointed as the Texas State Historian, Light T. Cummins of Sherman (replacing Jesus de la Teja of Austin whose term expired). He retains the designation for two years from the date of the honoring ceremony.

Designating Glynda Corley as Presiding Officer of the Texas State Board of Examiners of Professional Counselors for a term at the pleasure of the Governor. Ms. Corley is replacing Judith Powell of The Woodlands as presiding officer.

Appointed to the Commission on Human Rights for a term to expire February 1, 2015, Michelle H. Diggs of Cedar Park (replacing Jose de Santiago of Houston whose term expired).

Appointed to the Commission on Human Rights for a term to expire February 1, 2015, Veronica Vargas Stidvent of Austin (Ms. Stidvent is being reappointed).

Appointed to the Upper Guadalupe River Authority for a term to expire February 1, 2015, Lester C. Ferguson of Kerrville (replacing Jaime Quintanilla of Kerrville whose term expired).

Appointed to the Upper Guadalupe River Authority for a term to expire February 1, 2015, Stanley R. Kubenka of Kerrville (Mr. Kubenka is being reappointed).

Appointed to the Upper Guadalupe River Authority for a term to expire February 1, 2015, Lucy Ortiz Wilke of Kerrville (replacing Walter Schellhase of Kerrville whose term expired).

Appointed to the Texas Emancipation Juneteenth Cultural and Historical Commission for a term to expire February 1, 2011, Carmen P. Francis of Georgetown (replacing Stella Roland of Austin whose term expired).

Appointed to the Texas Emancipation Juneteenth Cultural and Historical Commission for a term to expire February 1, 2015, Willie Belle Boone of Houston (replacing Byron Miller of San Antonio whose term expired).

Appointed to the Texas Appraiser Licensing and Certification Board for a term to expire January 31, 2011, Walker R. Beard of El Paso (replacing Larry Kokel of Walburg whose term expired).

Appointed to the Texas Appraiser Licensing and Certification Board for a term to expire January 31, 2011, Danny R. Perkins of Houston (Dr. Perkins is being reappointed).

Appointed to the Texas Appraiser Licensing and Certification Board for a term to expire January 31, 2011, James B. Ratliff of Garland (Mr. Ratliff is being reappointed).

Appointed to the Texas Appraiser Licensing and Certification Board for a term to expire January 31, 2011, Donna L. Walz of Lubbock (Ms. Walz is being reappointed).

Appointed to the Automobile Burglary and Theft Prevention Authority for a term to expire February 1, 2015, Mark H. Wilson of Brandon (replacing Jason Hartgraves of Frisco whose term expired).

Appointed to the Automobile Burglary and Theft Prevention Authority for a term to expire February 1, 2015, Margaret "Jerry" Wright of El Paso (Ms. Wright is being reappointed).

Appointed to the Texas School Safety Center Board for a term to expire February 1, 2011, Amy L.C. Clapper of Georgetown. Ms. Clapper is replacing Lucy Rubio of Corpus Christ whose term expired.

Appointed to the Texas Diabetes Council for a term to expire February 1, 2015, Gene Fulton Bell of Lubbock (Ms. Bell is being reappointed).

Appointed to the Texas Diabetes Council for a term to expire February 1, 2015, Victor Hugo Gonzalez of McAllen (Dr. Gonzales is being reappointed).

Appointed to the Texas Diabetes Council for a term to expire February 1, 2015, Arthur E. Hernandez of Rockport (replacing Avery Rhodes of Diboll whose term expired).

Appointed to the Texas Diabetes Council for a term to expire February 1, 2015, Dora Rivas of Dallas (Ms. Rivas is being reappointed).

Appointed to the Texas Board of Orthotics and Prosthetics for a term to expire February 1, 2015, Leah F. Esparza of Austin (replacing Kenneth Mueller of Brenham whose term expired).

Appointed to the Texas Board of Orthotics and Prosthetics for a term to expire February 1, 2015, Roy D. McCoy of Round Rock (Mr. McCoy is being reappointed).

Appointed to the Texas Board of Orthotics and Prosthetics for a term to expire February 1, 2015, Miguel N. Mojica of Coppell (Mr. Mojica is being reappointed).

Appointed to the Private Sector Prison Industries Oversight Authority for a term to expire February 1, 2015, Elaine Anne Boatright of Smithville (replacing Lillian Barajas of El Paso whose term expired).

Appointed to the Private Sector Prison Industries Oversight Authority for a term to expire February 1, 2015, Burnis Brazil of Richmond (Mr. Brazil is being reappointed).

Appointed to the Private Sector Prison Industries Oversight Authority for a term to expire February 1, 2015, S. Roxanne Carter of Canyon (Ms. Carter is being reappointed).

Appointed to the Angelina and Neches River Authority Board of Directors for a term to expire September 5, 2011, Patricia E. Dickey of Crockett. Ms. Dickey is replacing Greg James of Nacogdoches who resigned.

Appointed to the Texas State Board of Public Accountancy for a term to expire January 31, 2015, Everett "Ray" Ferguson of Abilene (replacing Orville Mills of Sugar Land whose term expired).

Appointed to the Texas State Board of Public Accountancy for a term to expire January 31, 2015, James C. Flagg of College Station (Mr. Flagg is being reappointed).

Appointed to the Texas State Board of Public Accountancy for a term to expire January 31, 2015, Jon R. Keeney of Taylor Lake Village (replacing John Walton of Dallas whose term expired).

Appointed to the Texas State Board of Public Accountancy for a term to expire January 31, 2015, Maribess L. Miller of Dallas (replacing David Duree of Odessa whose term expired).

Appointed to the Texas State Board of Public Accountancy for a term to expire January 31, 2015, Thomas G. Prothro of Tyler (replacing Joe Richardson of Houston whose term expired).

Appointed to the Council on Sex Offender Treatment for a term to expire February 1, 2015, Frederick Liles Arnold of Plano (Mr. Arnold is being reappointed).

Appointed to the Council on Sex Offender Treatment for a term to expire February 1, 2015, Joseph R. Gutheinz, Jr. of Houston (replacing Glen Kercher of Huntsville whose term expired).

Appointed to the Council on Sex Offender Treatment for a term to expire February 1, 2015, Holly A. Miller of The Woodlands (replacing Maria Molett of Garland whose term expired).

Appointed to the Texas Board of Physical Therapy Examiners for a term to expire January 31, 2015, Kevin Lindsey of Mission (replacing Joseph Spano of Wharton whose term expired).

Appointed to the Texas Board of Physical Therapy Examiners for a term to expire January 31, 2015, Rene D. Pena of El Paso (replacing Manoranjan Mahadeva of Austin whose term expired).

Appointed to the Texas Board of Physical Therapy Examiners for a term to expire January 31, 2015, Melinda A. Rodriguez of San Antonio (Dr. Rodriguez is being reappointed).

Appointed to the Lavaca-Navidad River Authority Board of Directors for a term to expire May 1, 2015, John A. Cotton, Jr. of Ganado (Mr. Cotton is being reappointed).

Appointed to the Lavaca-Navidad River Authority Board of Directors for a term to expire May 1, 2015, Ronald E. Kubecka of Palacios (Mr. Kubecka is being reappointed).

Appointed to the Lavaca-Navidad River Authority Board of Directors for a term to expire May 1, 2015, Nils P. Mauritz of Ganado (replacing Jackie Ann Fowler of Ganado whose term expired).

Appointed to the Texas Commission on Fire Protection for a term to expire February 1, 2011, John W. Green of San Leon (replacing John Riddle of Willis who resigned).

Appointed to the Texas Commission on Fire Protection for a term to expire February 1, 2015, Leslie W. Bunte, Jr. of Bryan (Mr. Bunte is being reappointed).

Appointed to the Texas Commission on Fire Protection for a term to expire February 1, 2015, Yusuf Elias Farran of El Paso (Mr. Farran is being reappointed).

Appointed to the Texas Commission on Fire Protection for a term to expire February 1, 2015, Carl Gene Giles of Carthage (replacing Kelley Stalder of Parker whose term expired).

Appointed to the Texas Commission on Fire Protection for a term to expire February 1, 2015, Kimberly A. Shambley of Dallas (replacing Jane Burch of Grand Prairie whose term expired).

Appointed to the Texas Commission on Fire Protection for a term to expire February 1, 2015, Steven C. Tull of Valley Mills (replacing Kent Worley of Fort Worth whose term expired).

Appointed to the Texas Council on Purchasing from People with Disabilities for a term to expire January 31, 2015, Victor Kilman of Lubbock (Mr. Kilman is being reappointed).

Appointed to the Texas Council on Purchasing from People with Disabilities for a term to expire January 31, 2015, John W. Luna of Euless (Mr. Luna is being reappointed).

Appointed to the Texas Council on Purchasing from People with Disabilities for a term to expire January 31, 2015, Wanda White Stovall of Fort Worth (Ms. Stovall is being reappointed).

Appointed to the Governing Board of the Texas School for the Deaf for a term to expire January 31, 2013, Beatrice M. Burke of Temple (Ms. Burke is being reappointed).

Appointed to the Governing Board of the Texas School for the Deaf for a term to expire January 31, 2013, Nancy Mumme Carrizales of Katy (Ms. Carrizales is being reappointed).

Appointed to the Governing Board of the Texas School for the Deaf for a term to expire January 31, 2013, Susan K. Ridley of Sugar Land (replacing Dale Kesterson of Big Spring whose term expired).

Appointed to the Governing Board of the Texas School for the Deaf for a term to expire January 31, 2015, Walter Camenisch, III of Austin (Mr. Camenisch is being reappointed).

Appointed to the Governing Board of the Texas School for the Deaf for a term to expire January 31, 2015, Eric Hogue of Wylie (replacing Charles Estes of Denton whose term expired).

Appointed to the Texas Board of Nursing for a term to expire January 31, 2015, Tamara J. Cowen of Harlingen (replacing George Buchenau of Amarillo whose term expired).

Appointed to the Texas Board of Nursing for a term to expire January 31, 2015, Sheri Crosby of Mesquite (Ms. Crosby is being reappointed).

Appointed to the Texas Board of Nursing for a term to expire January 31, 2015, Kathy Leader-Horn of Granbury (replacing Rachel Gomez of Harlingen whose term expired).

Appointed to the Texas Board of Nursing for a term to expire January 31, 2015, Josefina Lujan of El Paso (replacing Brenda Jackson of San Antonio whose term expired).

Appointed to the Texas Board of Nursing for a term to expire January 31, 2015, Mary Jane Salgado of Eagle Pass (Ms. Salgado is being reappointed).

Appointed to the Texas Board of Professional Land Surveying for a term to expire January 31, 2015, James Allen Childress of San Saba (replacing Ty Runyon of Austin whose term expired).

Appointed to the Texas Board of Professional Land Surveying for a term to expire January 31, 2015, Nedra J. Foster of Silsbee (Ms. Foster is being reappointed).

Appointed to the Texas Board of Professional Land Surveying for a term to expire January 31, 2015, Robert H. Price of Euless (replacing Kelley Sue Neumann of San Antonio whose term expired).

Appointed to the Texas State Board of Examiners of Professional Counselors for a term to expire February 1, 2011, Glynda B. Corley of Round Rock (Ms. Corley is being reappointed).

Appointed to the Texas State Board of Examiners of Professional Counselors for a term to expire February 1, 2011, Michelle Alcon

Eggleston of Amarillo (replacing Ana Bergh of Edinburg whose term expired).

Appointed to the Texas State Board of Examiners of Professional Counselors for a term to expire February 1, 2011, Jaa St. Julien of Houston (replacing Judy Powell of The Woodlands whose term expired).

Appointed to the Texas State Board of Examiners of Professional Counselors for a term to expire February 1, 2013, Steven Christopherson of Pasadena (replacing Dan F. Wilkins of Center whose term expired).

Appointed to the Texas State Board of Examiners of Professional Counselors for a term to expire February 1, 2013, Leslie F. Pohl of Austin (replacing J. Helen Perkins of DeSoto whose term expired).

Appointed to the Texas State Board of Examiners of Professional Counselors for a term to expire February 1, 2013, Maria F. Teran of El Paso (replacing Michelle Eggleston of Amarillo whose term expired).

Appointed to the Texas State Board of Examiners of Professional Counselors for a term to expire February 1, 2015, Brenda Buckner of Weatherford (replacing Diane Boddy of Dallas whose term expired).

Appointed to the Texas State Board of Examiners of Professional Counselors for a term to expire February 1, 2015, Karen R. Burke of Austin (replacing Alma Leal of Rancho Viejo whose term expired).

Appointed to the Texas State Board of Examiners of Professional Counselors for a term to expire February 1, 2015, Brenda S. Compagnone of Carrizo Springs (replacing James Castro of San Antonio whose term expired).

Appointed to the Texas Board of Architectural Examiners for a term to expire January 31, 2015, Corbett Chase Bearden of Austin (replacing Kyle Garner of Amarillo whose term expired).

Appointed to the Texas Board of Architectural Examiners for a term to expire January 31, 2015, H. L. Bert Mijares, Jr. of El Paso (replacing Peter Pfeiffer of Austin whose term expired).

Appointed to the Texas Board of Architectural Examiners for a term to expire January 31, 2015, Alfred Vidaurri, Jr. of Aledo (Mr. Vidaurri is being reappointed).

Rick Perry, Governor

TRD-200901694

Proclamation 41-3182

TO ALL TO WHOM THESE PRESENTS SHALL COME:

I, RICK PERRY, Governor of Texas, do hereby certify that as a consequence of confirmed cases of Swine Influenza A (swH1N1) in certain parts of Texas, a public health emergency exists throughout the entire State of Texas involving Swine Influenza A that threatens or has significant potential to threaten the health, safety and security of the citizens of Texas.

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

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

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

IN TESTIMONY WHEREOF, I have hereunto signed my name and have officially caused the Seal of State to be affixed at my Office in the City of Austin, Texas, this the 29th day of April, 2009.

Rick Perry, Governor

Attested by: Esperanza "Hope" Andrade, Secretary of State

TRD-200901634

Proclamation 41-3183

TO ALL TO WHOM THESE PRESENTS SHALL COME:

I, RICK PERRY, Governor of the State of Texas, did issue an Emergency Disaster Proclamation on January 30, 2009, certifying that an extreme fire hazard posed a threat of imminent disaster in specified counties in Texas, beginning January 16, 2009 and continuing.

WHEREAS, the extreme fire hazard continues to create a threat of disaster for the people in the State of Texas.

WHEREAS, the state of disaster includes the counties of Andrews, Armstrong, Atascosa, Bandera, Baylor, Bee, Bexar, Blanco, Borden, Brewster, Briscoe, Brown, Calhoun, Callahan, Cameron, Castro, Childress, Clay, Cochran, Coleman, Collingsworth, Comal, Comanche, Concho, Cottle, Crane, Crockett, Crosby, Dawson, Deaf Smith, DeWitt, Dickens, Dimmit, Donley, Duval, Eastland, Ector, Edwards, El Paso, Erath, Fisher, Floyd, Foard, Frio, Galveston, Gray, Guadalupe, Hale, Hall, Hamilton, Harris, Haskell, Hemphill, Hidalgo, Hockley, Hood, Howard, Hudspeth, Hutchinson, Irion, Jack, Jeff Davis, Jim Hogg, Jim Wells, Jones, Karnes, Kendall, Kent, Kerr, Kimble, King, Kleberg, Knox, La Salle, Lamb, Lampasas, Lipscomb, Live Oak, Lubbock, Lynn, Martin, Maverick, Medina, Midland, Mills, Mitchell, Montague, Moore, Morris, Motley, Nolan, Nueces, Ochiltree, Oldham, Palo Pinto, Parmer, Pecos, Potter, Presidio, Randall, Reagan, Reeves, Refugio, Roberts, Runnels, San Patricio, San Saba, Schleicher, Scurry, Shackelford, Sherman, Starr, Stephens, Sterling, Stonewall, Sutton, Swisher, Taylor, Terrell, Terry, Throckmorton, Tom Green, Upton, Uvalde, Val Verde, Victoria, Ward, Webb, Wheeler, Wichita, Wilbarger, Willacy, Wilson, Winkler, Wise, Yoakum, Young, Zapata, and Zavala.

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

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

The renewal of the Emergency Disaster Proclamation becomes effective on April 30, 2009, and shall remain in effect until May 29, 2009, unless renewed or terminated.

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

IN TESTIMONY WHEREOF, I have hereunto signed my name and have officially caused the Seal of State to be affixed at my Office in the City of Austin, Texas, this the 29th day of April, 2009.

Rick Perry, Governor

Attested by: Esperanza "Hope" Andrade, Secretary of State

TRD-200901644

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.)

Opinions

Opinion No. GA-0712

Mr. Robert Scott, Commissioner

Texas Education Agency

1701 North Congress Avenue

Austin, Texas 78701-1494

Re: Authority of the board of trustees of the Dallas Independent School District to change the length of its members' terms after December 31, 2007 (RQ-0770-GA)

S U M M A R Y

The board of trustees of the Dallas Independent School District was authorized to change the length of its members' terms of office until December 31, 2007, but not thereafter.

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

TRD-200901720

Stacey Napier

Deputy Attorney General

Office of the Attorney General

Filed: May 6, 2009

EMERGENCY RULES

Emergency Rules include new rules, amendments to existing rules, and the repeals of existing rules. A state agency may adopt an emergency rule without prior notice or hearing if the agency finds that an imminent peril to the public health, safety, or welfare, or a requirement of state or federal law, requires adoption of a rule on fewer than 30 days' notice. An emergency rule may be effective for not longer than 120 days and may be renewed once for not longer than 60 days (Government Code, §2001.034). An emergency rule may be effective for not longer than 120 days and may be renewed once for not longer than 60 days. (Government Code, §2001.034).

TITLE 4. AGRICULTURE

PART 1. TEXAS DEPARTMENT OF AGRICULTURE

CHAPTER 19. QUARANTINES AND NOXIOUS AND INVASIVE PLANTS

SUBCHAPTER V. MEXICAN FRUIT FLY QUARANTINE

4 TAC §§19.500 - 19.508

The Texas Department of Agriculture (the department) adopts on an emergency basis new §§19.500 - 19.508, concerning a quarantine for the Mexican fruit fly, *Anastrepha ludens* (Loew). The new sections are adopted on an emergency basis to prevent the spread of Mexican fruit fly and to facilitate its eradication. The new sections require application of treatments to achieve eradication and prescribe specific restrictions on the handling and movement of quarantined articles. On April 27, 2009, a mated female of a fruit fly was detected in a McPhail trap established on a grapefruit tree in a dooryard located two miles from Encino, Brooks County, and on April 29, 2009, the fly was confirmed to be the Mexican fruit fly. The McPhail traps have been used in Cameron, Hidalgo and Willacy counties, where the state's commercial citrus crops are produced, for more than 20 years to survey for infestations of the Mexican fruit fly and certain other fruit fly species. Host plants of the Mexican fruit fly, including citrus, are not grown commercially in Brooks County; however, a few McPhail traps were deployed in 2008-2009 to find out if a residual population of the Mexican fruit flies occurs in that county. Furthermore, the occurrence of Mexican fruit fly in Brooks County poses a risk to the management and eradication effort of the fruit fly in Hidalgo County, which borders Brooks County.

The department believes that it is necessary to take this immediate action to prevent the spread of the Mexican fruit fly into commercial citrus growing areas of Texas and other states, and adoption of this quarantine on an emergency basis is both necessary and appropriate. The citrus industry in particular is in peril because without this emergency quarantine and treatment of the infestation, USDA would quarantine the entire state of Texas and as a result, Texas could lose important export markets and would require regulatory treatments such as fumigation of all exported fruit. The emergency quarantine takes necessary steps to prevent the artificial spread of the quarantined pest and provides for its elimination, thus protecting the state's citrus crops, an agricultural industry important to the state of Texas. Cameron and Hidalgo counties are currently quarantined for the Mexican fruit fly whereas the quarantine for the Willacy County was rescinded after the Mexican fruit fly was declared eradicated from that county.

New §19.500 states the basis for the quarantine and defines the quarantined pest. New §19.501 establishes the duration of the quarantine. New §19.502 designates the infested areas subject to quarantine. New §19.503 lists the articles subject to the quarantine. New §19.504 provides restrictions on the movement of articles subject to the quarantine. New §19.505 provides requirements for monitoring and handling and treatment of regulated articles located within the quarantined area. New §19.506 provides consequences for failure to comply with quarantine restrictions. New §19.507 provides for the appeal of action taken for failure to comply with the quarantine restrictions or requirements. New §19.508 provides procedures for handling of discrepancies or other inconsistencies in textual descriptions in this subchapter with graphic representations. The department may propose adoption of this rule on a permanent basis in a separate submission.

The new sections are adopted on an emergency basis under the Texas Agriculture Code, §71.004, which authorizes the department to establish emergency quarantines; §71.007 which authorizes the department to adopt rules as necessary to protect agricultural and horticultural interests, including rules to provide for specific treatment of a grove or orchard or of infested or infected plants, plant products, or substances; §12.020 which authorizes the department to assess administrative penalties for violations of Chapter 71; and the Texas Government Code, §2001.034, which provides for the adoption of administrative rules on an emergency basis, without notice and comment.

§19.500. Basis for Quarantine--Dangerous Insect Pest or Plant Disease (Proscribed Biological Entity).

(a) The department finds that *Anastrepha ludens* (Loew), also known as the Mexican fruit fly, is at any stage of development a dangerous insect pest or plant disease that is not widely distributed in this state.

(b) Description of dangerous insect pest or plant disease. The Mexican fruit fly, scientific name *Anastrepha ludens* (Loew), is a dangerous pest of the numerous host plants listed in §19.503 of this title (relating to Articles Subject to the Quarantine). The fly ovipos sits in the fruit where the larvae subsequently hatch and begin feeding. The larvae, feeding inside the fruit, cause damage to the flesh of the fruit, making it unmarketable. The United States Department of Agriculture (USDA), as well as many states, consider the Mexican fruit fly to be a serious plant pest whose control and eventual eradication from quarantined areas is imperative.

(c) Unless otherwise expressly stated, the term "Mexican fruit fly" when used in this subchapter refers to any or all developmental stages of the dangerous insect pest or a plant disease described in this section.

(d) The department is authorized by the Texas Agriculture Code, §71.002, to establish a quarantine against the dangerous insect pest or plant disease identified in this section.

§19.501. Duration of the Quarantine.

The quarantine established by this subchapter shall remain in effect until the dangerous insect pest or plant disease described in §19.500 of this title (relating to Basis for Quarantine--Dangerous Insect Pest or Plant Disease (Proscribed Biological Entity)) is eradicated. The Mexican fruit fly shall be considered eradicated from the quarantined area when no additional Mexican fruit flies are detected for a time period equal to three consecutive generations after the most recent detection. For the Mexican fruit fly, the number of days required to complete a reproductive cycle, one generation, is dependent upon temperature. Therefore, a day-degree model will be used to calculate the duration of each consecutive generation.

§19.502. Infested Geographical Areas Subject to the Quarantine.

(a) Quarantined infested areas.

(1) Quarantined infested areas (infested geographical areas subject to the quarantine) are those locations within this state in which the dangerous insect pest or plant disease is currently found, from which dissemination of the pest or disease is to be prevented, and in which the pest or disease is to be eradicated.

(2) The following areas are declared to be quarantined infested areas: The 4.5-mile radius area surrounding the Mexican fruit fly detection at latitude 26.33394 and longitude -98.15094 in Brooks County. Further, this area is described as beginning from a point at longitude -98.22450 N and latitude 26.86804 W, then easterly along the line of latitude 26.86804 N to the line of longitude 98.07762 W, then northerly along the line of longitude -98.07762 N to the line of latitude 26.99984 W, then westerly along the line of latitude 26.99984 W to the line of longitude -98.22450 N, then southerly along the line of -98.22450 N to the point of beginning and covers approximately 81 square miles.

(3) A map of the quarantined area may be obtained by contacting USDA, 903 San Jacinto, Suite 270, Austin, Texas 78701, (512) 916-5241 or the department's Valley Regional Office, 900-B East Expressway 82, San Juan, Texas 78598, (956) 787-8866.

(b) Creating, modifying, or extending quarantined infested areas. When five or more males or unmated females of the Mexican fruit flies are trapped or otherwise discovered within a time period equal to one fly generation and within 3 miles of each other or a mated female or one larva or pupa is trapped or otherwise discovered, a quarantine area shall be established around the site where the fly was trapped or otherwise discovered. The area quarantined shall consist of an area of approximately 4.5-mile radius with the detection site at the center (roughly 81 square miles).

(c) Core areas. In addition to the quarantined area, one or more core areas may be established within each quarantined area around a detection site. Each core area shall consist of an approximately 1.0 square mile area with a detection site at or near the center. Each approximately square-shaped core area is defined by four GPS readings for each corner of the core area. Core areas are subject to more extensive monitoring and handling requirements. One core area is currently in place for the Mexican fruit fly quarantine. A treatment area will comprise of an area up to 500 meters surrounding the detection.

(d) Core areas are as described in subsection (a) of this section. Additional core areas, if any, shall be published by the department in the In Addition section of the *Texas Register* as they are established.

§19.503. Articles Subject to the Quarantine.

An article subject to the quarantine, or regulated article, is an item the handling of which is controlled, regulated, or restricted by Chapter 71 of the Texas Agriculture Code, this subchapter, and any department orders issued pursuant to these rules and Chapter 71, in order to prevent dissemination of the dangerous insect pest or plant disease to areas located outside a quarantined infested area or into a quarantined non-infested area. The following articles are subject to the quarantine.

(1) The Mexican fruit fly;

(2) the fruit, at any stage of development, of all of the following plants, listed by common name with genus and species in parentheses, when grown, harvested, processed, or otherwise handled within or transported through the quarantined area:

(A) Apple *(Malus domestica);*

(B) Apricot *(Prunus armeniaca);*

(C) Avocado *(Persea americana);*

(D) Calamondin orange *(X citrofortunella mitis);*

(E) Cherimoya *(Annona cherimola);*

(F) Citrus citron *(Citrus medica);*

(G) Custard apple *(Annona reticulate);*

(H) Grapefruit *(Citrus paradise);*

(I) Guava *(Pisidium guajava);*

(J) Japanese plum *(Prunus salicina);*

(K) Lemon *(Citrus limon)* except Eureka, Lisbon, and Vila Franca cultivars (smooth skinned sour lemon);

(L) Lime *(Citrus aurantifolia);*

(M) Mammy-Apple *(Mammea americana);*

(N) Mandarin orange (tangerine) *(Citrus reticulate);*

(O) Mango *(Mangifera indica);*

(P) Nectarine *(Prunus persica);*

(Q) Peach *(Prunus persica);*

(R) Pear *(Pyrus communis);*

(S) Plum *(Prunus americana);*

(T) Pomegranate *(Punica granatum);*

(U) Prune, Plum *(Prunus domestica);*

(V) Pummelo (shaddock) *(Citrus maxima);*

(W) Quince *(Cydonia oblonga);*

(X) Rose apple *(Syzyglum jambos)* (Eugenia jambos);

(Y) Sour orange *(Citrus aurantium);*

(Z) Sapote *(Casimiroa* spp.);

(AA) Sapota, Sapodilla *(Sapotaceae);*

(BB) Sargentia, yellow chapote *(Sargentia greggi);*

(CC) Spanish Plum, purple mombin or Ciruela *(Spondias* spp.);

(DD) Sweet orange *(Citrus sinensis);*

(3) any other fruit capable of hosting, harboring, propagating, or disseminating the Mexican fruit fly;

(4) the producing plant if it has one or more fruits listed in paragraph (2) of this section attached to or growing from it; and

(5) any article, item, conveyance, or thing on or in which the Mexican fruit fly is actually found.

§19.504. Restrictions on Movement of Articles Subject to the Quarantine.

(a) In General.

(1) A regulated article originating within a quarantined infested area may not be moved outside the infested area except as otherwise provided by these rules.

(2) In order to prevent the movement of regulated articles, including the dangerous insect pest or plant disease, from a quarantined area into a non-quarantined area, as required by the Texas Agriculture Code, §71.005(a), a person that transports a regulated article through or within an infested area using a motor vehicle, railcar, or other conveyance capable of transporting the regulated article outside the infested area, is subject to the requirements of subsection (c) of this section.

(b) Conditions Under Which Regulated Articles May Be Moved Out of an Infested Area. Plants that are regulated articles shall not be moved outside the quarantined infested area with fruit attached. Detached fruit originating within a quarantined infested area may be moved outside the infested area if:

(1) the fruit is covered by a tarpaulin or other approved covering and taken directly to and segregated in an approved packing house or other approved treatment facility and fumigated as prescribed in the Texas Rio Grande Valley Mexican Fruit Fly Protocol 2008-2009, a copy of which may be obtained at the department's Valley Regional Office, 900-B East Expressway 82, San Juan, Texas 78598, (956) 787-8866, and the fruit is accompanied by a copy of all documentation of origin or treatment required by this subchapter or a compliance agreement with the department or USDA;

(2) the grower has entered into a compliance agreement with the department or the USDA, the fruit has been treated and is being handled in accordance with the requirements set forth in the compliance agreement (at the time these rules are published, a compliance agreement requires use of approved bait sprays at 10 to 12 day intervals, or a shorter or longer period upon receipt of written notice from the department or the USDA of the modified treatment interval, starting at least 30 days before harvest and continued through the harvest period), and the fruit is accompanied by all documentation of origin or treatment required by this subchapter or a compliance agreement with the department or USDA; or

(3) the fruit is to be moved outside the quarantined area for juicing and the fruit is covered by a tarpaulin or other approved covering and accompanied by all documentation of origin or treatment required by this subchapter or a compliance agreement with the department or USDA.

(c) Requirements for Transporters of Regulated Articles Within or Through an Infested Area.

(1) A person who transports a regulated article within or through an infested area using a motor vehicle, railcar, other conveyance, or equipment capable of transporting the regulated article outside the infested area shall take the following precautions to ensure that the dangerous insect pest or plant disease is not disseminated outside the quarantined area and that non-infested regulated articles do not become infested by virtue of transport within or through the infested area: if carried in a part of the conveyance or equipment that is open to the outside environment, detached fruit must be covered by a tarpaulin, plastic sheet, or other covering sufficient to prevent the Mexican fruit fly from contacting the fruit; regulated articles other than detached fruit shall not be moved within or through the quarantined area unless handled in accordance with the provisions of a written notice issued by the department or the USDA or a written compliance agreement between the person and the department or the USDA.

(2) Regulated articles originating outside the quarantined area and transported through the quarantined area in an open part of a conveyance or piece of equipment and without an appropriate covering shall be treated the same under this subchapter as regulated articles originating in the quarantined area and shall be handled according to the procedures described in subsection (b) of this section and elsewhere in this subchapter.

§19.505. Monitoring and Eradication of the Dangerous Pest or Plant Disease.

(a) A regulated article located within a core area shall be monitored, handled, and treated by ground or aerial sprays, as prescribed in a written notice issued by the department or the USDA or as specified in a written compliance agreement between the owner or person in control of the regulated article or the property on which the regulated article is located.

(b) The owner or manager of an orchard, other commercial fruit operation, or nursery subject to quarantine requirements may be required to bear all treatment expenses.

(c) Homeowners located in the core areas who enter into a written compliance agreement with the department or the USDA shall not be required to pay treatment expenses for fruit or fruit trees grown, harvested, or found on their residential property, unless the fruit or fruit tree is transported to the residential property from an orchard, other commercial fruit operation, or nursery owned or operated by the homeowner or at which the homeowner is employed, at a time during which the quarantine is in effect.

(d) Unless otherwise specified in a written notice issued by the department or the USDA or in a written compliance agreement between the person and the department or the USDA, a wholesaler, fruit retailer, street fruit vendor, or flea market stall operator located within the quarantined area shall cover or enclose detached fruit with air curtains, screens of appropriate mesh, plastic sheets, boxes without holes or other openings, or tarpaulins.

(e) A person who within the quarantined area is holding or displaying for sale or distribution a plant that is a regulated article shall ensure that each such plant is free from fruit at all times prior to sale or distribution.

§19.506. Consequences for Failure to Comply with Quarantine Restrictions.

A person who fails to comply with quarantine restrictions or requirements or a department order relating to the quarantine may be subject to administrative penalties not to exceed $5000 per occurrence, civil penalties not to exceed $10,000 per occurrence, or criminal prosecution. Each day a violation occurs or continues may be considered a separate occurrence. Additionally, the department is authorized to seize and treat or destroy, or order to be treated or destroyed, any quarantined article that is found to be infested with the quarantined pest or, regardless whether infested or not, transported out of or through the quarantined area in violation of these rules. Treatment, destruction, storage, or other charges, including those incurred by the department, are chargeable to the owner of the quarantined article to be treated or destroyed.

§19.507. Appeal of Department Action Taken for Failure to Comply with Quarantine Restrictions.

An order under the quarantine may be appealed according to procedures set forth in the Texas Agriculture Code, §71.010.

§19.508. Conflicts Between Graphical Representations and Textual Descriptions; Other Inconsistencies.

(a) In the event that discrepancies exist between graphical representations and textual descriptions in this subchapter, the representation or description creating the larger geographical area or more stringent requirements regarding the handling or movement of quarantined articles shall control.

(b) The textual description of the insect pest or plant disease shall control over any graphical representation of the same.

(c) Where otherwise clear as to intent, the mistyping of a scientific or common name in this subchapter shall not be grounds for avoiding the requirements of this subchapter.

This agency hereby certifies that the emergency adoption 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 May 1, 2009.

TRD-200901643
Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
Effective Date: May 1, 2009
Expiration Date: August 28, 2009
For further information, please call: (512) 463-4075

TITLE 19. EDUCATION

PART 1. TEXAS HIGHER EDUCATION COORDINATING BOARD

CHAPTER 1. AGENCY ADMINISTRATION

SUBCHAPTER A. GENERAL PROVISIONS

19 TAC §1.19

The Texas Higher Education Coordinating Board (Coordinating Board) adopts on an emergency basis new §1.19, concerning professional development through education and training for agency's administrators and employees.

The new section is adopted on an emergency basis pursuant to §2001.034 of the Government Code, which allows a state agency to adopt an emergency rule if a requirement of state or federal law requires adoption of the rule on less than 30 days notice. Therefore, emergency adoption at this time is essential to allow staff to continue with professional development through education and training. The Coordinating Board intends to also adopt these rules on a non-emergency basis after the required posting in the *Texas Register.*

The new section is adopted under the Texas Education Code, §61.027, which provides the Coordinating Board with general rulemaking authority, and Article III of the General Appropriations Act of the 80th Texas Legislature. Moreover, in order for an agency to provide training and education to its employees, it must adopt rules allowing same. Section 656.048 of the Government Code directs that: "(a) A state agency shall adopt rules relating to: (1) the eligibility of the agency's administrators and employees for training and education supported by the agency; and (2) the obligations assumed by the administrators and employees on receiving the training and education."

§1.19. Education and Training of Board Administrators and Employees.

The Texas Higher Education Coordinating Board values its administrators and employees and encourages lifelong learning and professional development through education and training pursuant to the State Employees Training Act, Texas Government Code §§656.041 - 656.104 and successor sections. The eligibility of the agency's administrators and employees for training and education provided by the agency, and the obligations, including restrictions and potential liability, assumed by administrators and employees on receiving such training and education, shall be as set forth in the Board's policies.

This agency hereby certifies that the emergency adoption 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 May 1, 2009.

TRD-200901637
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Effective Date: May 1, 2009
Expiration Date: August 28, 2009
For further information, please call: (512) 427-6114

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 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 355. REIMBURSEMENT RATES

SUBCHAPTER D. REIMBURSEMENT METHODOLOGY FOR INTERMEDIATE CARE FACILITIES FOR PERSONS WITH MENTAL RETARDATION (ICF/MR)

1 TAC §355.455

The Texas Health and Human Services Commission (HHSC) proposes to amend §355.455, concerning Payments to Non-State Operated Facilities.

Background and Justification

The proposed amendment exempts augmentative communication devices (ACDs) from existing requirements that limit reimbursement to Intermediate Care Facilities for Persons with Mental Retardation (ICF/MRs) for durable medical equipment purchased for Medicaid-eligible residents to $5,000 per resident per year. Instead, the amendment will refer to new 40 TAC §9.228, regarding ACDs, that the Department of Aging and Disability Services (DADS) is proposing concurrently with this rule. Proposed new 40 TAC §9.228 was published in the April 17, 2009, issue of the *Texas Register* (34 TexReg 2499). New §9.228 describes requirements that an ICF/MR must follow to obtain DADS reimbursement for purchasing an ACD for a Medicaid recipient. Under the proposed amendment to §355.455 and new 40 TAC §9.228, ICF/MRs will be reimbursed at cost for the purchase of ACDs for Medicaid-eligible residents.

The proposed amendment to §355.455 also deletes repetitive language and replaces references to the legacy Texas Department of Mental Health and Mental Retardation (MHMR) with references to the Health and Human Services Commission (HHSC) or its designee. It also updates terminology by replacing references to "clients" with the term "residents."

Section-by-Section Summary

The proposed amendment to §355.455:

Revises subsections (a) and (c) to replace references to legacy "MHMR" with references to "HHSC or its designee."

Revises subsection (c) to exclude ACDs from reimbursement requirements associated with the purchase of durable medical equipment in ICF/MRs.

Revises subsection (d) to delete language stating that "there are modeled rates for each level of need for each class of non-state operated facilities;" this language merely repeats statements made in subsections (a) and (b).

Revises subsection (d) to add language stating that reimbursement for ACDs is governed by 40 TAC §9.228, regarding Augmentative Communication Device system.

Revises subsections (a) and (c) and subsection (c)(4) to replace references to clients with references to residents.

Fiscal Note

Gordon E. Taylor, Chief Financial Officer for the Department of Aging and Disability Services, has determined that, for the first five-year period the proposed amendment is in effect, there will be a fiscal impact to state government of $74,412 for state fiscal year (SFY) 2009; $74,412 for SFY 2010; $75,348 for SFY 2011; $75,348 for SFY 2012; and $75,348 for SFY 2013. The proposed rule will not result in any fiscal implications for local health and human services agencies. There are no fiscal implications for local governments as a result of enforcing or administering this section.

Small Business and Micro-business Impact Analysis

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

HHSC does not anticipate that there will be any economic cost to persons who are required to comply with this amendment. The amendment will not affect local employment.

Public Benefit

Carolyn Pratt, Director of Rate Analysis, has determined that, for each of the first five years the amendment is in effect, the expected public benefit is that ICF/MRs will be reimbursed at appropriate amounts for ACDs, and it will be easier for Medicaid-eligible individuals receiving services in an ICF/MR to receive a medically-necessary ACD.

Takings Impact Assessment

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

Regulatory Analysis

HHSC has determined that this proposed rule is not a "major environmental rule" as defined by §2001.0225 of the Texas Gov-

ernment Code. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposed rule is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

Public Comment

Questions about the content of this proposal may be directed to Cheryl Jablonski in the HHSC Rate Analysis Department by telephone at (512) 491-1764. Written comments on the proposal may be submitted to Ms. Jablonski by facsimile at (512) 491-1998, by e-mail to cheryl.jablonski@hhsc.state.tx.us, or by mail to HHSC Rate Analysis, Mail Code H-400, P.O. Box 85200, Austin, Texas 78708-5200, within 30 days of publication of this proposal in the *Texas Register.*

Statutory Authority

The amendment is proposed under the Texas Government Code, §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; and the Human Resource Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas.

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

§355.455. Payments to Non-State Operated Facilities.

(a) HHSC or its designee [~~TDMHMR~~] will pay to non-state-operated facilities modeled rates that will vary by class of facility and a resident's [~~client's~~] level-of-need.

(b) The non-state operated facility modeled rates include payment for both residential and day program services. Residents [~~Individuals~~] receive medical and dental services through the Medicaid identification card. Any medical expenses other than Medicaid-covered services are the responsibility of the ICF/MR provider.

(c) With a limit of $5,000 per resident [~~client~~] per year, HHSC or its designee [~~TDMHMR~~] will pay a provider for the actual cost of a resident's [~~client's~~] durable medical equipment, excluding augmentative communication devices, if:

(1) the cost of the equipment exceeds $1,000;

(2) the facility receives approval from HHSC or its designee [~~TDMHMR~~] to purchase the equipment;

(3) the provider submits a voucher to HHSC or its designee [~~TDMHMR~~] for the cost of the equipment; and

(4) the resident [~~client~~] is eligible for Medicare benefits and the provider has submitted a Medicare claim and received a response to the claim prior to requesting payment from HHSC or its designee [~~TDMHMR~~].

(d) Reimbursement for augmentative communication devices is governed by 40 TAC §9.228, relating to Augmentative Communication Device Systems. [~~There are modeled rates for each level of need for each class of non-state operated facilities.~~]

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 April 29, 2009.

TRD-200901604
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: June 14, 2009
For further information, please call: (512) 424-6900

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TITLE 22. EXAMINING BOARDS

PART 11. TEXAS BOARD OF NURSING

CHAPTER 216. CONTINUING EDUCATION

22 TAC §§216.1 - 216.11

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

The Texas Board of Nursing (Board) proposes the repeal of Chapter 216, §§216.1 - 216.11, concerning Continuing Education. This repeal is necessary because the Board is proposing a new chapter for adoption that promotes a comprehensive approach to continuing competency in nursing. Traditionally, nurses have primarily demonstrated continuing competency through the completion of continuing education courses. The requirements of the proposed new chapter, however, permit nurses to demonstrate continuing competency through other means. It is anticipated that this new approach to continuing competency will provide necessary flexibility to nurses while ensuring the ongoing delivery of safe nursing care. Ultimately, the proposed new chapter is designed to protect the public health, safety, and welfare by requiring nurses to maintain a skill level appropriate for their practice areas. The proposed new chapter is also published in this edition of the *Texas Register*.

Katherine Thomas, Executive Director, has determined that for each year of the first five years the proposed repeal will be in effect, there will be no fiscal impact to state or local governments as a result of the enforcement or administration of the proposal. There will be no anticipated effect on local employment or the local economy as a result of the proposed repeal.

Ms. Thomas has also determined that for each year of the first five years the proposed repeal is in effect, the anticipated public benefit will be the repeal of outdated requirements and the adoption of new requirements that will promote a comprehensive approach to continuing competency in nursing, provide nurses with additional options for meeting continuing competency requirements; and ensure the protection of the public health, safety and welfare through the demonstration of competent, quality nursing care. There are no anticipated economic costs to persons who are required to comply with the proposed repeal.

As required by the Government Code §2006.002(c) and (f), the Board has determined that the proposed repeal will not have an adverse economic effect on any small or micro business because there are no anticipated economic costs to any person who is required to comply with the proposed repeal.

The Board has determined that no private real property interests are affected by this proposed repeal and that this proposed repeal does not restrict or limit an owner's right to property that

would otherwise exist in the absence of government action and, therefore, does not constitute a taking or require a takings impact assessment under the Government Code §2007.043.

To be considered, written comments on the proposal or any request for a public hearing must be submitted no later than 5:00 p.m. on June 14, 2009, to James W. Johnston, General Counsel, Texas Board of Nursing, 333 Guadalupe, Suite 3-460, Austin, Texas 78701, or by e-mail to dusty.johnston@bon.state.tx.us, or faxed to (512) 305-8101. An additional copy of the comments on the proposal or any request for a public hearing must be simultaneously submitted to Denise Benbow, Nursing Practice Consultant, Texas Board of Nursing, 333 Guadalupe, Suite 3-460, Austin, Texas 78701, or by e-mail to denise.benbow@bon.state.tx.us, or faxed to (512) 305-8101. If a hearing is held, written and oral comments presented at the hearing will be considered.

The repeal of §§216.1 - 216.11 is proposed pursuant to the Occupations Code §301.303 and §301.151. The Occupations Code §301.303(a) provides that the Board may recognize, prepare, or implement continuing competency programs for license holders under Chapter 301 and may require participation in continuing competency programs as a condition of renewal of a license. Further, §301.303(a) provides that the programs may allow a license holder to demonstrate competency through various methods, including completion of targeted continuing education programs and consideration of a license holder's professional portfolio, including certifications held by the license holder. Section 301.303(b) provides that the Board may not require participation in more than a total of 20 hours of continuing education in a two-year licensing period. Section 301.303(c) authorizes the Board by rule to establish a system for the approval of programs and providers of continuing education if the Board requires participation in continuing education programs as a condition of license renewal. Section 301.303(e) authorizes the Board to adopt rules as necessary to implement §301.303. Section 301.303(f) states that the Board may assess each program and provider under §301.303 a fee in an amount that is reasonable and necessary to defray the costs incurred in approving programs and providers. Section 301.303(g) provides that the Board by rule may establish guidelines for targeted continuing education required under Chapter 301. Further, §301.303(g) requires the rules adopted under §301.303(g) to address (i) the nurses who are required to complete the targeted continuing education program; (ii) the type of courses that satisfy the targeted continuing education requirement; (iii) the time in which a nurse is required to complete the targeted continuing education; (iv) the frequency with which a nurse is required to meet the targeted continuing education requirement; and (v) any other requirement considered necessary by the Board. The Occupations Code §301.151 authorizes the Board to adopt and enforce rules consistent with Chapter 301 and necessary to perform its duties and conduct proceedings before the Board; regulate the practice of professional nursing and vocational nursing; establish standards of professional conduct for license holders under Chapter 301; and determine whether an act constitutes the practice of professional nursing or vocational nursing.

The following statutes are affected by the proposed repeal:

Rule -- Statute

Sections 216.1 - 216.11 -- Occupations Code §301.303

§216.1. Definitions.

§216.2. Purpose.

§216.3. Requirements.

§216.4. Criteria for Acceptable Continuing Education Activity.

§216.5. Additional Criteria for Specific Continuing Education Programs.

§216.6. Activities Which are not Acceptable as Continuing Education.

§216.7. Responsibilities of Individual Licensee.

§216.8. Relicensure Process.

§216.9. Audit Process.

§216.10. Appeals.

§216.11. Consequences of Non-Compliance.

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 May 1, 2009.

TRD-200901639
James W. Johnston
General Counsel
Texas Board of Nursing
Earliest possible date of adoption: June 14, 2009
For further information, please call: (512) 305-6811

CHAPTER 216. CONTINUING COMPETENCY

22 TAC §§216.1 - 216.11

The Texas Board of Nursing (Board) proposes new Chapter 216, §§216.1 - 216.11, concerning Continuing Competency. New Chapter 216 is necessary to implement the requirements of the Occupations Code §§301.152, 301.303, and 301.306 and to better define the role of continuing competency in nursing. Simultaneously with the proposal of the new chapter, the Board has proposed the repeal of existing Chapter 216, §§216.1 - 216.11, relating to Continuing Education, which is also published in this edition of the *Texas Register*.

The proposed new chapter implements a comprehensive approach to continuing competency in nursing. Board staff has extensively studied, reviewed, and evaluated continuing competency methodologies and national and local initiatives relating to continuing competency over the last few years. Board staff presented summaries of these methodologies and national and local initiatives to the Board during its regularly scheduled April, 2006; July, 2006; October, 2006; January, 2007; April, 2007; July, 2007; October, 2007; January, 2008; April, 2008; July, 2008, October, 2008; January, 2009; and April, 2009 Board meetings. At the April 2009, Board meeting, Board staff recommended, and the Board approved, adopting a comprehensive approach to continuing competency in Texas. A history of the methodologies and initiatives supporting this comprehensive approach are summarized in the following paragraphs.

The concept of implementing and evaluating continuing competency requirements in nursing is not new. In fact, nursing boards, commissions, and organizations have been developing continuing competency programs since the early 1990s. The Board began actively evaluating and testing models of continuing nursing competency after SB 617 (effective September 1, 1997) was enacted by the 75th Texas Legislature. SB 617

authorized the Board to conduct pilot programs to evaluate the continued competency of nurses in Texas. Pursuant to SB 617, the Board approved and funded six pilot studies, including (i) evaluation of a mandatory competency evaluation program of an urban county hospital and the validity and reliability of a 360 degree performance appraisal system in an urban specialty hospital; (ii) delineation of competencies for nurses working in rural health care settings; (iii) the use of vignettes for targeted continuing education in psychiatric nursing; (iv) assessment of certification in ACLS and PALs as a valid indication of competence; (v) identification and assessment of competencies of nurses in long-term care; and (vi) development of reliable and validity information for assessing home health nurse competencies. Various recommendations resulted from these studies, including a recommendation from the Competency Advisory Committee that acceptable components of competency maintenance should not be limited solely to continuing education hours. The Board reported its findings and recommendations regarding continuing competency in a 2000 publication, *Ensuring Professional Nursing Competency*. Shortly thereafter, ongoing competency evaluation began receiving further national attention and review. For example, the National Council of State Boards of Nursing (NCSBN) formed a special task force to survey over 20,000 licensed vocational nurses and 20,000 registered nurses with at least one year of practice experience to determine competencies that were required in their work environments. The NCSBN also compiled state-by-state information about continued competency processes using the APPLE criteria (Administratively feasible, Publicly credible, Professionally acceptable, Legally defensible, and Economically feasible) for an analysis of best practices among states. Around the same time, the following groups in Texas began evaluating and testing competency models: The Alliance for Innovation in Nursing Education; North Texas Consortium School of Nursing; Texas Higher Education Coordinating Board Nursing Innovative Grant Program - Midwestern State University High Fidelity Clinical Simulation; and Texas Nurses Association Competency Task Force. In February, 2006, these groups formed the Texas Competency Consortium to share information and coordinate competency development in the state of Texas.

Board staff actively participated in the Texas Nurses Association Competency Task Force (Task Force) during this time period and routinely reported the activities and initiatives of the Task Force to the Board. The Task Force focused on two specific approaches to continuing competency: (i) whether competencies should be developed that are related to a nurse's specific role/practice in his or her work environment; or (ii) whether broad-based competencies for all nurses should be developed. The NCSBN also considered these approaches on a national level, opting to develop and test a core set of broad-based competencies for all nurses. Ultimately, this approach was also adopted by the Task Force. The Task Force spent five years evaluating and testing different approaches to continuing competency. In July, 2008, the Task Force issued *Continuing Competency: Movement Toward Assurance in Nursing*, in which the Task Force outlined its recommendations for continuing competency requirements in Texas. Specifically, the Task Force recommended allowing nurses to meet their continuing competency requirements through either the completion of 20 hours of continuing education in their area of practice or through national certification in their area of practice.

The requirements of the proposed new chapter are patterned after the studies, findings, and recommendations of the aforementioned national and local groups. Traditionally, continuing competency has been demonstrated primarily through the completion of continuing education courses. However, based upon the recommendations of the Task Force and the Texas Competency Consortium and the studies conducted by the NCSBN over the last five to ten years, the Board is proposing a departure from this approach by authorizing nurses to utilize other methods of demonstrating continuing competency. Under the proposed new chapter, a nurse is authorized to demonstrate continuing competency through the achievement, maintenance, or renewal of an approved national nursing certification in the nurse's area of practice, as well as through the completion of continuing education courses. Recognizing this additional method of compliance provides nurses with the option of pursuing and maintaining a certification in a specific area of practice. The additional education and training associated with obtaining and maintaining such a certification serves the purpose of the proposed new chapter, which is to protect the public health, safety, and welfare by ensuring that nurses stay abreast of current industry practices, enhance their professional competence, learn about new technology and treatment regimens, and update their clinical skills. This additional method of compliance is also consistent with the Occupations Code §301.303(a), which authorizes the demonstration of competency through various methods, including consideration of a license holder's professional portfolio and certifications held by the license holder.

The proposed new chapter also requires a nurse to demonstrate continuing competency in the nurse's specific area of practice. This proposed new requirement is designed to ensure that nurses maintain competency in the area in which they are currently practicing. The Board recognizes that there is benefit in continuing education activities that generally apply to all nursing practice. However, the Board has determined that there is more benefit in continuing education activities that apply to a nurse's specific area of practice. This is because a nurse is able to provide a better quality of care in the area of practice in which she is most knowledgeable. A nurse who enhances his or her expertise through practice specific continuing education activities is more likely to provide his or her patients with efficient and effective care than a nurse who has not received the same specified training. For example, assume that a nurse who works in a cardiac unit completes a continuing competency activity relating to the use of technology in rhythm interpretations. When the nurse begins working in his or her cardiac unit later that week, it is anticipated that the nurse's enhanced knowledge will better assist him or her in recognizing and interpreting variations in a patient's heart monitor readout. As a result, the nurse may be able to initiate medical interventions faster because she is able to recognize the subtle changes in the readout more quickly and accurately. In this way, the proposed new requirements are anticipated to ensure a better quality of care for the public.

The Board anticipates that some nurses working in specialized areas of practice, such as nursing administration or nursing education, may have questions about the kinds of continuing competency activities that relate to their specific area of practice. A continuing competency activity should incorporate and relate to the knowledge, skills, or activities performed or required by the nurse in his or her area of practice. In the case of a nurse educator, the Board anticipates that continuing competency activities related to nursing education should meet the requirements of the proposed new chapter. In the case of a nurse administrator, the Board anticipates that continuing competency requirements re-

lated to nursing administration should meet the requirements of the proposed new chapter.

Proposed New Sections. The following paragraphs summarize the intended purpose of the proposed new sections.

Proposed new §216.3(a) and (b) are necessary to implement the continuing competency requirements under the Occupations Code §301.303(a) and (b). The Occupations Code §301.303(a) authorizes the Board to recognize, prepare, and implement continuing competency programs for license holders under Chapter 301 and to require participation in continuing competency as a condition of renewal of a license. Section 301.303(b) states that the Board may not require participation in more than a total of 20 hours of continuing education in a two-year licensing period. Proposed new §216.3(a) and (b) prescribe the continuing competency requirements applicable to nurses for each two-year licensing period and authorize two acceptable methods of satisfying those requirements. Under proposed new §216.3(a) and (b), a nurse must either complete (i) 20 contact hours of continuing education in the nurse's area of practice within the two years immediately preceding renewal of registration; or (ii) achieve, maintain, or renew an approved national nursing certification in the nurse's area of practice. These proposed new requirements emphasize the proposed new chapter's comprehensive approach to continuing competency by authorizing a viable alternative to completing traditional continuing education courses.

Proposed new §216.3(c), (d), and (e) address specific continuing competency requirements applicable to advanced practice registered nurses; advanced practice registered nurses holding prescriptive authority; nurses working in emergency room settings; and volunteer retired registered nurses. These proposed new requirements are necessary to implement the Occupations Code §301.152(b) and (c) and §301.306. The Occupations Code §301.152(b) authorizes the Board to adopt rules to approve registered nurses as advanced practice nurses and advanced practice nurses with prescriptive authority. Further, §301.152(b) authorizes the Board to adopt rules to establish specialized training, including pharmacology, that a registered nurse must have to carry out a prescription drug order. Section 301.152(c) requires the rules adopted under §301.152(b) to require continuing education in clinical pharmacology and related pathology in addition to any continuing education otherwise required under §301.303. Consistent with the requirements of §301.152(b) and (c), proposed new §216.3(c) specifies the continuing competency requirements for advanced practice registered nurses and advanced practice registered nurses holding prescriptive authority and the methods that may be utilized to achieve compliance. The proposed new continuing competency requirements for advanced practice registered nurses do not differ significantly from the proposed new continuing competency requirements for registered or vocational nurses. Proposed new §216.3(c) generally requires an advanced practice registered nurse to either obtain 20 contact hours of continuing education appropriate to the advanced specialty area and role recognized by the Board or to attain, maintain, or renew a national certification recognized by the Board. However, additional continuing competency requirements apply to an advanced practice registered nurse holding prescriptive authority. Proposed new §216.3(c)(3) requires an advanced practice registered nurse holding prescriptive authority to complete at least five contact hours of continuing education in pharmacotherapeutics, in addition to satisfying the continuing competency requirements in proposed new §216.3(c). This proposed new requirement is particularly important because advanced practice registered nurses holding prescriptive authority are authorized to prescribe medications for their patients. It is important for these nurses to stay abreast of any changes in medication and treatment regimens so they may continue to safely prescribe medications and treatments for their patients.

The Occupations Code §301.306(a) requires a license holder who is employed to work in an emergency room setting to complete at least two hours of continuing education relating to forensic evidence collection. Further, §301.306(c) requires the Board to adopt rules to identify which license holders are required to comply with the requirements of §301.306(a) and to establish the content of the continuing education required under §301.306(a). Pursuant to §301.306, proposed new §216.3(d) clarifies that each nurse licensed in Texas and employed in an emergency room setting on or after September 1, 2006 shall complete a minimum of two hours of continuing education relating to forensic evidence collection. Proposed new §216.3(d) also defines the types of emergency room settings that are implicated by the proposed new requirements and specifies the information that must be addressed in continuing education courses focusing on forensic evidence collection. In addition to implementing the statutory requirements of the Occupations Code, proposed new §216.3(d) also helps ensure the preservation of valuable evidence. Persons who are the victims of crimes, such as sexual assault, assault, or abuse, often seek treatment in emergency rooms. In such situations, it may be necessary for an emergency room nurse to collect evidence of such crimes from the patient. While some institutions have a trained and certified Sexual Assault Nurse Examiner (SANE) on site to collect such evidence, not every institution will be able to provide a SANE nurse for evidence collection at certain times or locations. Proposed new §216.3(d) requires all nurses working in an emergency room setting to maintain competency in forensic evidence collection so that evidence may be appropriately preserved and collected from a patient at any time. This proposed new requirement furthers the public interest by ensuring the preservation of valuable evidence necessary for the prosecution of violent crimes.

Lastly, proposed new §216.3(e) addresses the continuing competency of retired nurses over the age of 65 who choose to volunteer their nursing services. The Board recognizes that these nurses are not compensated for providing volunteer nursing services and are generally not practicing nursing full time. However, these nurses are still providing patient care, and must comply with the requirements of the Nursing Practice Act. Further, because these nurses are providing patient care, it is important that they maintain their competency and clinical skills, stay abreast of current industry practices, and learn about new technology and treatment regimens. The Board recognizes that it may be inappropriate and financially burdensome to require a retired nurse who volunteers his or her nursing services on a part time basis to complete the same number of continuing education hours as a nurse who is not retired and practices nursing on a full time basis. As such, proposed new §216.3(e) requires a volunteer retired nurse to complete at least 10 contact hours of continuing education in his or her area of nursing practice. In this way, proposed new §216.3(e) appropriately balances the need for retired volunteer nurses to demonstrate an acceptable level of continuing competency, while reducing the financial burden associated with completing continuing education courses.

Proposed new §216.4 and §216.5 address the criteria that a continuing education program must meet under the proposed new requirements. First, proposed new §216.4 requires all con-

tinuing education programs to be approved by a credentialing agency, or an affiliated entity of such an agency, recognized by the Board. In order to be recognized by the Board, a credentialing agency must meet nationally, pre-determined criteria to approve programs and providers of continuing education. Second, proposed new §216.4 clarifies that a nurse may only receive credit for completing a continuing education program in the nurse's area of practice. This proposed new requirement is consistent with the primary goal of continuing competency in nursing, which is to ensure the ongoing delivery of safe nursing care. Patients are able to immediately realize the benefits of a nurse's continuing competency when the nurse has focused on the area of care that she is working in at that specific point in time. Therefore, while the Board recognizes the value of training and education in other areas of nursing practice, the Board has determined that it is more important for nurses to maintain continuing competency in their current area of practice before considering other areas of practice.

Further, the Board recognizes that some nurses will choose to further their formal education and training and encourages those nurses to do so. As such, proposed new §216.5 permits certain, qualifying academic courses to satisfy all or a portion of a nurse's continuing competency requirements under the proposed new chapter. In order to qualify under proposed new §216.5, an academic course must either be included within the framework of a curriculum that leads to an academic degree in nursing or be relevant to nursing practice. Further, a nurse must be able to demonstrate that she completed the course with a grade of "C" or better or with a "Pass" on a "Pass/Fail" grading system. Proposed new §216.5 is intended to encourage nurses to further their nursing education through academic courses and to authorize the completion of these academic courses as an additional method of demonstrating continuing competency.

Proposed new §216.6 prohibits 11 categories of programs, activities, and courses from satisfying the proposed new continuing competency requirements. The Board recognizes that some continuing education programs, activities, and courses that are prohibited under proposed new §216.6 may provide nurses with helpful or valuable knowledge or may refresh a nurse's basic skills. While the Board recognizes that such knowledge is of value, the Board has determined that these programs, activities, and courses are not sufficient to advance or improve a nurse's knowledge or skill level or to develop a nurse's attitude for the enhancement of nursing practice. As such, while these programs, activities, and course may provide helpful information, they cannot be used to satisfy the continuing competency requirements of the proposed new chapter.

Proposed new §216.7 is necessary to clarify a nurse's responsibility for satisfying the continuing competency requirements of the proposed new chapter. Proposed new §216.7 specifically requires each nurse to select, participate in, and maintain a record of qualifying continuing education programs, activities, and courses. Further, proposed new §216.7 prescribes the specific amount of time that a nurse must maintain a record of the completion of continuing education programs, activities, and courses. Not only do these proposed new requirements clearly delineate a nurse's compliance obligations under the proposed new chapter, but they also provide important information regarding compliance with proposed new §216.9. Proposed new §216.9 prescribes the audit process through which the Board will monitor a nurse's compliance with the proposed new continuing competency requirements. A nurse who is audited pursuant to proposed new §216.9 may be required to produce documentation to verify his or her continuing competency compliance for a specific period of licensure. If a nurse maintains records of the completion of continuing education programs, activities, and courses in compliance with proposed new §216.7, the nurse should also be able to provide the documentation necessary to prove his or her compliance during an audit conducted under proposed new §216.9.

Proposed new §216.8 clarifies the continuing competency requirements applicable to: licensees seeking renewal of their license; persons licensed by examination or endorsement; persons whose license is delinquent or inactive; and persons whose license has been revoked. These proposed new requirements provide important guidance to nurses regarding their responsibilities in meeting continuing competency requirements upon initial licensure and renewal and upon their license being returned to current or active status.

Proposed new §216.9 prescribes the process the Board will utilize in auditing and monitoring a nurse's compliance with the requirements of the proposed new chapter. The Board considers a nurse's compliance with the proposed new continuing competency requirements to be of utmost importance because a nurse's continuing competency directly affects the ongoing delivery of safe nursing care. Proposed new §216.9 implements an audit system, by which nurses will be randomly selected for a compliance audit 90 days prior to each renewal month. If a nurse is selected to be audited, the Board will review the nurse's continuing competency activities to determine compliance. To the extent that an audit reveals a nurse's non-compliance with any of the proposed new continuing competency requirements, it is anticipated that the Board will be able to take corrective action in a timely manner in order to prevent the nurse from providing potentially unsafe or incompetent care.

Proposed new §216.10 affords a nurse an opportunity to appeal a Board determination of continuing competency non-compliance. This proposed new section serves an important purpose. Under proposed new §216.9, the Board seeks to monitor and enforce compliance with its proposed new continuing competency requirements. However, the Board recognizes that incorrect compliance determinations may be made at times, due to human error. In such situations, it is important for a nurse to be afforded an opportunity to dispute the incorrect compliance determination. Proposed new §216.10 affords each nurse an opportunity to appeal a non-compliance determination and provide the Board with evidence of continuing competency compliance. The Board's goal in monitoring compliance with the proposed new continuing competency requirements is to identify non-compliant nurses so that corrective action may be taken as appropriate. However, corrective action is not necessary or appropriate in situations where a compliant nurse has been identified in error as non-compliant. Proposed new §216.10 seeks to minimize this risk by providing nurses the opportunity to challenge a determination of non-compliance and prove their compliance so that inappropriate corrective action may be timely avoided.

Finally, proposed new §216.11 clearly identifies the Board's expectations with regard to compliance with the proposed new continuing competency requirements. Proposed new §216.11 clearly states that a nurse's failure to comply with the continuing competency requirements will result in denial of renewal by the Board. Nurses are entrusted with the care of those most vulnerable by virtue of illness or injury. As such, their level of competence is of utmost importance in creating safe environments for patients. Because a nurse's continuing competency

is such an integral part of providing safe nursing care to the public, the Board considers the denial of renewal one of the appropriate sanctions for non-compliance with the proposed new continuing competency requirements.

Section-by-Section Overview. The following is a section-by-section overview of the proposal.

Proposed new §216.1 defines the terms to be used in the proposed new chapter.

Proposed new §216.2 states that the purpose of continuing competency is to ensure that nurses stay abreast of current industry practices, enhance their professional competence, learn about new technology and treatment regimens, and update their clinical skills. Further, proposed new §216.2 makes clear that continuing education in nursing includes programs beyond the basic preparation which are designed to promote and enrich knowledge, improve skills and develop attitudes for the enhancement of nursing practice, thus improving health care to the public. Additionally, proposed new §216.2 recognizes that nursing certification is another method of demonstrating continuing competence. Proposed new §216.2 also states that, pursuant to authority set forth in the Occupations Code §301.303, the Board requires participation in continuing competency activities for license renewal. Further, the procedures set forth in the proposed new chapter provide guidance to fulfilling the continuing competency requirement. Finally, proposed new §216.2 requires nurses to participate in continuing education courses that relate to their practice area or to attain, maintain, or renew an approved national nursing certification in their practice area, which benefits the public welfare.

Proposed new §216.3(a) and (b) require a nurse to either (i) complete 20 contact hours of continuing education within the two years immediately preceding renewal of registration or (ii) demonstrate the achievement, maintenance, or renewal of an approved national nursing certification in the nurse's area of practice. Proposed new §216.3(a) further requires the 20 contact hours of continuing education to be obtained in the nurse's area of practice and to be in programs approved by a credentialing agency recognized by the Board. Further, proposed new §216.3(a) states that a list of these agencies/organizations may be obtained from the Board's office or web site. Proposed new §216.3(b) states that a list of approved national nursing certification criteria may be obtained from the Board's office or web site. Proposed new §216.3(c) states that a licensee authorized by the Board as an advanced practice registered nurse (APRN) is required to obtain 20 contact hours of continuing education or attain, maintain or renew the national certification recognized by the Board as meeting the certification requirement for the advanced practice registered nurse's role and population focus area of licensure within the previous two years of licensure. Further, proposed new §216.3(c) provides that national certification will only meet the requirement for licensure renewal. Additionally, proposed new §216.3(c)(1) states that the required hours are not in addition to the requirements of §216.3(a) or (b). Proposed new §216.3(c)(2) provides that the 20 contact hours of continuing education must be appropriate to the advanced specialty area and role recognized by the Board. Proposed new §216.3(c)(3) provides that the APRN who holds prescriptive authority must complete, in addition to the required continuing competency requirements in §216.3(c), at least five contact hours of continuing education in pharmacotherapeutics. Proposed new §216.3(c)(4) states that Category I Continuing Medical Education (CME) contact hours will meet requirements as described in the proposed new chapter. Proposed new §216.3(d)(1) requires each nurse licensed in Texas and employed in an emergency room setting on or after September 1, 2006 to complete a minimum of two hours of continuing education relating to forensic evidence collection, as required by the Occupations Code §301.306 and proposed new §216.3(d) by (i) September 1, 2008 for nurses to whom this requirement applies who are employed in an emergency room setting on or before September 1, 2006; or (ii) within two years of the initial date of employment in an emergency room setting. This requirement may be met through completion of approved continuing education activities, as set forth in §216.4 (relating to Criteria for Acceptable Continuing Education Activity). Further, proposed new §216.3(d)(2) provides that this requirement applies to nurses who work in an emergency room setting that is: (i) the nurse's home unit; (ii) an ER unit to which the nurse "floats" or schedules shifts; or (iii) a nurse employed under contractual, temporary, per diem, agency, traveling, or other employment relationship whose duties include working in an emergency room. Additionally, proposed new §216.3(d)(3) states that a licensed nurse in Texas who would otherwise be exempt from continuing education requirements during the nurse's initial licensure or first renewal periods under §216.8(b) or (c) (relating to Relicensure Process) shall comply with the requirements of §216.3. This is a one time requirement for each nurse employed in an emergency room setting. In compliance with §216.7(b) (relating to Responsibilities of Individual Licensee), each licensee is responsible for maintaining records of continuing education attendance. Validation of course completion in Forensic Evidence Collection should be retained by the nurse indefinitely, even if a nurse changes employment. Further, proposed new §216.3(d)(4) provides that the minimum two hours of continuing education requirement shall include information relevant to forensic evidence collection and age or population-specific nursing interventions that may be required by other laws and/or are necessary in order to assure evidence collection that meets requirements under the Government Code §420.031 regarding use of a service-approved evidence collection kit and protocol. The content may also include, but is not limited to: documentation, history-taking skills, use of sexual assault kit, survivor symptoms, and emotional and psychological support interventions for victims. Lastly, proposed new §216.3(d)(5) provides that the required hours under proposed new §216.3(d) are included in the continuing education requirements for nurses. Proposed new §216.3(e)(1) provides that a nurse who is 65 years old or older and who holds or is seeking to hold a valid volunteer retired nurse authorization in compliance with the Occupations Code §112.051 and §217.9(d) of this title (relating to Inactive Status) must have completed at least 10 hours of continuing education in the nurse's area of nursing practice during the previous biennium, unless the nurse also holds valid recognition as an advanced practice registered nurse or is a Volunteer Retired Registered Nurse with advanced practice authorization in a given role and specialty in the State of Texas. Further, proposed new §216.3(e)(2) provides that a nurse who is 65 years old or older and who holds or is seeking to hold a valid volunteer retired nurse authorization in compliance with the Occupations Code §112.051 and §217.9(d) of this title must have completed at least 20 hours of continuing education as defined in the proposed new chapter if authorized by the Board in a specific advanced practice role and specialty. The 20 hours of continuing education must meet the same criteria as advanced practice registered nurse continuing education defined under §216.3(c). An advance practice registered

nurse authorized as a volunteer retired registered nurse with advance practice registered nurse authorization may not hold prescriptive authority. This does not preclude a registered nurse from placing his/her advance practice registered nurse authorization on inactive status and applying for authorization only as a volunteer retired registered nurse. Finally, proposed new §216.3(e)(3) provides that a nurse who is 65 years old or older and who holds or is seeking to hold a valid volunteer retired nurse authorization in compliance with the Occupations Code §112.051 and §217.9(d) of this title is exempt from fulfilling targeted continuing education requirements except as required for volunteer retired advanced practice registered nurses.

Proposed new §216.4 states that continuing education programs must be approved by a credentialing agency or an affiliated entity of one of these agencies, and must be in the nurse's area of practice. Proof of successful completion shall contain the name of the provider; the program title, date, and location; number of contact hours; provider number; and credentialing agency.

Proposed new §216.5 states that in addition to those programs reviewed by a Board-approved entity, a licensee may attend an academic course that meets certain criteria. First, the course shall be within the framework of a curriculum that leads to an academic degree in nursing or any academic course relevant to nursing practice. Second, participants, upon audit by the Board, shall be able to present an official transcript indicating completion of the course with a grade of "C" or better, or a "Pass" on a Pass/Fail grading system.

Proposed new §216.6 enumerates the following list of activities that do not meet continuing education requirements for licensure renewal: Basic Life Support or cardiopulmonary resuscitation courses; in-service programs; nursing refresher courses; orientation programs; courses which focus upon self-improvement, changes in attitude, self-therapy, self-awareness, weight loss, and yoga; economic courses for financial gain, e.g., investments, retirement, preparing resumes, and techniques for job interview; courses which focus on personal appearance in nursing; liberal art courses in music, art, philosophy, and others when unrelated to patient/client care; courses designed for lay people; self-directed study; and continuing education that is not the nurse's area of practice unless required by the Occupations Code or the proposed new chapter.

Proposed new §216.7(a) provides that it shall be the licensee's responsibility to select and participate in continuing competency activities that will meet the criteria listed in the proposed new chapter. Proposed new §216.7(b) provides that the licensee shall be responsible for maintaining a record of continuing education activities. These records shall document attendance as evidenced by original certificates of attendance, contact hour certificates, academic transcripts, or grade slips and copies of these shall be submitted to the Board upon audit. Proposed new §216.7(c) provides that these records shall be maintained by the licensee for a minimum of two consecutive renewal periods or four years.

Proposed new §216.8(a) provides that, upon renewal of the license, the licensee shall sign a statement attesting that the continuing education or approved national nursing certification requirements have been met. The contact hours must have been completed in the biennium immediately preceding the license renewal. Continuing education contact hours from a previous renewal period will not be accepted. Additional contact hours earned may not be used for subsequent renewal periods. Proposed new §216.8(b) states that a candidate licensed by examination shall be exempt from the continuing education or approved national nursing certification requirement for issuance of the initial license and for the immediate renewal period following licensure. Proposed new §216.8(c) states that an applicant licensed by endorsement shall be exempt from the continuing education or approved national nursing certification requirement for the issuance of the initial Texas license and for the immediate renewal period following initial Texas licensure. Proposed new §216.8(d)(1) provides that a license that has been delinquent for less than four years may be renewed by the licensee showing evidence of having completed 20 contact hours in their current or prior area of practice of acceptable continuing education or an approved national nursing certification within two years immediately preceding the application for relicensure and by meeting all other Board requirements. A licensee shall be exempt from the continuing education requirement for the immediate renewal period following renewal of the delinquent license. Further, proposed new §216.8(d)(2) provides a license that has been delinquent for four or more years may be renewed upon completion of requirements listed in §217.6(b) of this title (relating to Failure to Renew License). Proposed new §216.8(e)(1) provides that a license that has been inactive for less than four years may be reactivated by the licensee submitting verification of having completed at least 20 contact hours of continuing education in their current or prior area of practice or a current approved national nursing certification in their current or prior area of practice within the past two years immediately prior to application for reactivation. Proposed new §216.8(e)(2) provides that a license that has been inactive for four or more years may be reactivated upon completion of requirements in §217.9(e) of this title (relating to Reactivation from Inactive Status). Proposed new §216.8(f) states that a licensee whose license has been revoked and subsequently applies for reinstatement must show evidence that the continuing competency requirement and other Board requirements have been met prior to reinstatement of the license by the Board.

Proposed new §216.9(1) provides that the Board shall select a random sample of licensees 90 days prior to each renewal month. Audit forms shall be sent to selected licensees to substantiate compliance with the continuing competency requirements. Within 30 days following notification of audit, these selected licensees shall submit an audit form and documentation as specified in §216.4 and §216.5 and any additional documentation the Board deems necessary to verify compliance with continuing education requirements for the period of licensure being audited or a copy of the current approved national nursing certification and any additional documentation the Board deems necessary to verify compliance with continuing competency requirements for the period of licensure being audited. Further, proposed new §216.9(2) provides that failure to notify the Board of a current mailing address will not absolve the licensee from audit requirements. Additionally, proposed new §216.9(3) provides that an audit shall be automatic for a licensee who has been found noncompliant in an immediately preceding audit. Finally, proposed new §216.9(4) states that failure to complete the audit satisfactorily or falsification of records shall constitute unprofessional conduct and provide grounds for disciplinary action.

Proposed new §216.10 states that any individual who wishes to appeal a determination of non-compliance with continuing competency requirements must submit a letter of appeal within 20 days of notification of the audit results. The Board or its designee shall conduct a review in which the appellant may appear in person to present reasons why the audit decision should be

set aside or modified. Further, the decision of the Board after the appeal shall be considered final and binding.

Proposed new §216.11 provides that failure to comply with the Board's continuing competency requirements will result in the denial of renewal.

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

Ms. Thomas has also determined that for each year of the first five years the new sections are in effect, there will be public benefits, and there will be potential costs for individuals required to comply with the proposal.

Anticipated Public Benefits. The anticipated public benefits will be the adoption of new requirements that: (i) promote a comprehensive approach to continuing competency in nursing, (ii) provide nurses with additional options for meeting continuing competency requirements; and (iii) ensure the protection of the public health, safety, and welfare through the demonstration of competent, quality nursing care.

The ever evolving landscape of medical care requires nurses to stay abreast of the most current changes in medical techniques, treatments, and technology. The proposed new continuing competency requirements are designed to assist nurses in maintaining and improving their knowledge, skills, and attitudes so that the public may continue to receive safe, nursing care. The proposed new sections also encourage nurses to further their nursing education and to develop expertise in their current area of practice. Requiring a nurse to maintain competence in his or her current area of practice is especially important because it ensures that the nursing skills necessary for that particular setting are thoroughly developed and enriched. As a result, the nurse's patients directly benefit because the nurse is more knowledgeable and competent in his or her practice. In this way, the proposed new requirements seek to provide a higher quality of care in each area of nursing.

The proposed new sections also promote a new comprehensive approach to continuing competency in nursing. This new approach is beneficial to both individual nurses required to comply with the proposal and to the public. Traditionally, continuing competency has been demonstrated through the completion of continuing education courses. While continuing education courses continue to be a valuable method in promoting and enriching a nurse's knowledge and skills, they are not the only method for doing so. The proposed new sections recognize other methods in which nurses may develop expertise, enhance their professional competence, learn about new technology and treatment regimens, and update their clinical skills. This approach provides nurses with the flexibility of choosing courses, activities, and certifications that compliment their personality, skill level, learning style, and area of practice. Further, this approach encourages nurses to explore options beyond continuing education courses, such as national nursing certifications and academic courses related to the nursing practice. Because these additional methods of compliance are authorized under the proposed new sections, nurses will be able to consider a wider variety of continuing competency activities. These additional options should result in nurses with better training, education, subject matter expertise, and enriched skill sets, which ultimately should provide the public with access to better health care.

Potential Costs for Individuals Required to Comply with the Proposal.

Nurses required to comply with the proposed new requirements may incur compliance costs. Potential compliance costs result from the proposed new requirements in §§216.3, 216.7, 216.8, 216.9, and 216.10.

Pursuant to proposed new §216.3(a), nurses have the option of completing 20 hours of continuing education in their area of practice within the two years immediately preceding renewal of registration. For nurses who choose to comply with proposed new §216.3(a), the probable economic costs of compliance are estimated to range between $0.00 per credit hour and $20 per credit hour, with an average of $6.40 per credit hour. This estimated cost is based on the following considerations. The Board collected a sampling of continuing education courses currently being offered by various continuing education providers. The Board then compared the total cost of each course with the cost per credit hour. It should be noted that several continuing education providers offer free continuing education courses. Of the continuing education courses surveyed that were not free, the credit hours ranged from one hour to 35 credit hours and their total associated costs ranged from $5.00 to $90.00. Based on the continuing education courses surveyed, the range of cost per credit hour is $0.00 to $20, with an average cost per hour of $6.40. This cost estimate includes contact hour estimates for a variety of continuing education course subjects, including oncology and cancer courses, cardiovascular, cardiac, and heart disease courses, critical care courses, respiratory care courses, advanced assessment courses, bio-terrorism courses, nurse practitioner review courses, wound care courses, and family nurse practitioner courses.

Under proposed new §216.3(c), an advanced practice registered nurse has the option of completing 20 contact hours of continuing education. Additional continuing competency requirements apply to an advanced practice registered nurse with prescriptive authority. Proposed new §216.3(c)(3) requires advanced practice registered nurses with prescriptive authority to complete five additional contact hours of continuing education in pharmacotherapeutics, in addition to meeting the continuing competency requirements of proposed new §216.3(c). The probable estimated costs of complying with proposed new §216.3(a) have already been addressed in the foregoing paragraphs of this Public Benefit/Cost note. The probable estimated costs of complying with proposed new §216.3(c) are estimated to be the same as the estimated costs of complying with proposed new §216.3(a) because the Board anticipates the range of credit hours and costs for continuing education courses relating to an advanced practice registered nurse's specialty area to be similar to the credit hours and costs of the continuing education courses previously addressed in the foregoing paragraphs of this Public Benefit/Cost note. The probable estimated costs of complying with proposed new §216.3(c)(3) are estimated to be the same as the estimated costs of complying with proposed new §216.3(a) because the Board anticipates the range of credit hours and costs for pharmacotherapeutic continuing education courses to be similar to the credit hours and costs of the continuing education courses previously addressed in the foregoing paragraphs of this Public Benefit/Cost note.

Pursuant to the Occupations Code §301.306, proposed new §216.3(d) requires each nurse licensed in Texas and employed in an emergency room setting on or after September 1, 2006, to complete two hours of continuing education relating to forensic

evidence collection. The probable estimated costs of completing continuing education hours in compliance with proposed new §216.3(a) have already been addressed in the foregoing paragraphs of this Public Benefit/Cost note. The probable estimated costs of complying with proposed new §216.3(d) are estimated to be the same as the estimated costs of completing continuing education hours in compliance with proposed new §216.3(a) because the Board anticipates the range of credit hours and costs for forensic evidence collection continuing education courses to be similar to the credit hours and costs of the continuing education courses previously addressed in the foregoing paragraphs of this Public Benefit/Cost note. However, the Board anticipates that the probable estimated costs associated with proposed new §216.3(d) may be somewhat reduced because proposed new §216.3(d) is a one-time requirement. Thus, once a nurse completes the required number of forensic evidence collection continuing education hours under proposed new §216.3(d), the nurse will not be required to complete those continuing education hours again. As such, the estimated costs of compliance with proposed new §216.3(d) are anticipated to be one-time costs only. Further, proposed new §216.3(d) permits forensic evidence collection continuing education hours to satisfy a portion of the continuing competency requirements in proposed new §216.3(a). This further reduces the estimated compliance costs for nurses subject to proposed new §216.3(d) because these nurses may simultaneously apply the completion of forensic evidence collection continuing education hours to the requirements of both proposed new §216.3(a) and §216.3(d).

Proposed new §216.3(e) requires a retired nurse over the age of 65 who continues to volunteer nursing services to complete 10 hours of continuing education in the nurse's area of practice. The probable estimated costs of completing continuing education hours in compliance with proposed new §216.3(a) have already been addressed in the foregoing paragraphs of this Public Benefit/Cost note. The probable estimated costs of complying with proposed new §216.3(e) are estimated to be similar to the estimated costs of completing continuing education hours in compliance with proposed new §216.3(a) because the Board anticipates that the range of credit hours and costs for continuing education courses required under proposed new §216.3(e) will be similar to the credit hours and costs of the continuing education courses required under proposed new §216.3(a), which were previously addressed in the foregoing paragraphs of this Public Benefit/Cost note. However, the Board anticipates that the probable estimated costs associated with proposed new §216.3(d) may be somewhat reduced because proposed new §216.3(e) requires the completion of substantially less continuing education hours than proposed new §216.3(a). This is because retired nurses who volunteer their nursing services are not compensated for those services. Further, these nurses generally do not provide nursing services on a full time basis, and do not provide nursing services in acute care, intensive care, or emergency room settings. The Board recognizes that the costs of continuing competency compliance may be a financial burden to these retired nurses. As a result, proposed new §216.3(e) requires the completion of 10 hours of continuing education for these nurses. In this way, proposed new §216.3(e) reduces the estimated compliance costs for retired nurses, while maintaining an appropriate number of continuing education hours to ensure the ongoing delivery of safe nursing care.

It is anticipated that individuals subject to proposed new §216.3(a), (c), (d), and (e) will incur the aforementioned estimated costs of compliance every two years. The proposed new requirements, however, also provide options to defray some of these estimated costs of compliance. First, several continuing education providers offer continuing education courses at no cost. The proposed new continuing competency requirements do not limit the number of free continuing education courses that a nurse may complete. A nurse may take as many free continuing education courses as he or she chooses or is able, provided that the courses meet the applicable requirements of the proposed new chapter, such as being approved by a credentialing agency approved by the Board and being in the nurse's area of practice. Second, many continuing education courses are offered online so nurses may complete the courses during non-business hours, preventing a nurse from having to miss work to complete a course. Third, proposed new §216.5 permits a nurse to meet the proposed new continuing competency requirements of §216.3(a) by attending and passing an academic course that is either within the framework of a curriculum that leads to an academic degree in nursing or is relevant to the nursing practice. The Board permits one qualifying academic semester hour to satisfy 15 contact hours of required continuing education. As a result, some nurses may be able to satisfy all or a portion of their continuing competency requirements under proposed new §216.3(a) while simultaneously furthering their nursing education. This additional option provides potential cost savings to these nurses. Finally, proposed new §216.8 provides an exemption from the continuing competency requirements of proposed new §216.3(a) for nurses licensed by examination and endorsement for the issuance of an initial Texas license and for the immediate renewal period following Texas licensure. This option eliminates the costs of continuing competency compliance for the first renewal period following initial Texas licensure for these nurses.

For nurses who choose to comply with §216.3(b) by achieving, maintaining, or renewing an approved national nursing certification in the nurse's area of practice, the probable economic costs of compliance will vary substantially based upon the following factors: (i) whether the nurse is a licensed registered nurse or a licensed vocational nurse; (ii) the specific certification sought; (iii) the credentialing body offering the specific certification; and (iv) the requirements and associated fees of the credentialing body offering the certification, including application fees, which are estimated to range between $200 - $500; exam fees, which are estimated to range between $270 - $400; renewal fees, which are estimated to range between $200 - $350, and the completion of a required number of continuing education or practice hours. A nurse is not required to achieve, maintain, or renew an approved national nursing certification in the nurse's area of practice under the proposed new requirements. Rather, a nurse is required to either (i) complete 20 contact hours of continuing education or (ii) achieve, maintain, or renew an approved national nursing certification. Thus, a nurse may choose to comply with the proposed new continuing competency requirements by achieving, maintaining, or renewing a national nursing certification. Proposed new §216.3(b) does not dictate the precise credentialing body that must be used by a nurse seeking a national nursing certification. As a result, each nurse is free to choose the most economical means of complying with the requirements of proposed new §216.3(b). Further, each nurse has the information necessary to estimate his or her own individual suitability for achieving, maintaining, or renewing a national nursing certification, including his or her individualized area of practice and individualized professional accomplishments that might be used to satisfy a portion of a credentialing body's initial requirements

for certification, such as the completion of required clinical or continuing education hours. These estimated compliance costs may be reduced, however, for certain nurses. For nurses licensed by examination and endorsement for the issuance of an initial Texas license, proposed new §216.8 provides an exemption from the continuing competency requirements of proposed new §216.3(b) for the immediate renewal period following Texas licensure. This option eliminates the costs of continuing competency compliance for the first renewal period following initial Texas licensure for these nurses.

Proposed new §216.7 requires a nurse to maintain a record of his or her continuing education activities for a minimum of two consecutive renewal periods, or four years. The Board anticipates the costs of compliance with this proposed new requirement to be minimal. The Board accepts original or copied certificates of attendance, contact hour certificates, transcripts, and grade slips as acceptable evidence of completion of a continuing education activity. The Board anticipates that there should be minimal costs associated with storing these pieces of information for a four year time period. Further, because proposed new §216.7 does not prescribe the method by which a nurse must store this information, a nurse is able to choose the most economic and feasible method for doing do.

Proposed new §216.8(d)(1) requires a nurse whose license has been delinquent for less than four years to renew the license by showing evidence of (i) the completion of 20 contact hours of continuing education in the nurse's current or prior area of practice or (ii) an approved national nursing certification within the two years immediately preceding the application for relicensure. Proposed new §216.3(e)(1) requires a nurse whose license has been inactive for less than four years to reactivate the license by showing evidence of (i) the completion of 20 contact hours of continuing education in the nurse's current or prior area of practice or (ii) a current, approved national nursing certification within the two years immediately prior to the application for reactivation. Proposed new §216.3(f) requires a nurse who applies for reinstatement after the nurse's license has been revoked by the Board to satisfy the continuing competency requirements of proposed new §216.3(a) and (b). The probable estimated costs of complying with proposed new §216.3(a) and (b) have already been addressed in the foregoing paragraphs of this Public Benefit/Cost note. The estimated costs of complying with proposed new §216.3(d)(1), (e)(1), and (f) are estimated to be the same as the estimated costs of complying with proposed new §216.3(a) and (b), which have been previously addressed in the foregoing paragraphs of this Public Benefit/Cost note.

Proposed new §216.9 requires each nurse who receives an audit notice to submit a completed audit form and verification of the completion of the proposed new continuing competency requirements to the Board within 30 days following notification of the audit. The Board anticipates the costs of compliance with proposed new §216.9 to be less than $25. The Board anticipates the costs of compliance to include: an envelope suitable for mailing, an appropriate number of copies of appropriate/requested documentation, and postage. The Board anticipates that the cost of an envelope suitable for mailing will not exceed $5 and that the cost of postage will not exceed $10. Further, proposed new §216.9 does not prescribe a specific delivery method. As such, each nurse required to comply with proposed new §216.9 may choose the most economical way of mailing the requested documentation to the Board. The Board further anticipates that the cost of copies of the appropriate/requested documentation should not exceed $10. These estimated costs of compliance may be reduced further because not every nurse will be subject to compliance with proposed new §216.9. Pursuant to proposed new §216.9, a random sample of nurses are selected for audit 90 days prior to each renewal month. Thus, the estimated costs of compliance with proposed new §216.9, while minimal, may be further defrayed due to the random selection of nurses who will be required to comply with proposed new §216.9.

Finally, proposed new §216.10 affords nurses an opportunity to challenge the Board's determination of continuing competency non-compliance by filing a letter of appeal with the Board within 20 days of notification of the nurse's audit results. The Board anticipates the costs of compliance associated with proposed new §216.10 to be less than $25. First, a nurse is not required to appeal the Board's determination of continuing competency non-compliance. Rather, it is an option made available to each nurse. For nurses who choose to exercise this option, the Board estimates the costs of compliance to include: an envelope suitable for mailing, an appropriate number of copies of necessary documentation, and postage. The Board anticipates that the cost of an envelope suitable for mailing will not exceed $5 and that the cost of postage will not exceed $10. Further, proposed new §216.10 does not prescribe a specific delivery method. As such, each nurse may choose the most economical means of mailing the documentation to the Board. The Board anticipates that the cost of copies of any necessary documentation should not exceed $10. Further, while a nurse is required to submit a letter of appeal to the Board under proposed new §216.10 in order to challenge an audit decision, a nurse is not required to appear in person before the Board to challenge an audit decision. Rather, proposed new §216.10 provides nurses with the option of appearing in person before the Board to present reasons why an audit decision should be set aside or modified. Nurses who choose to appear in person to contest an audit decision may incur travel costs in doing so. However, nurses are free to choose the most economical means of traveling to Austin, Texas, to appear before the Board.

Any other costs to comply with the proposed new sections result from the enactment of the Occupations Code Chapter 301 and are not a result of the adoption, enforcement, or administration of the proposal.

As required by the Government Code §2006.002(c) and (f), the Board has determined that the proposed new requirements of Chapter 216 will not have an adverse economic effect on any individual, Board regulated entity, or other entity required to comply with the proposed new chapter because no individual, Board regulated entity, or other entity required to comply with the requirements of the proposed new chapter meets the definition of a small or micro business under the Government Code §2006.001(1) or §2006.001(2). The Government Code §2006.001(1) defines a micro business as a legal entity, including a corporation, partnership, or sole proprietorship that: (i) is formed for the purpose of making a profit; (ii) is independently owned and operated; and (iii) has not more than 20 employees. The Government Code §2006.001(2) defines a small business as a legal entity, including a corporation, partnership, or sole proprietorship, that: (i) is formed for the purpose of making a profit; (ii) is independently owned and operated; and (iii) has fewer than 100 employees or less than $6 million in annual gross receipts. Each of the elements in §2006.001(1) and §2006.001(2) must be met in order for an entity to qualify as a micro business or small business. The only entities subject to the proposed new requirements of Chapter 216 are individual nurses. Because individual nurses are not independently owned

and operated legal entities that are formed for the purpose of making a profit, no individual nurse qualifies as a micro business or small business under the Government Code §2006.001(1) or §2006.001(2). Therefore, in accordance with the Government Code §2006.002(c) and (f), the Board is not required to prepare a regulatory flexibility analysis.

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

To be considered, written comments on the proposal or any request for a public hearing must be submitted no later than 5:00 p.m. on June 14, 2009, to James W. Johnston, General Counsel, Texas Board of Nursing, 333 Guadalupe, Suite 3-460, Austin, Texas 78701, or by e-mail to dusty.johnston@bon.state.tx.us, or faxed to (512) 305-8101. An additional copy of the comments on the proposal or any request for a public hearing must be simultaneously submitted to Denise Benbow, Nursing Practice Consultant, Texas Board of Nursing, 333 Guadalupe, Suite 3-460, Austin, Texas 78701, or by e-mail to denise.benbow@bon.state.tx.us, or faxed to (512) 305-8101. If a hearing is held, written and oral comments presented at the hearing will be considered.

The new rules are proposed under the Occupations Code §§301.152, 301.303, 301.306, and 301.151. The Occupations Code §301.152(a) defines *advanced practice nurse* as a registered nurse approved by the Board to practice as an advanced practice nurse on the basis of completion of an advanced educational program. The term includes a nurse practitioner, nurse midwife, nurse anesthetist, and clinical nurse specialist. The term is synonymous with *advanced nurse practitioner*. Section 301.152(b) authorizes the Board to adopt rules to: (i) establish any specialized education or training, including pharmacology, that a registered nurse must have to carry out a prescription drug order and a system for assigning an identification number to a registered nurse who provides the Board with evidence of completing the required specialized education and training requirement; (ii) approve a registered nurse as an advanced practice nurse; and (iii) initially approve and biennially renew an advanced practice nurse's authority to carry out or sign a prescription drug order. Section 301.152(c) requires the rules adopted under §301.152(b) to (i) require completion of pharmacology and related pathology education for initial approval; (ii) require continuing education in clinical pharmacology and related pathology in addition to any continuing education otherwise required under §301.303; and (iii) provide for the issuance of a prescription authorization number to an advanced practice nurse approved under §301.152. Section 301.152(d) provides that the signature of an advanced practice nurse attesting to the provision of a legally authorized service by the advanced practice nurse satisfies any documentation requirement for that service established by a state agency. Section 301.303(a) authorizes the Board to recognize, prepare, or implement continuing competency programs for license holders under Chapter 301 and to require participation in continuing competency programs as a condition of renewal of a license. The programs may allow a license holder to demonstrate competency through various methods, including completion of targeted continuing education programs and consideration of a license holder's professional portfolio, including certifications held by the license holder. Section 301.303(b) provides that the Board may not require participation in more than a total of 20 hours of continuing education in a two-year licensing period. Section 301.303(c) authorizes the Board by rule to establish a system for the approval of programs and providers of continuing education if the Board requires participation in continuing education programs as a condition of license renewal. Section 301.303(e) authorizes the Board to adopt other rules as necessary to implement §301.303. Section 301.303(f) states that the Board may assess each program and provider under this section a fee in an amount that is reasonable and necessary to defray the costs incurred in approving programs and providers. Section 301.303(g) authorizes the Board by rule to establish guidelines for targeted continuing education required under Chapter 301. The rules adopted under §301.303(g) must address: (i) the nurses who are required to complete the targeted continuing education program; (ii) the type of courses that satisfy the targeted continuing education requirement; (iii) the time in which a nurse is required to complete the targeted continuing education; (iv) the frequency with which a nurse is required to meet the targeted continuing education requirement; and (v) any other requirement considered necessary by the Board. Section 301.306(a) provides that, as part of continuing education requirements under §301.303, a license holder who is employed to work in an emergency room setting and who is required under Board rules to comply with §301.303 shall complete at least two hours of continuing education relating to forensic evidence collection not later than September 1, 2008 or the second anniversary of the initial issuance of a license under this chapter to the license holder. Section 301.303(b) states that the continuing education required under §301.303(a) must be part of a program approved under §301.303(c). Section 301.303(c) authorizes the Board to adopt rules to identify the license holders who are required to complete continuing education under §301.303(a) and to establish the content of that continuing education. Further, the Board may adopt other rules to implement §301.303, including rules under Section 301.303(c) for the approval of education programs and providers. Section 301.151 authorizes the Board to adopt and enforce rules consistent with Chapter 301 and necessary to: (i) perform its duties and conduct proceedings before the Board; (ii) regulate the practice of professional nursing and vocational nursing; (iii) establish standards of professional conduct for license holders under this chapter; and (iv) determine whether an act constitutes the practice of professional nursing or vocational nursing.

The following statutes are affected by this proposal:

Rule -- Statute

Sections 216.1 - 216.11 -- Occupations Code §§301.152, 301.303 and 301.306

§216.1. Definitions.

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

(1) Academic course--A specific set of learning experiences offered in an accredited school, college or university. Academic credit will convert on the following basis: One academic quarter hour = 10 contact hours; one academic semester hour = 15 contact hours.

(2) Advanced Practice Registered Nurse (APRN)--A nurse anesthetist, nurse practitioner, nurse midwife, or clinical nurse specialist approved by the board to practice as an advanced practice registered nurse based on completion of an advanced educational program acceptable to the board.

(3) Approved--Recognized as having met established standards and pre-determined criteria of the:

(A) credentialing agencies recognized by the board (applies to providers and programs); and

(B) certifying bodies accredited by a national certification accreditation body recognized by the board.

(4) Area of Practice--Any nursing practice the nurse engaged in during the licensure renewal cycle.

(5) Audit--A random sample of licensees taken to verify satisfactory completion of the board's requirements for continuing competency during a biennial license renewal period.

(6) Authorship--Development and publication of a manuscript related to nursing and health care.

(7) Certification--Nursing certification from an approved certifying body accredited by a national accreditation body recognized by the board.

(8) Classroom instruction--Workshops, seminars, institutes, conferences or short term courses which the individual attends which may be acceptable for continuing education credit.

(9) Clinical learning experiences--Faculty-planned and guided learning experiences designed to assist students to meet the course objectives and to apply nursing knowledge and skills in the direct care of patients/clients. This includes laboratories, acute care facilities, extended care facilities, and other community resources.

(10) Competency--The application of knowledge and the interpersonal decision making, and psychomotor skills expected for the nurse's practice role, within the context of public health, safety, and welfare.

(11) Contact hour--Sixty consecutive minutes of participation in a learning activity.

(12) Continuing Education (CE)--Programs beyond the basic preparation which are designed to promote and enrich knowledge, improve skills, and develop attitudes for the enhancement of nursing practice, thus improving health care to the public.

(13) Continuing education program--An organized educational activity, e.g, self paced (online), classroom, approved through an external review process based on a predetermined set of criteria. The review is conducted by an organization(s) recognized by the board to approve programs and providers.

(14) Credentialing agency--An organization recognized by the board as having met nationally predetermined criteria to approve programs and providers of CE.

(15) Prescriptive Authority--Authorization granted to an advanced practice registered nurse who meets the requirements to carry out or sign a prescription drug order.

(16) Program number--A unique number assigned to a program upon approval which shall identify it regardless of the number of times it is presented.

(17) Provider--An individual, partnership, organization, agency or institution approved by an organization recognized by the board which offers continuing education programs.

(18) Provider number--A unique number assigned to the provider upon approval by the credentialing agency or organization.

§216.2. Purpose.

The purpose of continuing competency is to ensure that nurses stay abreast of current industry practices, enhance their professional competence, learn about new technology and treatment regimens, and update their clinical skills. Continuing education in nursing includes programs beyond the basic preparation which are designed to promote and enrich knowledge, improve skills and develop attitudes for the enhancement of nursing practice, thus improving health care to the public. Nursing certification is another method of demonstrating continuing competence. Pursuant to authority set forth in the Occupations Code §301.303, the board requires participation in continuing competency activities for license renewal. The procedures set forth in these rules provide guidance to fulfilling the continuing competency requirement. The board requires nurses to participate in continuing education courses that relate to their practice area or to attain, maintain, or renew an approved national nursing certification in their practice area, which benefits the public welfare.

§216.3. Requirements.

(a) A nurse must meet either the requirements of this subsection or subsection (b) of this section. A nurse may choose to complete 20 contact hours of continuing education within the two years immediately preceding renewal of registration. These hours shall be obtained in the nurse's area of practice and be in programs approved by a credentialing agency recognized by the board. A list of these agencies/organizations may be obtained from the board's office or web site.

(b) A nurse must meet either the requirements of this subsection or subsection (a) of this section. A nurse may choose to demonstrate the achievement, maintenance, or renewal of an approved national nursing certification in the nurse's area of practice. A list of approved national nursing certification criteria may be obtained from the board's office or web site.

(c) Requirements for the Advanced Practice Registered Nurse. The licensee authorized by the board as an advanced practice registered nurse (APRN) is required to obtain 20 contact hours of continuing education or attain, maintain or renew the national certification recognized by the board as meeting the certification requirement for the advanced practice registered nurse's role and population focus area of licensure within the previous two years of licensure. National certification as discussed in this section will only meet the requirement for licensure renewal.

(1) The required hours are not in addition to the requirements of subsection (a) or (b) of this section.

(2) The 20 contact hours of continuing education must be appropriate to the advanced specialty area and role recognized by the board.

(3) The APRN who holds prescriptive authority must complete, in addition to the requirements of this subsection, at least five additional contact hours of continuing education in pharmacotherapeutics.

(4) Category I Continuing Medical Education (CME) contact hours will meet requirements as described in this chapter.

(d) Forensic Evidence Collection.

(1) Each nurse licensed in Texas and employed in an emergency room (ER) setting on or after September 1, 2006 shall complete a minimum of two hours of continuing education relating to forensic evidence collection, as required by the Occupations Code §301.306 and this subsection:

(A) by September 1, 2008 for nurses to whom this requirement applies who are employed in an ER setting on or before September 1, 2006; or

(B) within two years of the initial date of employment in an ER setting. This requirement may be met through completion of approved continuing education activities, as set forth in §216.4 of this chapter (relating to Criteria for Acceptable Continuing Education Activity).

(2) This requirement shall apply to nurses who work in an ER setting that is:

(A) the nurse's home unit;

(B) an ER unit to which the nurse "floats" or schedules shifts; or

(C) a nurse employed under contractual, temporary, per diem, agency, traveling, or other employment relationship whose duties include working in an ER.

(3) A licensed nurse in Texas who would otherwise be exempt from CE requirements during the nurse's initial licensure or first renewal periods under §216.8(b) or (c) of this chapter (relating to Relicensure Process) shall comply with the requirements of this section. This is a one-time requirement for each nurse employed in an ER setting. In compliance with §216.7(b) of this chapter (relating to Responsibilities of Individual Licensee), each licensee is responsible for maintaining records of CE attendance. Validation of course completion in Forensic Evidence Collection should be retained by the nurse indefinitely, even if a nurse changes employment.

(4) The minimum 2 hours of continuing education requirement shall include information relevant to forensic evidence collection and age or population-specific nursing interventions that may be required by other laws and/or are necessary in order to assure evidence collection that meets requirements under the Government Code §420.031 regarding use of a service-approved evidence collection kit and protocol. Content may also include but is not limited to documentation, history-taking skills, use of sexual assault kit, survivor symptoms, and emotional and psychological support interventions for victims.

(5) The required hours under this subsection are included in the continuing education requirements for nurses.

(e) A nurse who is 65 years old or older and who holds or is seeking to hold a valid volunteer retired (VR) nurse authorization in compliance with the Occupations Code §112.051 and §217.9(d) of this title (relating to Inactive Status):

(1) Must have completed at least 10 hours of continuing education in the nurse's area of nursing practice during the previous biennium, unless the nurse also holds valid recognition as an advanced practice registered nurse or is a Volunteer Retired Registered Nurse (VR-RN) with advanced practice authorization in a given role and specialty in the State of Texas.

(2) Must have completed at least 20 hours of CE as defined in this chapter if authorized by the board in a specific advanced practice role and specialty. The 20 hours of CE must meet the same criteria as APRN CE defined under subsection (c) of this section. An APRN authorized as a VR-RN with APRN authorization may not hold prescriptive authority. This does not preclude a registered nurse from placing his/her APRN authorization on inactive status and applying for authorization only as a VR-RN.

(3) Is exempt from fulfilling targeted CE requirements except as required for volunteer retired advanced practice registered nurses.

§216.4. Criteria for Acceptable Continuing Education Activity.

Continuing Education programs must be approved by a credentialing agency or an affiliated entity of one of these agencies and must be in the nurse's area of practice. Proof of successful completion shall contain the name of the provider; the program title, date, and location; number of contact hours; provider number; and credentialing agency.

§216.5. Additional Criteria for Specific Continuing Education Programs.

In addition to those programs reviewed by a board-approved entity, a licensee may attend an academic course that meets the following criteria:

(1) The course shall be within the framework of a curriculum that leads to an academic degree in nursing or any academic course relevant to nursing practice.

(2) Participants, upon audit by the board, shall be able to present an official transcript indicating completion of the course with a grade of "C" or better, or a "Pass" on a Pass/Fail grading system.

§216.6. Activities Which are not Acceptable as Continuing Education.

The following activities do not meet continuing education requirements for licensure renewal.

(1) Basic Life Support (BLS) or cardiopulmonary resuscitation (CPR) courses.

(2) In service programs. Programs sponsored by the employing agency to provide specific information about the work setting and orientation or other programs which address the institution's philosophy, policies and procedures; on-the-job training; basic CPR; and equipment demonstration are not acceptable for CE credit.

(3) Nursing refresher courses. Programs designed to update knowledge or current nursing theory and clinical practice, which consist of a didactic and clinical component to ensure entry level competencies into professional practice are not accepted for CE credit.

(4) Orientation programs. A program designed to introduce employees to the philosophy, goals, policies, procedures, role expectations and physical facilities of a specific work place are not acceptable for CE credit.

(5) Courses which focus upon self-improvement, changes in attitude, self-therapy, self-awareness, weight loss, and yoga.

(6) Economic courses for financial gain, e.g., investments, retirement, preparing resumes, and techniques for job interview.

(7) Courses which focus on personal appearance in nursing.

(8) Liberal art courses in music, art, philosophy, and others when unrelated to patient/client care.

(9) Courses designed for lay people.

(10) Self-directed study--An educational activity wherein the learner takes the initiative and the responsibility for assessing, planning, implementing and evaluating the activity including, but not limited to:

(A) academic courses that are audited, or that are healthcare-related courses but not part of a nursing degree program, or that are prerequisite courses such as mathematics, physiology, biology, government, or other similar courses are not acceptable;

(B) authorship; and

(C) program development and presentation.

(11) CE that is not the nurses area of practice unless required by the Occupations Code or this chapter.

§216.7. Responsibilities of Individual Licensee.

(a) It shall be the licensee's responsibility to select and participate in continuing competency activities that will meet the criteria listed in this chapter.

(b) The licensee shall be responsible for maintaining a record of CE activities. These records shall document attendance as evidenced by original certificates of attendance, contact hour certificates, academic transcripts, or grade slips and copies of these shall be submitted to the board upon audit.

(c) These records shall be maintained by the licensee for a minimum of two consecutive renewal periods or four years.

§216.8. Relicensure Process.

(a) Renewal of license.

(1) Upon renewal of the license, the licensee shall sign a statement attesting that the CE or approved national nursing certification requirements have been met.

(2) The contact hours must have been completed in the biennium immediately preceding the license renewal. CE contact hours from a previous renewal period will not be accepted. Additional contact hours earned may not be used for subsequent renewal periods.

(b) Persons licensed by examination. A candidate licensed by examination shall be exempt from the CE or approved national nursing certification requirement for issuance of the initial license and for the immediate renewal period following licensure.

(c) Persons licensed by endorsement. An applicant licensed by endorsement shall be exempt from the CE or approved national nursing certification requirement for the issuance of the initial Texas license and for the immediate renewal period following initial Texas licensure.

(d) Delinquent license.

(1) A license that has been delinquent for less than four years may be renewed by the licensee showing evidence of having completed 20 contact hours in their current or prior area of practice of acceptable continuing education or an approved national nursing certification within two years immediately preceding the application for relicensure and by meeting all other board requirements. A licensee shall be exempt from the continuing education requirement for the immediate renewal period following renewal of the delinquent license.

(2) A license that has been delinquent for four or more years may be renewed upon completion of requirements listed in §217.6 of this title (relating to Failure to Renew License).

(e) Reactivation of a license.

(1) A license that has been inactive for less than four years may be reactivated by the licensee submitting verification of having completed at least 20 contact hours of continuing education in their current or prior area of practice or a current approved national nursing certification in their current or prior area of practice within the past two years immediately prior to application for reactivation.

(2) A license that has been inactive for four or more years may be reactivated upon completion of requirements in §217.9 of this title (relating to Inactive Status).

(f) Reinstatement of a license. A licensee whose license has been revoked and subsequently applies for reinstatement must show evidence that the continuing competency requirement and other board requirements have been met prior to reinstatement of the license by the board.

§216.9. Audit Process.

The board shall select a random sample of licensees 90 days prior to each renewal month. Audit forms shall be sent to selected licensees to substantiate compliance with the continuing competency requirements.

(1) Within 30 days following notification of audit, these selected licensees shall submit an audit form and:

(A) documentation as specified in §216.4 and §216.5 of this chapter (relating to Criteria for Acceptable Continuing Education Activity and Additional Criteria for Specific Continuing Education Programs) and any additional documentation the board deems necessary to verify compliance with continuing education requirements for the period of licensure being audited; or

(B) a copy of the current approved national nursing certification and any additional documentation the board deems necessary to verify compliance with continuing competency requirements for the period of licensure being audited.

(2) Failure to notify the board of a current mailing address will not absolve the licensee from audit requirements.

(3) Pursuant to this section, an audit shall be automatic for a licensee who has been found noncompliant in an immediately preceding audit.

(4) Failure to complete the audit satisfactorily or falsification of records shall constitute unprofessional conduct and provide grounds for disciplinary action.

§216.10. Appeals.

(a) Any individual who wishes to appeal a determination of non-compliance with continuing competency requirements must submit a letter of appeal within 20 days of notification of the audit results.

(b) The board or its designee shall conduct a review in which the appellant may appear in person to present reasons why the audit decision should be set aside or modified.

(c) The decision of the board after the appeal shall be considered final and binding.

§216.11. Consequences of Non-Compliance.

Failure to comply with the board's continuing competency requirements will result in the denial of renewal.

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 May 1, 2009.

TRD-200901640
James W. Johnston
General Counsel
Texas Board of Nursing
Earliest possible date of adoption: June 14, 2009
For further information, please call: (512) 305-6811

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PART 21. TEXAS STATE BOARD OF EXAMINERS OF PSYCHOLOGISTS

CHAPTER 470. ADMINISTRATIVE PROCEDURE

22 TAC §470.10

The Texas State Board of Examiners of Psychologists proposes amendments to §470.10, Subpoenas. The amendments are being proposed to conform with the Administrative Procedure Act as cited.

Sherry L. Lee, Executive Director, has determined that for the first five-year period the amendments will be in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the proposed amendments.

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

Comments on the proposal may be submitted to Brenda Skiff, Texas State Board of Examiners of Psychologists, 333 Guadalupe, Suite 2-450, Austin, TX 78701, (512) 305-7700 or email brenda.skiff@tsbep.state.tx.us.

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

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

§470.10. Subpoenas.

On [~~Upon on~~] its own motion or, on [~~upon~~] the written request of any party to a contested case pending before it, for good cause shown and on deposit of sums [~~with the executive director/secretary~~] that will reasonably, ensure [~~insure~~] payment of [~~in~~] the amounts estimated to accrue under Administrative Procedure Act, Tex. Gov't Code Ann. §2001.103 (relating to expenses of witness or deponent) [~~§155.31 of Title 1 of the Texas Administrative Code (relating to Discovery)~~], the agency shall issue a subpoena addressed to the [~~an authorized agency employee or~~] sheriff or to a [~~any~~] constable to require the attendance of a witness or [~~witnesses and~~] the production of books, records, papers, or other objects that [~~as~~] may be necessary and proper for the purpose of a proceeding [~~the proceedings~~].

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 May 1, 2009.

TRD-200901645
Sherry L. Lee
Executive Director
Texas State Board of Examiners of Psychologists
Earliest possible date of adoption: June 14, 2009
For further information, please call: (512) 305-7706

CHAPTER 473. FEES

22 TAC §473.3

The Texas State Board of Examiners of Psychologists proposes amendments to §473.3, Annual Renewal Fees (Not Refundable). The amendments are being proposed to cover the cost of the shared Data Base Migration System for the Board.

Sherry L. Lee, Executive Director, has determined that for the first five-year period the amendments will be in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the proposed amendments.

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

Comments on the proposal may be submitted to Brenda Skiff, Texas State Board of Examiners of Psychologists, 333 Guadalupe, Suite 2-450, Austin, TX 78701, (512) 305-7700 or email brenda.skiff@tsbep.state.tx.us.

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

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

§473.3. Annual Renewal Fees (Not Refundable).

(a) Psychological Associate Licensure--$111 [~~$98~~].

(b) Psychological Associate Licensure over the age of 70--$16.

(c) Provisionally Licensed Psychologist--$106 [~~$93~~].

(d) Provisionally Licensed Psychologist over the age of 70--$16.

(e) Psychologist Licensure--$202 [~~$189~~].

(f) Psychologist Licensure over the age of 70--$16.

(g) Psychologist Health Service Provider Status--$20.

(h) Psychologist Health Service Provider status over the age of 70--No Fee.

(i) Licensed Specialist in School Psychology--$54 [~~$41~~].

(j) Licensed Specialist in School Psychology over the age of 70--$14.

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 May 1, 2009.

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Sherry L. Lee
Executive Director
Texas State Board of Examiners of Psychologists
Earliest possible date of adoption: June 14, 2009
For further information, please call: (512) 305-7706

TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 1. GENERAL LAND OFFICE

CHAPTER 9. EXPLORATION AND LEASING OF STATE OIL AND GAS

INTRODUCTION AND BACKGROUND

The Texas General Land Office (GLO) proposes amendments to §9.11 relating to Geophysical and Geochemical Exploration Permits and §9.22 relating to Leasing Procedures. The GLO proposes the nonsubstantive amendments to §9.11(c)(6) and §9.22(2)(E)(iv), (2)(F)(xii), and (5)(C)(ii)(IV) to conform with substantive and nonsubstantive changes made to other rules in Chapter 9.

The GLO proposes amendments to §9.31 relating to General Provisions; §9.35 relating to Producing the State Lease; and §9.37 relating to Offset Well Obligations and Compensatory Royalties. The GLO proposes the deletion of §9.31(a)(3) because its provisions are no longer applicable due to subsequently amended rules; the amendment to §9.31(b)(2) to clarify the definition of "drilling operations"; the amendment to §9.31(b)(6) to clarify the definition of "producing in paying quantities"; the deletion and replacement of §9.35(a)(2) which would permit the use of full well stream meters in lieu of separators with the submittal of appropriate data and the approval of GLO staff; the deletion and replacement of §9.35(a)(3) which would clarify when GLO staff approval for surface commingling is required; the amendment to §9.37(b)(1) which would make it mandatory, rather than an option, that a person obligated to drill an offset well, who is certain that an encroaching well cannot be draining state property, send a written explanation to the GLO; and the amendment to §9.37(b)(3) which would allow the Land Commissioner to appoint a designee to send an agreement letter to a person complying with §9.37(b)(1).

The GLO proposes amendments to §9.81 relating to Pooling and Unitizing of State Property. The GLO proposes the nonsubstantive amendments to conform with substantive and nonsubstantive changes made to other rules in Chapter 9.

The GLO proposes amendments to §9.91 relating to General Provisions; §9.92 relating to Release; and §9.93 relating to Assignments. The GLO proposes the amendment to §9.91(c)(3) to delete redundant language and the amendment to §9.91(c)(5)(C) to clarify GLO authority when an operator does not comply with lease requirements. The GLO proposes the nonsubstantive amendments to §9.92(b)(2) and §9.93(a)(2) to conform with substantive and nonsubstantive changes made to other rules in Chapter 9.

FISCAL IMPACTS

Larry Laine, Chief Clerk/Deputy Land Commissioner has determined that for each year of the first five years the proposed amendments will be in effect, there will be no fiscal implications for state government as a result of enforcing or administering the amendments.

PUBLIC BENEFIT/COST ANALYSIS

Larry Laine, also has determined that for each year of the first five years the amendments are proposed to be in effect, the public benefit will be improved operation of the GLO and better conservation of state resources. The GLO does not anticipate incurring any additional costs as a result of administering the proposed rule amendments. There will be no fiscal implications for local governments.

SMALL BUSINESS ANALYSIS

There may be some economic cost to small businesses, micro-businesses, and individuals based on the proposed amendments. The total costs for an individual, small business, or micro-business associated with compliance will vary depending on the different situations and choices made by each individual, small business, or micro-business. Further, the GLO does not have information on these businesses' gross receipts, sales revenues, or labor costs. Therefore, the GLO is not able to determine the exact cost of compliance.

EMPLOYMENT IMPACT

Larry Laine does not anticipate any employment impact as a result of administering the proposed rule amendments.

REQUEST FOR COMMENTS BY THE PUBLIC

Comments on the proposed rulemaking may be submitted to Mr. Walter Talley, the GLO Texas Register Liaison, at Texas General Land Office, P.O. Box 12873, Austin, TX 78711-2873, facsimile number (512) 463-6311, or email to walter.talley@glo.state.tx.us.

SUBCHAPTER B. ISSUING EXPLORATION PERMITS AND OIL AND GAS LEASES

31 TAC §9.11, §9.22

STATUTORY AUTHORITY

Texas Natural Resources Code, §§31.051(3), 32.062(a), 32.205, and 33.064.

CROSS-REFERENCE TO STATUTE

Texas Natural Resources Code, §§31.051, 32.062, and 32.205.

§9.11. Geophysical and Geochemical Exploration Permits.

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

(c) Permit applications and procedures.

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

(6) The application shall be accompanied by the application fee. All other appropriate fees, as specified in §3.31 [~~§1.3(b)(16)~~] of this title (relating to Fees), are due and shall be paid to the GLO prior to the permit's issuance.

(7) - (8) (No change.)

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

§9.22. Leasing Procedures.

State property will be leased for the exploration and development of oil and gas under these procedures.

(1) (No change.)

(2) Leasing of Relinquishment Act lands by surface owner as the state's agent.

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

(E) Lease negotiation procedure.

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

(iv) The proposed lease shall be submitted to the GLO for approval prior to recording the lease in the county records. The proposed lease shall be accompanied by the processing fee required by §3.31 [~~§1.3~~] of this title, (relating to Fees).

(F) State approval and filing of lease.

(i) - (xi) (No change.)

(xii) The state's share of the bonus payment and the filing fee prescribed by §3.31 [§1.3] of this title, (relating to Fees) shall be submitted along with the certified copy or copies of the lease.

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

(5) Leasing of highway rights-of-way by the SLB.

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

(C) Preliminary leasing procedures.

(i) (No change.)

(ii) Any outside party, including the adjacent mineral owner, may apply to lease a tract by sending the following materials to the GLO:

(I) - (III) (No change.)

(IV) the processing fee required by §3.31 [§1.3] of this title, (relating to Fees).

(iii) - (iv) (No change.)

(D) - (E) (No change.)

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

Filed with the Office of the Secretary of State on April 28, 2009.

TRD-200901585
Trace Finley
Deputy Commissioner, Policy and Governmental Affairs
General Land Office
Earliest possible date of adoption: June 14, 2009
For further information, please call: (512) 475-1859

SUBCHAPTER C. MAINTAINING A STATE OIL AND GAS LEASE

31 TAC §§9.31, 9.35, 9.37

STATUTORY AUTHORITY

Texas Natural Resources Code, §§31.051(3), 32.062(a), 32.205, and 33.064.

CROSS-REFERENCE TO STATUTE

Texas Natural Resources Code, §§31.051, 32.062, and 32.205.

§9.31. General Provisions.

(a) Applicability of this Subchapter.

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

[(3) The remaining rules in this subchapter are largely based on the SLB's October, 1997 state fee lease form. Consequently, these remaining rules will only apply to leases executed on this October, 1997 lease form and to provisions in any other state leases covering lands described in §9.21(1)-(5) whenever the other relevant state lease provisions are substantively equivalent to the corresponding provisions in the October, 1997 lease form.]

(b) Definitions Applicable to this Subchapter. The following terms shall have the following meanings unless the context or express language in a rule clearly indicates a contrary meaning.

(1) (No change.)

(2) Drilling Operation. One drilling operation consists of all the activities designed and conducted in an effort to obtain initial production from a well. As long as the actual spud date of the well occurs within a reasonable time, a drilling operation begins when a RRC drilling permit has been obtained and preliminary work, such as grading roads, moving equipment, digging pits or staking locations, has started. A drilling operation continues as long as operations progress in a diligent manner toward the completion of that well. One drilling operation ends when lessee obtains production in paying quantities or when lessee abandons efforts to obtain such production. Notwithstanding the foregoing, drilling operations cease the day the well is completed or the date the completion rig is released.

(3) - (5) (No change.)

(6) Producing (or production) in paying quantities. When a lease specifically defines this term, that definition applies. If a lease contains no such definition, the following definition shall apply: a lease or a well produces in paying quantities when receipts from the sale of oil and/or gas produced from the lease or well exceeds the lease's or well's total operating expenses (including all overhead, general and administration costs traceable to the expense of operating and marketing production from said lease or well) and a reasonably prudent operator would continue to operate the well or the lease in the same manner for the purpose of making a profit and not merely for speculation. Minimum royalty payments are not revenue from actual production and will not be treated as revenue when calculating whether a lease or a well is capable of producing in paying quantities.

(7) - (11) (No change.)

§9.35. Producing the State Lease.

(a) General provisions applicable to producing oil and/or gas on state leases.

(1) (No change.)

(2) All wells producing natural gas and water or natural gas and surface hydrocarbon liquids or natural gas, water and surface hydrocarbon liquids must be produced through oil and gas separators of ample capacity and in good working order. All separators shall be of conventional type (or other equipment at least as efficient) to provide for separation and measurement of all lease or pooled unit gas and liquid hydrocarbon production before sale or surface commingling with production from any other lease and/or pooled unit. All measurement shall be in accordance with the American Gas Association (AGA) standards and all applicable chapters of the American Petroleum Institute (API) Manual of Petroleum Measurement Standards (MPMS). However, upon review and approval by the GLO, a waiver granting exception to this requirement may be provided. The lessee shall request and obtain the waiver from GLO staff before installation of full well stream/wet gas meters in lieu of setting a separator. Waiver requests shall be sent to the Texas General Land Office, Attention: Mineral Leasing, 1700 N. Congress Avenue, Austin, TX 78701-1495. [All wells producing liquids must be produced through an oil and gas separator of ample capacity and in good working order.]

(3) Lessee shall obtain written permission from GLO before surface commingling state lease or state pooled-unit production with private lease production or before surface commingling oil and/or gas from two separate state leases and/or pooled state units. Lessee shall obtain written permission from GLO staff before down-hole commingling production from two or more intervals where the state's royalty interests differ between the proposed commingled intervals. Send commingling requests to the Texas General Land Office, Attention: Mineral Leasing, 1700 North Congress Avenue, Austin, TX 78701-1495. The requirement to obtain GLO staff approval applies to all commingle exception applications including new permits and amendments

to existing permits. [~~Lessee must obtain written permission from GLO staff before commingling state production with private production or before commingling state oil and/or gas from two separate leases, separate reservoirs or multiple stratigraphic or lenticular accumulations. Send commingling requests to the address found in §9.32(c)(3)(A) of this title, (relating to General Responsibilities of State Lessees).~~]

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

§9.37. Offset Well Obligations and Compensatory Royalties.

(a) (No change.)

(b) Agreement that no drainage of state hydrocarbons is possible.

(1) Application. If the person obligated to drill an offset well is certain that an encroaching well cannot be draining the state property, he shall [~~should~~] apply in writing to GLO staff at the address found in §9.32(c)(3)(A) of this title (relating to Required Activity Lessee Responsibilities). This application should include a full explanation of why applicant contends that no drainage of state hydrocarbons is possible and request the commissioner to agree with this contention.

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

(c) (No change.)

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

Filed with the Office of the Secretary of State on April 28, 2009.

TRD-200901586
Trace Finley
Deputy Commissioner, Policy and Governmental Affairs
General Land Office
Earliest possible date of adoption: June 14, 2009
For further information, please call: (512) 475-1859

SUBCHAPTER E. POOLING AND UNITIZING STATE PROPERTY

31 TAC §9.81

STATUTORY AUTHORITY

Texas Natural Resources Code, §§31.051(3), 32.062(a), 32.205, and 33.064.

CROSS-REFERENCE TO STATUTE

Texas Natural Resources Code, §§31.051, 32.062, and 32.205.

§9.81. Pooling and Unitizing of State Property.

(a) (No change.)

(b) Procedure.

(1) Submit a completed pooling application and the processing fee prescribed by §3.31 [~~§1.3~~] of this title, (relating to Fees) to the GLO. Application forms may be obtained from the GLO upon request. The application must be submitted at least 14 days prior to the SLB meeting at which the application will be considered. If not timely submitted, the application will be considered at the next available meeting. Any proprietary information submitted with the application shall be kept confidential as required by law, and upon request of applicant, will be returned after examination by GLO staff. The application should include the following information if available:

(A) - (G) (No change.)

(2) (No change.)

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

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

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Deputy Commissioner, Policy and Governmental Affairs
General Land Office
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For further information, please call: (512) 475-1859

SUBCHAPTER F. DISCONTINUING THE LEASEHOLD RELATIONSHIP

31 TAC §§9.91 - 9.93

STATUTORY AUTHORITY

Texas Natural Resources Code, §§31.051(3), 32.062(a), 32.205, and 33.064.

CROSS-REFERENCE TO STATUTE

Texas Natural Resources Code, §§31.051, 32.062, and 32.205.

§9.91. General Provisions.

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

(c) Effect of discontinuing the leasehold relationship. When the discontinuance of a leasehold relationship becomes effective, the lessee shall be relieved of all further obligations to the state due to the lessee's ownership of the lease except for the following:

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

(3) the accrual of penalty and interest, [~~both in the past and in the future,~~] as set out in this chapter on any delinquent royalty or report owed by the lessee;

(4) (No change.)

(5) if all oil and gas production, drilling, and rework activity has ceased on a well, the following clean-up duties:

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

(C) the duty to remove all equipment, structures, machinery, tools, supplies, and other items on the property and otherwise restore the property to the condition it was in immediately preceding issuance of that lease. If such is not completed within 120 days of when the discontinuance of the leasehold relationship becomes effective, a presumption shall arise that these items have been abandoned by the lessee or operator and the commissioner may exercise the state's rights pursuant to Natural Resources Code §51.302 *et seq.* [~~state shall become the owner of these items~~];

(D) - (E) (No change.)

(d) (No change.)

§9.92. Release.

(a) (No change.)

(b) Fees and other required information. The following must accompany each release and counterpart required to be filed in the GLO under this section:

(1) (No change.)

(2) the payment of the filing fee required by §3.31 [~~§1.3~~] of this title, (relating to Fees) for each state lease, as identified by its mineral file number, affected by the release;

(3) - (5) (No change.)

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

§9.93. Assignments.

(a) Assignment of a state oil and gas lease. All or part of a state oil and gas leasehold interest may be assigned at any time, except as prohibited by statute, administrative rule, or common law. All assignments, including assignments of overriding royalty interests on Relinquishment Act lands, must be recorded in each county in which all or part of the original acreage covered by the lease is located. The original recorded assignment or a certified copy thereof shall be filed in the GLO within 90 days of its execution. For purposes of this paragraph, the last execution date shown on the instrument shall be deemed to be the date of execution. The following must accompany each assignment required to be filed and every counterpart so filed in the GLO under this subsection:

(1) (No change.)

(2) the payment of the filing fee required by §3.31 [~~§1.3~~] of this title, (relating to Fees) for each state lease, as identified by its mineral file number, affected by the assignment;

(3) - (5) (No change.)

(b) - (n) (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 April 28, 2009.

TRD-200901588
Trace Finley
Deputy Commissioner, Policy and Governmental Affairs
General Land Office
Earliest possible date of adoption: June 14, 2009
For further information, please call: (512) 475-1859

TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 3. TEXAS YOUTH COMMISSION

CHAPTER 85. ADMISSION, PLACEMENT, AND PROGRAM COMPLETION

The Texas Youth Commission (TYC) proposes the repeal of §85.1 (concerning legal requirements for admission), §85.21 (concerning program assignment system), §85.23 (concerning classification), §85.41 (concerning maximum length of stay), §85.45 (concerning movement without program completion), §85.55 (concerning program completion for other than sentenced offenders), §85.59 (concerning program completion for sentenced offenders under age 19), §85.61 (concerning program completion for sentenced offenders age 19 or older), §85.65 (concerning discharge of sentenced offenders upon transfer to TDCJ or expiration of sentence), §85.69 (concerning program completion for sentenced offenders adjudicated for capital murder), and §85.95 (concerning parole completion and discharge).

The repeal of §85.1 will allow for a new section to be published with this number. The new section will establish definitions used throughout Chapter 85, and is proposed in this issue of the *Texas Register.*

The repeal of §85.21 will allow for a significantly revised rule to be published in its place. The revised rule is proposed as a new rule in this issue of the *Texas Register.*

The repeal of §85.23 will allow for new rules to establish TYC's new processes for classifying youth. Currently, §85.23 classifies youth according to only one factor--the youth's most serious adjudicated offense. This rule will be replaced by §85.24 and §85.25, which are also proposed in this issue of the *Texas Register.* These rules will establish a classification system that takes into account many additional factors, such as a risk assessment instrument that addresses risk to re-offend, youth age, size, gang affiliation, treatment needs, and other factors when determining appropriate minimum lengths of stay and housing assignments.

The repeal of §85.41 will reflect reforms enacted by Senate Bill (SB) 103, 80th Texas Legislature. This legislation created a Release Review Panel as the only means by which a youth's length of stay may be extended. This panel serves to ensure that youth are not inappropriately extended beyond their initially assigned minimum length of stay. The need for §85.41 no longer exists, as the purpose for this rule is now served by the statutorily created Review Panel, and several components that serve as the basis for determinations made under §85.41 (such as Resocialization Program phase assignments, possible disciplinary extensions of the minimum length of stay, and completion of the general treatment program as a requirement to qualify for release) are no longer used within TYC.

The repeal of §§85.45, 85.55, 85.59, 85.61, 85.65, 85.69, and 85.95 will allow for significantly revised rules to be published in their place. The revised rules are proposed as new rules in this issue of the *Texas Register.*

Robin McKeever, Director of Administrative Services, has determined that for the first five-year period the repeals are in effect there are no anticipated significant fiscal implications for state or local government as a result of enforcing or administering the repeals.

Toysha Martin, General Counsel, has determined that for each year of the first five years the repeals are in effect the public benefit anticipated as a result of enforcing the repeals will be the availability of accurate and up-to-date information concerning TYC programming and operations.

There will be no effect on small businesses or micro-businesses. There is no anticipated economic cost to persons who are required to comply with the repeals as proposed. No private real property rights are affected by adoption of this repeal.

Comments on the proposal may be submitted within 30 days of the publication of this notice to Steve Roman, Policy Coordinator, Texas Youth Commission, P.O. Box 4260, Austin, Texas 78765, or email to steve.roman@tyc.state.tx.us.

SUBCHAPTER A. COMMITMENT AND RECEPTION

37 TAC §85.1

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

The repeal is proposed under Human Resources Code §61.034, which provides the commission with the authority to adopt rules appropriate to the proper accomplishment of its functions.

The proposed repeal implements Human Resources Code §61.034.

§85.1. Legal Requirements for Admission.

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 May 1, 2009.

TRD-200901660
Cheryln K. Townsend
Executive Commissioner
Texas Youth Commission
Earliest possible date of adoption: June 14, 2009
For further information, please call: (512) 424-6014

SUBCHAPTER B. PLACEMENT PLANNING

37 TAC §85.21, §85.23

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

The repeals are proposed under Human Resources Code §61.034, which provides the commission with the authority to adopt rules appropriate to the proper accomplishment of its functions.

The proposed repeals implement Human Resources Code §61.034.

§85.21. Program Assignment System.

§85.23. Classification.

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 May 1, 2009.

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Cheryln K. Townsend
Executive Commissioner
Texas Youth Commission
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For further information, please call: (512) 424-6014

SUBCHAPTER C. MOVEMENT WITHOUT PROGRAM COMPLETION

37 TAC §85.41, §85.45

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

The repeals are proposed under Human Resources Code §61.034, which provides the commission with the authority to adopt rules appropriate to the proper accomplishment of its functions.

The proposed repeals implement Human Resources Code §61.034.

§85.41. Maximum Length of Stay.

§85.45. Movement Without Program Completion.

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 May 1, 2009.

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Cheryln K. Townsend
Executive Commissioner
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For further information, please call: (512) 424-6014

SUBCHAPTER D. PROGRAM COMPLETION

37 TAC §§85.55, 85.59, 85.61, 85.65, 85.69

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

The repeals are proposed under Human Resources Code §61.034, which provides the commission with the authority to adopt rules appropriate to the proper accomplishment of its functions.

The proposed repeals implement Human Resources Code §61.034.

§85.55. Program Completion for Other Than Sentenced Offenders.

§85.59. Program Completion for Sentenced Offenders Under Age 19.

§85.61. Program Completion for Sentenced Offenders Age 19 or Older.

§85.65. Discharge of Sentenced Offenders Upon Transfer to TDCJ or Expiration of Sentence.

§85.69. Program Completion for Sentenced Offenders Adjudicated for Capital Murder.

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 May 1, 2009.

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Cheryln K. Townsend
Executive Commissioner
Texas Youth Commission
Earliest possible date of adoption: June 14, 2009
For further information, please call: (512) 424-6014

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SUBCHAPTER E. PAROLE PLACEMENT AND DISCHARGE

37 TAC §85.95

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

The repeal is proposed under Human Resources Code §61.034, which provides the commission with the authority to adopt rules appropriate to the proper accomplishment of its functions.

The proposed rule implements Human Resources Code §61.034.

§85.95. Parole Completion and Discharge.

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-200901664

Cheryln K. Townsend

Executive Commissioner

Texas Youth Commission

Earliest possible date of adoption: June 14, 2009

For further information, please call: (512) 424-6014

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CHAPTER 85. ADMISSION, PLACEMENT, RELEASE, AND DISCHARGE

The Texas Youth Commission (TYC or commission) proposes amendments to §85.3 (concerning admission process), §85.5 (concerning assessment/evaluation), and §85.25 (concerning minimum length of stay/minimum period of confinement). TYC also proposes new §85.1 (concerning definitions), §85.2 (concerning legal requirements for admission), §85.21 (concerning placement assignment system), §85.24 (assessment for safe housing placement), §85.45 (concerning movement prior to program completion), §85.55 (concerning program completion for non-sentenced offenders), §85.59 (concerning program completion for sentenced offenders), §85.65 (concerning discharge of sentenced offenders upon transfer to TDCJ or expiration of sentence), §85.69 (concerning transfer of sentenced offenders adjudicated for capital murder), and §85.95 (concerning parole completion and discharge).

New §85.1 will establish definitions for terms commonly used throughout Chapter 85.

New §85.2 will republish the current text of §85.1 with a new section number.

The amended §85.3 will clarify that the requirement for youth to provide a blood sample for the Department of Public Safety DNA database as part of the routine admission process now applies to all youth committed to TYC. Texas Government Code §411.148 requires TYC to collect DNA from any youth committed for a felony level offense, and Senate Bill 103, enacted by the 80th Texas Legislature, allows only youth who have been adjudicated for felony-level offenses to be committed to TYC. References to locations where TYC no longer operates correctional facilities have also been removed from the text of the rule.

The amended §85.5 will refer to several additional assessments to be conducted during the admission process. Specifically, the amended rule will require that prior to assigning a youth to a room at the intake unit, staff must conduct a safe housing assessment, a suicide risk screening, and a screening for vulnerability to sexual victimization or aggression. The amended rule will also require, pursuant to Senate Bill 103, that TYC conduct a comprehensive psychological evaluation for all youth upon admission, and a comprehensive psychiatric evaluation for all youth assigned a minimum length of stay of 12 months or longer.

New §85.21 will establish TYC's process for determining the most appropriate residential facility for individual youth placements. The new rule describes in much greater detail than the existing rule how gender, treatment needs, risk assessment, and proximity to home, are used in making placement determinations. This new rule will replace §85.21 that is currently in effect and is proposed for repeal in this issue of the *Texas Register*.

New §85.24 will establish a system for ensuring that youth are assessed and assigned to the safest possible housing assignment within the youth's current placement. Evidence-based criminogenic factors, physical stature, likelihood of sexual vulnerability or aggression, medical needs, suicide risk, and other individual factors are assessed upon initial admission and periodically throughout a youth's stay in residential facilities. Housing assignments will be made and changed based on the results.

The amended §85.25 will no longer include a definitions section. The definitions will instead be included in new §85.1.

New §85.45 will establish the eligibility criteria for youth to transition to a facility of lesser restriction, eligibility criteria and placement factors for youth to be released due to an overpopulation condition, and addresses other types of release or transfer that may occur prior to completion of a youth's minimum length of stay. This new rule will replace §85.45 that is currently in effect and is proposed for repeal in this issue of the *Texas Register*.

New §85.55 will establish the eligibility criteria for non-sentenced offenders to qualify for release from a residential facility and placement on parole. Youth who do not qualify for this type of earned release may still be released to parole if the Release Review Panel determines that the youth is not in need of further rehabilitation in a TYC residential placement. This new rule will replace §85.55 that is currently in effect and is proposed for repeal in this issue of the *Texas Register*.

New §85.59 will establish the eligibility criteria for sentenced offenders to qualify for release from a residential facility and placement on parole. This new rule will replace §85.59 and §85.61 that are currently in effect and are proposed for repeal in this issue of the *Texas Register*.

New §85.65 will establish the criteria and process for requesting court approval to transfer sentenced offenders to adult prison, and for discharging sentenced offenders whose sentences have expired, or who have not qualified for release or transfer based on completing required programming. This new rule will replace §85.65 that is currently in effect and is proposed for repeal in this issue of the *Texas Register*.

New §85.69 will establish the criteria and process for transferring sentenced offenders adjudicated for capital murder to the Parole

Division or Institutional Division of the Texas Department of Criminal Justice. This new rule will replace §85.69 that is currently in effect and is proposed for repeal in this issue of the *Texas Register*.

New §85.95 will establish the criteria for discharging non-sentenced offenders from the legal custody of TYC.

Robin McKeever, Director of Administrative Services, has determined that for the first five-year period the sections are in effect there are no anticipated significant fiscal implications for state or local government as a result of enforcing or administering the sections.

Toysha Martin, General Counsel, 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 will be the operation of a more evidence-based system for assessing, placing, and releasing youth, compliance with recently enacted legislation, as well as the availability of accurate and up-to-date information concerning TYC programming and operations.

There will be no effect on small businesses or micro-businesses. There is no anticipated economic cost to persons who are required to comply with the sections as proposed. No private real property rights are affected by adoption of these rules.

Comments on the proposal may be submitted within 30 days of the publication of this notice to Steve Roman, Policy Coordinator, Texas Youth Commission, P.O. Box 4260, Austin, Texas 78765, or email to steve.roman@tyc.state.tx.us.

SUBCHAPTER A. DEFINITIONS; COMMITMENT AND RECEPTION

37 TAC §85.1

The new rule is proposed under Human Resources Code §61.034, which provides the commission with the authority to adopt rules appropriate to the proper accomplishment of its functions.

The proposed rule implements Human Resources Code §61.034.

§85.1. Definitions.

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

(1) Administrative Transfer--a lateral movement, i.e., a movement from one program to another program within the same restriction level for an administrative purpose. Purposes may include but are not limited to proximity to a youth's home, specific treatment needed becomes available, appropriateness of placement due to education needs, age, etc.

(2) Assessment Rating Level--a score derived from evidence-based criminogenic factors in a youth's history used to assess the danger a youth poses to the community.

(3) Committing Offense--the offense on which the initial minimum length of stay assessment is based. It is the most serious of the relevant offenses found at the youth's commitment proceeding and any probated offense(s) modified by the commitment order. If a committing offense is a violation of a federal statute, the offense will be treated as a violation of a state statute which prohibits the same conduct as the relevant federal offense.

(4) Community Re-Integration Plan--a workbook-style document which a youth revises over the course of his/her rehabilitation program based on feedback from the case manager, group, family members and multi-disciplinary team. The document demonstrates the youth's understanding of his/her risk and protective factors, development of skills, abilities, and knowledge to reduce risk factors and increase protective factors, identification of goals and a plan of action to achieve goals, and identification of obstacles that may hinder successful community re-entry and plans to deal with those obstacles.

(5) Consistent Demonstration of Learned Skills--a youth has achieved a weekly performance status rating of higher than neutral, as described in §95.2 of this title, for at least three of the four weeks prior to the youth's most recent multi-disciplinary team stage assessment.

(6) Consistent Participation in Skills Development Groups--that in the month prior to the youth's most recent multi-disciplinary team stage assessment, the youth:

(A) has no unexcused absences from scheduled groups sessions and actively and appropriately participates; and

(B) with few exceptions, completes required homework or assignments for the group lesson.

(7) Classification--an ongoing process of determining a youth's treatment and placement needs, taking into consideration the following factors: age, committing offense, gang affiliation, delinquent history, treatment needs, proximity to home, risk of violence, and vulnerability to assault.

(8) Discharge--a decision that ends Texas Youth Commission (TYC) jurisdiction over a youth.

(9) Exit Review/Interview--a process by which the Special Service Committee (SSC) for high restriction, the superintendent for medium restriction or the quality assurance supervisor for contract care programs, determines whether the youth meets program completion criteria and whether the transition/release individual case plan adequately addresses the youth's identified risk factors for re-offending. The SSC is required to conduct a face-to-face interview with sentenced offenders and youth with a committing offense of high severity, along with review and approval of the release packet.

(10) High Restriction and Medium Restriction--see definitions in §85.27 of this title.

(11) Home Placement--a placement in the home of the parent, other relative or individual acting in the role of parent, managing conservator, or guardian, or an independent living arrangement (excluding contract independent living programs), for youth who have earned parole status.

(12) Home Substitute Placement--a program placement in the community that is not high restriction for youth who have earned parole status.

(13) Indicator--tasks that clarify and show evidence of completing the stage objective. These tasks are completed by the youth and involve discussion with the youth's case manager, group, multi-disciplinary team, and/or family/adult mentor. In order to complete an objective, all indicators must be completed.

(14) Initial Placement--a placement to which youth are assigned following a period of assessment at a TYC intake unit upon being committed to TYC.

(15) Minimum Length of Stay--the predetermined minimum period of time established by TYC that a youth will be assigned to live in a high or medium restriction placement.

(16) Minimum Period of Confinement--the predetermined minimum period of time established by law that a youth committed to

TYC on a determinate sentence must remain confined in a high restriction placement.

(17) Most Serious Relevant Offense--the offense that carries the most severe consequences which are, from most to least severe:

(A) an offense which carries a determinate sentence;

(B) the offense for which the designated minimum length of stay will produce the longest time in the physical custody of TYC;

(C) the offense which requires the highest level of restriction in placement;

(D) the offense which carries the most severe criminal penalty; and

(E) the most recently adjudicated offense.

(18) Multi-Disciplinary Team (MDT)--a group of staff in TYC-operated residential facilities who are responsible for partnering with the youth to facilitate his/her progress in the rehabilitation program. In high restriction facilities, the MDT consists of, at a minimum, the youth's assigned educator, the youth's case manager, and a juvenile correctional officer IV, V, or VI familiar with the youth. In medium restriction facilities, the MDT consists of, at a minimum, an administrator, the youth's case manager, and a juvenile correctional officer. The youth's family, along with other relevant staff members (psychologists, program specialists, principal, medical staff, etc.) involved in the youth's treatment and rehabilitation are encouraged to attend and participate in MDT meetings.

(19) Non-Sentenced Offender--a youth who is committed to TYC and is not a sentenced offender, as defined in this rule. Non-sentenced offenders are committed to TYC for an indeterminate period of time, not to exceed age 19 (or age 21 for youth committed prior to June 9, 2007).

(20) Objective--the most important concepts or skills necessary to earn a stage and progress in the rehabilitation program. Each objective has one or more indicators of completion.

(21) Offense Severity--a rating of high, moderate, or low based on the degree of the committing or revocation offense as defined by the Texas Penal Code or relevant federal statute and any of the following applicable aggravating factors:

(A) sex offense as identified in §62.001 of the Texas Code of Criminal Procedure;

(B) felony against a person;

(C) possession or use of a firearm during the commission of the committing offense.

(22) Parole status--a status assigned to a youth when program completion criteria have been met which qualifies the youth for placement in the home or home substitute and ensures that the youth shall not be moved to a high restriction placement without the highest level of due process afforded to TYC youth.

(23) Positive Behavior Change System--the system designed to reinforce positive behavior and provide tools for accountability for negative behavior to help youth accept personal responsibility for their choices. The system ensures that youth receive ongoing behavioral interventions from staff, when necessary, and rewards for positive participation in the daily program.

(24) Program Completion--occurs when a youth has met specific requirements established by rule in order to earn release from a residential program.

(25) Release Under Supervision--also referred to as "release", when the youth remains under the jurisdiction of TYC and is subject to the conditions of parole supervision.

(26) Revocation Offense--the offense on which a youth's minimum length of stay is based following a parole revocation hearing. It is the most serious of the relevant offenses found at a parole revocation hearing.

(27) Risk and Protective Factors--risk factors are aspects of a youth's environment, behavior, and mental processes which contribute to potential of further delinquent activity. Protective factors are positive aspects of individual youth situations which keep a youth away from delinquent activity. These factors are used as the foundation to design individual rehabilitation plans so that youth can learn to reduce their risk factors and increase their protective factors.

(28) Sentenced Offender--a youth committed to TYC pursuant to Family Code §54.04(d)(3) or §54.05(f) with a fixed sentence assigned by the committing court. Depending on the length of the sentence, a youth may be transferred to the Texas Department of Criminal Justice (TDCJ) to complete the sentence.

(29) Special Services Committee (SSC)--the SSC is a standing committee that reviews youth progress toward program completion requirements and readiness for release into the community. The SSC consists of at least five (5) members and must include, at a minimum:

(A) manager of institution clinical services, chairperson;

(B) program specialist (up to three); and

(C) principal.

(30) Stage--measure of progress through TYC's rehabilitation program. The youth's stage assignment reflects the stage objectives he/she is currently working on.

(31) Transfer--a movement of a sentenced offender to the Texas Department of Criminal Justice-Institutional Division or Texas Department of Criminal Justice-Parole Division.

(32) Transition--a movement from one program site to another for purposes of facilitating the youth's adjustment to the community when youth have met the required transition criteria. Transition is always to placement of equal or less restriction than that of the current placement.

(33) Transition/Release Plan--consists of a transition/release individual case plan for youth who are moving from one program to another or from one facility to a different facility. The transition/release individual case plan identifies risk factors and protective factors that enable youth and staff to develop plans to minimize risk and take advantage of protective factors.

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 May 1, 2009.

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Cheryln K. Townsend
Executive Commissioner
Texas Youth Commission
Earliest possible date of adoption: June 14, 2009
For further information, please call: (512) 424-6014

37 TAC §§85.2, 85.3, 85.5

The new rule and amendments are proposed under: (1) Human Resources Code §61.034, which provides the commission with the authority to adopt rules appropriate to the proper accomplishment of its functions; (2) Texas Government Code §411.148, which requires a juvenile who is, after an adjudication for conduct constituting a felony, confined in a facility operated by or under contract with the Texas Youth Commission to provide one or more DNA samples for the purpose of creating a DNA record; and (3) Human Resources Code §61.071, which requires the commission to examine and make a study of each child committed to it as soon as possible after commitment.

The proposed new rule and amendments implement Human Resources Code §61.034.

§85.2. Legal Requirements for Admission.

(a) The purpose of this rule is to establish documentation required and requested by the Texas Youth Commission (TYC) from each juvenile court committing youth to TYC.

(b) Each youth committed to TYC must be accompanied by legal and supporting documents supplied by the committing court.

(c) Upon admission, the following documents are required of the committing court:

(1) certified copy of the Order of Commitment;

(2) immunization records;

(3) Common Application, including the computerized referral and case history for the youth documenting case disposition, contact information for the youth's parents or guardians, the name, address, and telephone number of the court administrator in the committing county, and Title IV-E eligibility screening information;

(4) detention order(s) (initial and subsequent) for offense(s) which resulted in commitment to TYC;

(5) for sentenced offenders, the amount of time spent in detention in connection with the offense for which the youth was sentenced. It is preferable for the detention information to be included in the Order of Commitment;

(6) petition, adjudication, and disposition orders for the youth, including the youth's thumbprint;

(7) if the commitment is the result of revocation of probation, a copy of the conditions of probation and the revocation order;

(8) any law enforcement incident reports concerning the offense for which the youth is committed;

(9) any sex offender registration documentation and information;

(10) birth certificate for all youth;

(11) social security number or social security card, if available;

(12) social history;

(13) education records, including any special education records;

(14) medical and dental records;

(15) any existing psychological and psychiatric reports;

(16) pretrial detention time creditable to the youth's sentence;

(17) progressive sanctions deviation worksheet if assigned progressive sanctions level does not equal the progressive sanctions guideline level; and

(18) when available, the Victim Impact Statement and/or Victim Information form.

(d) The TYC intake staff shall review the commitment order to determine if, on its face, it meets all requirements of a valid court order before TYC admits the youth. TYC will not look beyond the document itself for determining validity.

(e) No youth, under any circumstance, shall be admitted to TYC without a certified copy of the Order of Commitment, immunization records (except for undocumented aliens), and the Common Application. All other documents may be received subsequent to admission.

(f) No youth shall be accepted to custody of TYC until TYC staff issues a written receipt to the entity delivering the youth at the designated place of intake accompanied by the required legal documents.

§85.3. Admission Process.

(a) Purpose. The purpose of this rule is to establish the process through which [location and protocol whereby] youth committed to the Texas Youth Commission (TYC) are received into the custody of the agency.

(b) Intake activities, including receipt of the youth from the committing county, shall be performed by the TYC diagnostic intake units [unit, Marlin Orientation and Assessment Unit located at Marlin, Texas].

(c) The intake units receive [Marlin Orientation and Assessment Unit in Marlin, Texas, receives] youth committed to TYC between 8 a.m. and 8 p.m., Monday through Friday.

(d) Youth are not allowed to have personal possessions while at the intake [assessment] unit. Personal items are inventoried and returned to the county transporter. The transporter and youth are asked to sign an inventory/receipt for property items returned to the transporter's care. Items a youth may be allowed to keep are inventoried and a copy is given to the youth.

(e) Parents are notified:

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

(3) that contraband money as defined in §91.7 of this title [(relating to Youth Personal Property)] found in possession of a TYC youth in a residential program will be deposited in the student benefit fund;

(4) - (6) (No change.)

(f) Orientation to the admissions process and the TYC system is provided and documented as required in §91.15 of this title [(relating to Youth Orientation)].

(g) Routine admission procedures include, but are not limited to the following:

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

(10) Each [A] youth is required to provide a blood sample for the DPS DNA database. [if the youth:]

[(A) has a felony conviction or adjudication or any offense for which the youth must register as a sex offender; or]

[(B) is ordered by the juvenile court to provide a sample.]

(h) - (j) (No change.)

§85.5. Assessment and Evaluation [~~Assessment/Evaluation~~].

(a) Purpose. The purpose of this rule is to establish the assessment process of each youth initially admitted to the Texas Youth Commission (TYC). The assessment process includes summarizing admission information, conducting diagnostic evaluations, identifying treatment needs [~~classification~~], [~~and~~] developing an initial placement category recommendation, and long-term planning for the youth [~~by the classification unit~~].

(b) The assessment and evaluation [~~youth classification~~] process is designed to [~~will~~] be completed within 21 days [~~two weeks~~] of receipt of the youth at the intake unit [~~Marlin Orientation and Assessment Unit~~].

(c) Prior to assigning a youth to a dormitory placement in the intake unit, intake staff will:

(1) conduct a medical and suicide screening;

(2) conduct a screening for risk to display sexually aggressive or assaultive behavior or to be sexually victimized; and

(3) conduct a safe housing assessment in accordance with §85.24 of this title.

(d) [~~(c)~~] Intake staff at the appropriate diagnostic unit conduct [~~conducts the following~~] routine evaluations, including but not limited to:

(1) completion of the Common Application [~~(CCF-002)~~];

(2) social summary;

(3) risk/needs assessment;

(4) religious preference assessment;

(5) recreation interest;

(6) comprehensive psychological evaluation, including review of prior treatment [~~(if one has not been completed within the last year). Residential treatment centers require an updated clinical interview for current status within six months prior to placement~~];

(7) [~~physical and~~] dental examination [~~examinations~~];

(8) medical examination, including review of history and prior treatment;

(9) [~~(8)~~] educational assessment;

(10) [~~(9)~~] substance abuse screening and assessment;

(11) [~~(10)~~] career interests and experience;

(12) [~~(11)~~] comprehensive psychiatric evaluation [~~interview~~] of youth, including review of prior treatment, when:

(A) a youth has been identified during admission as being currently prescribed psychotropic medication; [~~or~~]

(B) a youth's psychological evaluation shows the need for a psychiatric referral; or

(C) a youth has been assigned a minimum length of stay of 12 months or longer; and

[~~(B) a youth has been prescribed psychotropic medication within the past six (6) months; and~~]

(13) [~~(12)~~] assessment of behavior while at the facility.

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 May 1, 2009.

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Cheryln K. Townsend
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Texas Youth Commission
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For further information, please call: (512) 424-6014

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SUBCHAPTER B. PLACEMENT PLANNING

37 TAC §§85.21, 85.24, 85.25

The new rules and amendment are proposed under: (1) Human Resources Code §61.061, which requires the commission to consider the proximity of the residence of a child's family in determining the appropriate commission facility in which to place a child; (2) Human Resources Code §61.075, which provides the commission with the authority to order a committed child's confinement under conditions it believes best designed for the child's welfare and the interests of the public; (3) Human Resources Code §61.061, which requires the commission not to assign a child younger than 15 years of age to the same correctional facility dormitory as a person who is at least 17 years of age unless the commission determines that the placement is necessary to ensure the safety of children, and requires the commission to adopt scheduling, housing, and placement procedures for the purpose of protecting vulnerable children; and (4) Human Resources Code §61.062, which requires the commission to establish a minimum length of stay for each youth committed to the commission without a determinate sentence that considers the nature and seriousness of the conduct engaged in by the child, and the danger the child poses to the community.

The proposed new rules and amendment implement Human Resources Code §61.034.

§85.21. Placement Assignment System.

(a) Purpose. The purpose of this rule is to establish an objective system of assigning youth to the most appropriate placement considering the Texas Youth Commission's responsibilities to provide for public protection and promotion of rehabilitation.

(b) General Provisions.

(1) This rule applies to placement decisions made upon:

(A) release from an intake unit on initial commitment to TYC; and

(B) return to a residential facility from a parole placement.

(2) Youth may be assigned to subsequent residential placements based on changing treatment needs, progress in rehabilitation programming, safety issues, or overpopulation concerns. For more information on transfers between facilities and transitions to less restrictive placements, see §85.45 of this title.

(3) Placements described in this rule will be to a facility of high or medium restriction. For more information on facility restriction levels, see §85.27 of this title.

(c) Placement System Factors. Placement decisions will be based on factors including but not limited to those listed in paragraphs (1) - (4) of this subsection, with each factor given priority in the order listed.

(1) Gender--Facilities are authorized to house males only, females only, and in certain facilities which provide specialized treatment services, both genders. Absent a specialized treatment need which can only be met at a co-educational facility, youth will be assigned to male-only or female-only placements. Youth in coeducational facilities have equal access to agency programs and activities.

(2) Treatment Needs--Of the placements available for the youth's gender, youth will be assigned to the placement that is best suited to meet the youth's individual treatment needs. Youth with the highest need for any of the following specialized treatment services will be assigned to a placement that provides those services: mental health, mental retardation, sexual behavior, capital/violent offender, or chemical dependency. Whenever possible, youth with co-occurring specialized treatment needs will be assigned to placements providing each indicated type of treatment. See §87.51 of this title for more information on the assessment of specialized treatment needs. Age and medical restrictions will also be considered in determining an appropriate placement assignment.

(3) Risk Assessment--Of the placements available for the youth's gender and treatment needs, youth are assigned to a high or medium restriction facility based on a risk assessment. The youth's risk to re-offend is evaluated based on offense history, age at first referral to juvenile court, and other criminogenic factors. The assessment of risk to re-offend is combined with information about past facility escapes and behavior while at the intake unit or on parole and used to determine the required facility restriction level.

(A) Placement upon Initial Commitment to TYC.

(i) Non-sentenced offenders with a committing offense of high or moderate severity and all sentenced offenders will initially be assigned to a program of high restriction.

(ii) Non-sentenced offenders with a committing offense of low severity will initially be assigned to a program of either high or medium restriction, depending on the results of the risk assessment and other factors identified in this rule.

(B) Placement upon Disciplinary Transfer from Parole to a Residential Facility.

(i) Following a Level I due process hearing held in accordance with §95.51 of this title, non-sentenced offenders found to have engaged in felony-level conduct while on parole and all sentenced offenders will be assigned to a program of high restriction.

(ii) Following a Level I due process hearing, non-sentenced offenders found to have engaged in misdemeanor-level conduct or violated conditions of parole which are not law violations will be assigned to a program of either high or medium restriction, depending on the results of the risk assessment and other factors identified in this rule.

(4) Proximity to Home--Of the placements available for the youth's gender, treatment needs, and risk assessment score, youth will be assigned to the placement closest to the youth's approved home location. See §85.71 of this title for more information on the criteria and process for approving a youth's home. In cases where the closest placement is at or above established population capacity, the youth will be assigned to the next closest appropriate placement.

(d) Waivers. Except for non-sentenced offenders with a committing offense of high severity and sentenced offenders, the placement restriction level required under this rule may be waived by the executive commissioner or designee. A designated restriction level may be waived in order to provide specialized treatment or when it is determined that a youth has a disability or special medical condition that would prevent the youth from functioning in the designated restriction level.

(e) Parent Notification. Parents or guardians of youth under the age of 18 will be notified of all placement assignments. Youth 18 or older must give consent to disclose any placement information to a parent.

§85.24. Assessment for Safe Housing Placement.

(a) Policy. The Texas Youth Commission (TYC) uses an objective system to assess the threat of harm posed by a youth to others and a youth's potential vulnerabilities to make housing and supervision assignments.

(b) Applicability. This rule applies to high and medium restriction TYC facilities.

(c) Definitions. Safe Housing Assessment--an instrument designed to determine the appropriate housing assignment at a youth's assigned facility and level of supervision for an individual youth. The assessment considers factors including, but not limited to, the following:

(1) evidence-based criminogenic factors in a youth's history that indicate level of risk to others;

(2) age and physical stature of youth;

(3) potential vulnerability to sexual victimization or likelihood of sexually aggressive behavior; and

(4) special needs including medical needs, suicide risk, disabilities, mental health or other placement concerns.

(d) General Provisions.

(1) Each facility must establish a written housing plan that describes the housing levels allowed, staffing requirements, security level, and programming schedule of each housing unit.

(2) TYC will conduct a safe housing assessment for each youth upon arrival to the intake unit and prior to facility transfer. Safe housing assessments will be conducted at specified intervals thereafter, and may be conducted at any time as indicated by youth needs, serious incidents, or facility security needs.

(3) Youth will be assigned to housing units based on the results of the safe housing assessment. Placement within the housing unit may also be determined by the results of the safe housing assessment.

(4) Unless it is determined necessary to ensure youth safety, a youth 14 years of age or younger shall not be assigned to the same dormitory as a youth 17 years of age or older.

(5) Male and female youths shall not occupy the same sleeping room.

(6) Unless otherwise approved on a case-by-case basis by the division director over residential services or his/her designee, youth who have a reportable adjudication for a sex offense, as defined in Chapter 62, Code of Criminal Procedure, shall be assigned to an open bay dorm with direct line of sight supervision or a single-occupant room.

§85.25. Minimum Length of Stay/Minimum Period of Confinement.

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

(c) Definitions. Definitions pertaining to this rule are under §85.1 of this title.

[~~(1) Assessment Rating Level--a score derived from evidence-based criminogenic factors in a youth's history used to assess the danger a youth poses to the community.~~]

[(2) Committing Offense--the offense on which the initial minimum length of stay assessment is based. It is the most serious of the relevant offenses found at the youth's commitment proceeding and any probated offense(s) modified by the commitment order.]

[(3) Federal Offenses--youth who have committed federal offenses and are sent to TYC by federal courts. If a committing offense is a violation of a federal statute, the offense will be treated as a violation of a state statute which prohibits the same conduct as the relevant federal offense.]

[(4) Minimum Length of Stay--the predetermined minimum period of time established by TYC that a youth will be assigned to live in a high or medium restriction placement.]

[(5) Minimum Period of Confinement--the predetermined minimum period of time established by law that a youth committed to TYC on a determinate sentence must remain confined in a high restriction placement.]

[(6) Most Serious Relevant Offense--the offense that carries the most severe consequences which are, from most to least severe:]

[(A) an offense which carries a determinate sentence;]

[(B) the offense for which the designated minimum length of stay will produce the longest time in the physical custody of TYC;]

[(C) the offense which requires the highest level of restriction in placement;]

[(D) the offense which carries the most severe criminal penalty; and]

[(E) the most recently adjudicated offense.]

[(7) Revocation Offense--the offense on which a youth's minimum length of stay is based following a parole revocation hearing. It is the most serious of the relevant offenses found at a parole revocation hearing.]

[(8) Sentenced Offender--a youth sent to TYC under the provisions of the Determinate Sentence Act, as codified by the Texas Family Code.]

[(9) Severity of Offense--the degree of an offense as defined by the Texas Penal Code or relevant federal statute and any of the following applicable aggravating factors:]

[(A) sex offense as identified in §62.001 of the Texas Code of Criminal Procedure;]

[(B) felony against a person;]

[(C) possession or use of a firearm during the commission of the committing offense.]

(d) - (i) (No change.)

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

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SUBCHAPTER C. MOVEMENT PRIOR TO PROGRAM COMPLETION

37 TAC §85.45

The new rule is proposed under Human Resources Code §61.075, which provides the commission with the authority to order a committed child's confinement under conditions it believes best designed for the child's welfare and the interests of the public and permit the child liberty under supervision and on conditions it believes conducive to acceptable behavior. The rule is also proposed under §61.081, which provides the commission to release under supervision any child in its custody and place the child in his or her home or in any situation or family approved by the commission.

The proposed rule implements Human Resources Code §61.034.

§85.45. Movement Prior to Program Completion.

(a) Purpose. The purpose of this policy is to establish criteria and procedures for moving youth who have not met program completion requirements to placements of equal or lesser restriction.

(b) Definitions.

(1) Except as noted below, definitions pertaining to this rule are under §85.1 of this title.

(2) Operational Capacity--the identified general population level that a Texas Youth Commission (TYC) operated residential facility is appropriately capable of housing. Unless otherwise specified by the executive commissioner or designee, the operational capacity for a program is equivalent to the budgeted average daily population (ADP). Operational capacity may be set higher than the budgeted ADP when there is need and it has been determined that adequate program space and resources, including personnel, are available to support the higher capacity. Operational capacity may be set lower than the budgeted ADP when program space or resources, including personnel, indicate a reduced population is warranted.

(c) General Provisions.

(1) Prior to a transition, a youth may request and in doing so will be granted a Level II hearing.

(2) A plan to minimize risk factors for re-offending shall be developed for each youth prior to release, unless the youth is to be discharged.

(3) All residential programs releasing an undocumented foreign national youth must notify Immigration and Customs Enforcement (ICE) pursuant to §85.79 of this title.

(4) TYC shall comply with Chapter 57, Family Code and Article 56.02, Code of Criminal Procedure, regarding victim notification. Refer to §81.35 of this title regarding victim notification rights.

(5) TYC shall comply with the Sex Offender Registration Program, pursuant to Chapter 62, Code of Criminal Procedure, regarding youth who are subject to sex offender registration. Refer to §87.85 of this title regarding sex offender registration requirements.

(6) Parents or guardians of youth under the age of 18 will be notified of all movements. Youth 18 or older must give consent to disclose any movement information to a parent.

(d) Transition Movements.

(1) Eligibility. Youth classified as Type A violent offenders prior to February 1, 2009, and sentenced offenders are not eligible for transition movement. Youth of eligible classifications must meet transition criteria as set forth in paragraphs (2) and (3) of this subsection to qualify for a transition movement.

(2) Transition Movement Criteria. Youth in a high restriction placement may be eligible for transition to a medium restriction placement when the following criteria have been met:

(A) no major rule violations confirmed through a Level I or II due process hearing within 30 days prior to the exit review or during the approval process; and

(B) completion of minimum length of stay requirements:

(i) For youth committed to TYC prior to February 1, 2009:

(I) general offenders must complete all but three months of the minimum length of stay; and

(II) Type B violent offenders, chronic serious offenders, controlled substance dealer offenders and firearms offenders must complete all but six months of the minimum length of stay; or

(ii) For youth committed to TYC on or after February 1, 2009:

(I) youth with a committing offense of low severity must complete six months of the minimum length of stay in high restriction placements; or

(II) youth with a committing offense of moderate severity must complete nine months of the minimum length of stay in high restriction placements; or

(III) youth with a committing offense of high severity must complete all but 90 days of the minimum length of stay in high restriction placements; and

(iii) For youth placed in a high restriction facility following revocation of parole, regardless of date, the youth must complete at least 2/3 of the minimum length of stay.

(C) participation in or completion of assigned specialized treatment programs or curriculum as required under §87.51 of this title; and

(D) completion of rehabilitation program requirements:

(i) for TYC-operated facilities, assignment by the multi-disciplinary team to the second highest stage in the assigned rehabilitation program as described in §87.3 of this title, which reflects that the youth is currently:

(I) consistently participating in academic and/or workforce development programs commensurate with abilities as reflected in the youth's educational plan; and

(II) consistently participating in skills development groups, as reflected in the youth's individual case plan; and

(III) consistently demonstrating learned skills, as reflected in the individual youth log and daily ratings of performance expectations; or

(ii) for facilities operated under contract with TYC, completion of requirements for transition to a community residential placement as defined in the TYC-approved rehabilitation program; and

(E) completion of a draft community reintegration plan (or equivalent in a contract facility), to be finalized at the medium restriction facility, that demonstrates the youth's:

(i) understanding of his/her risk and protective factors; and

(ii) development of skills, abilities, and knowledge to reduce risk factors and increase protective factors; and

(iii) identification of goals and a plan of action to achieve goals in the medium restriction placement; and

(iv) identification of obstacles that may hinder successful community re-entry and plans to deal with those obstacles in the medium restriction placement.

(3) Decision Authority for Approval of Transition.

(A) The final decision authority will approve the youth's transition plan upon a determination that the youth meets all transition criteria and the transition/release ICP adequately addresses risk factors.

(B) The final decision authority is:

(i) the superintendent if the youth is assigned to a TYC-operated placement; or

(ii) the division director over residential services or designee if the youth is assigned to a facility operated under contract with TYC.

(e) Population Control Movements. When overpopulation occurs in any high restriction facility, certain remedial actions are taken. The director of residential services may cancel or revise any population control measure in effect or implement any other youth movement option when necessary to control population and/or manage available funds concerning youth in residential placement.

(1) Overpopulation Condition.

(A) When population reaches three percent (3%) above operational capacity for general population, the superintendent may invoke population control procedures, upon the approval of the appropriate director of residential services.

(B) When population reaches five percent (5%) above operational capacity for general population, the superintendent must:

(i) invoke population control procedures; and

(ii) notify the appropriate director of residential services.

(2) Release Criteria.

(A) The following youth are ineligible for population control movement:

(i) for youth committed to TYC prior to February 1, 2009: Type A violent offenders, and Type B violent offenders whose classification is for manslaughter, criminally negligent homicide, or intoxication manslaughter;

(ii) for youth committed to TYC on or after February 1, 2009: youth with committing offenses of high severity;

(iii) sentenced offenders;

(iv) youth with a high specialized treatment need who have not completed required specialized treatment programming;

(v) sex offenders with court orders deferring their sex offender registration requirements; and

(vi) any sex offender who will be released to a parole placement where the victim or a potential victim resides.

(B) Youth who are eligible for transition or release due to an overpopulation condition must meet the following criteria:

(i) completion of the minimum length of stay;

(ii) no major rule violations confirmed through a Level I or II due process hearing within 30 days of the release date; and

(iii) substantial completion of the youth's rehabilitation program as determined by the youth's treatment team and approved by the facility administrator or designee.

(3) Placement Options. Youth moved from high restriction under population management procedures will be placed in:

(A) TYC-operated medium restriction placements; or

(B) an approved parole placement (home or home substitute) if all appropriate medium restriction placements are currently at capacity.

(f) Administrative Transfers. Administrative transfers may be made for non-disciplinary, programmatic purposes among programs of equal restriction without a due process hearing. An administrative transfer may not be made in lieu of a disciplinary transfer for which a due process hearing is mandatory.

(g) Hardship Cases. In hardship cases, the executive commissioner or designee may approve placing a youth on parole status without meeting program completion criteria.

(h) Youth with Mental Illness or Mental Retardation. Pursuant to §87.79 of this title, certain youth shall be discharged following application for appropriate services to address their mental illness or mental retardation.

(i) Notification. TYC will notify the committing juvenile court, the prosecuting attorney, the parole officer, and the chief juvenile probation officer in the county to which the youth is being moved no later than ten calendar days prior to the transition or release.

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. PROGRAM COMPLETION AND RELEASE

37 TAC §§85.55, 85.59, 85.65, 85.69

The new rules are proposed under: (1) Human Resources Code §61.075, which provides the commission with the authority to order a committed child's confinement under conditions it believes best designed for the child's welfare and the interests of the public and permit the child liberty under supervision and on conditions it believes conducive to acceptable behavior; (2) Human Resources Code §61.081, which provides the commission to release under supervision any child in its custody and place the child in his or her home or in any situation or family approved by the commission; and (3) Human Resources Code §61.084, which requires the commission to transfer a person who has been sentenced under a determinate sentence to the custody of the Texas Department of Criminal Justice on the person's 19th birthday, if the person has not already been discharged or transferred, to serve the remainder of the person's sentence on parole, and which requires the commission to discharge without a court hearing a person committed to it for a determinate sentence who has not been transferred to the institutional division of the Texas Department of Criminal Justice under a court order on the date that the time spent by the person in detention in connection with the committing case plus the time spent at the Texas Youth Commission under the order of commitment equals the period of the sentence, and to transfer to the institutional division of the Texas Department of Criminal Justice a person who is the subject of an order under §54.11(i)(2), Family Code, transferring the person to the custody of the institutional division of the Texas Department of Criminal Justice for the completion of the person's sentence.

The proposed rules implement Human Resources Code §61.034.

§85.55. Program Completion for Non-Sentenced Offenders.

(a) Purpose. The purpose of this rule is to establish criteria and the approval process for release of youth upon program completion.

(b) Applicability.

(1) Definitions pertaining to this rule are under §85.1 of this title.

(2) This rule does not apply to sentenced offenders.

(3) This rule does not apply to youth who have received an extension of stay by the TYC Release Review Panel. See §85.57 of this title for more information on releases issued by the Release Review Panel.

(c) General Provisions.

(1) A detainer or bench warrant is not an automatic bar to earned release. The agency shall release a youth to authorities pursuant to a warrant.

(2) A plan to minimize risk factors for re-offending shall be developed for each youth prior to release, unless the youth is to be discharged.

(3) TYC shall comply with Chapter 57, Family Code, and Article 56.02, Code of Criminal Procedure, regarding victim notification. Refer to §81.35 of this title for victim notification procedures.

(4) Immigration and Customs Enforcement must be notified when releasing an undocumented foreign national youth. Refer to §85.79 of this title for notification procedures regarding undocumented foreign national youth.

(5) TYC shall comply with the Sex Offender Registration Program, pursuant to Chapter 62, Code of Criminal Procedure, regarding youth who are subject to sex offender registration. Refer to §87.85 of this title for sex offender registration procedures.

(6) Parents or guardians of youth under the age of 18 will be notified of all movements. Youth 18 or older must give consent to disclose any movement information to a parent.

(d) Program Completion Criteria. Youth in high or medium restriction placements will be eligible for release to TYC parole (home or home substitute) when the following criteria have been met:

(1) no major rule violations confirmed through a Level I or II due process hearing within 30 days prior to the exit review or during the approval process; and

(2) completion of the minimum length of stay; and

(3) participation in or completion of assigned specialized treatment programs or curriculum as required under §87.51 of this title; and

(4) completion of rehabilitation program requirements:

(A) for TYC-operated facilities, assignment by the multi-disciplinary team to the highest stage in the assigned rehabilitation program as described in §87.3 of this title, which reflects that the youth is currently:

(i) consistently participating in academic and workforce development programs commensurate with abilities as reflected in the youth's educational plan;

(ii) consistently participating in skills development groups, as reflected in the youth's individual case plan;

(iii) consistently demonstrating learned skills, as reflected in the individual youth log and daily rating of performance expectations; or

(B) for facilities operated under contract with TYC, completion of requirements for release to parole as defined in the TYC-approved rehabilitation program; and

(5) completion of a community re-integration plan (or equivalent in a contract facility), approved by the youth's treatment team, that demonstrates the youth's:

(A) understanding of his/her risk and protective factors;

(B) development of skills, abilities, and knowledge to reduce risk factors and increase protective factors;

(C) identification of goals and a plan of action to achieve those goals; and

(D) identification of obstacles that may hinder successful re-entry and plans to deal with those obstacles.

(e) Review and Approval Process.

(1) Treatment Team Review.

(A) Prior to expiration of a youth's minimum length of stay, the youth's treatment team must review and determine whether the youth meets program completion criteria.

(B) The review and determination must occur at least:

(i) 30 days prior to the expiration of the minimum length of stay for youth with a committing offense of low or moderate severity; or

(ii) and at least 90 days in advance for youth classified as Type A violent offenders prior to February 1, 2009 or youth with a committing or revocation offense of high severity.

(C) If the treatment team determines the youth does not meet program completion criteria, the youth's case will be referred to the Release Review Panel for decision in accordance with §85.57 of this title.

(D) If the treatment team determines that the youth does meet program completion criteria, the youth's case will be referred to the final decision authority.

(2) Final Decision Authority for Approval of Release.

(A) The final decision authority for youth classified as Type A violent offenders prior to February 1, 2009 and youth with a committing or revocation offense of high severity is the division director over programming and treatment services.

(B) The final decision authority for all other non-sentenced offender youth is:

(i) the facility administrator for youth assigned to TYC-operated facilities; or

(ii) the division director over residential services or designee for youth assigned to facilities operated under contract with TYC.

(C) If the final decision authority approves the release, the youth must be placed on parole or parole status on the minimum length of stay date.

(D) If the final decision authority does not approve the release, or if the youth loses release eligibility prior to the minimum length of stay date and the treatment team confirms that the youth no longer meets program completion criteria, the youth's case must be referred to the Release Review Panel.

(f) Notification.

(1) Staff shall notify the youth, parent/guardian, any designated advocate for the youth, and any identified victim(s) of the pending release review by the treatment team at least 30 days prior to the date of the review.

(2) Staff shall notify the youth, parent/guardian, and any designated advocate for the youth of the review decision at least 30 days prior to the expiration of the minimum length of stay.

(3) TYC will notify the committing juvenile court, the prosecuting attorney, the parole officer, and the chief juvenile probation officer in the county to which the youth is being moved no later than ten calendar days prior to the release.

§85.59. Program Completion for Sentenced Offenders.

(a) Purpose. The purpose of this rule is to establish criteria and the approval process for sentenced offender youth to qualify for release or transfer to parole by completing required programming.

(b) Applicability.

(1) Definitions pertaining to this rule are under §85.1 of this title.

(2) This rule applies only to sentenced offenders.

(3) This rule does not apply to:

(A) sentenced offenders who are discharged due to expiration of the sentence or transferred to the Texas Department of Criminal Justice (TDCJ) by court order or by aging out of TYC; or

(B) sentenced offenders adjudicated for capital murder.

(c) General Requirements.

(1) A detainer or bench warrant is not an automatic bar to earned release. The agency shall release a youth to authorities pursuant to a warrant.

(2) In order to determine eligibility for release or transfer, the Special Services Committee (SSC) shall evaluate the youth:

(A) six (6) months after admission to TYC;

(B) when the minimum period of confinement (MPC) is complete;

(C) at 18 years of age and 18 years and six months of age for youth sentenced on or after June 9, 2007;

(D) at 20 years of age and 20 years and six months of age for youth sentenced before June 9, 2007; and

(E) at other times as requested by the committee.

(3) Staff shall notify the youth, parent/guardian, any designated advocate for the youth, and any identified victim(s) of a pending SSC exit review/interview at least 30 days prior to the date of the review. The notification shall inform the recipients that they have the opportunity to submit written comments to the SSC. Victims may also submit a written request to participate in the exit review in accordance with §81.35 of this title. Any information received from a youth's family members, victims, local officials, or the general public will be considered by the SSC or designee and included in the release/transfer packet.

(4) A plan to minimize risk factors for re-offending shall be developed for each youth prior to release or transfer to TDCJ-Parole Department (TDCJ-PD), unless the youth is to be discharged.

(5) TYC shall comply with Chapter 57, Family Code and Article 56.02, Code of Criminal Procedure, regarding victim notification. Refer to §81.35 of this title for victim notification procedures.

(6) Immigration and Customs Enforcement must be notified when releasing an undocumented foreign national youth. Refer to §85.79 of this title for notification procedures for youth who are undocumented foreign nationals.

(7) TYC shall comply with the Sex Offender Registration Program, pursuant to Chapter 62, Code of Criminal Procedure, regarding youth who are subject to sex offender registration. Refer to §87.85 of this title for sex offender registration procedures.

(8) Parents or guardians of youth under the age of 18 will be notified of all movements. Youth 18 or older must give consent to notify parents or guardians of any movement.

(9) Sentenced offenders shall serve the entire MPC applicable to the youth's committing offense in high restriction facilities unless:

(A) the youth is transferred to TDCJ-Institutional Division in accordance with legal requirements or committing court approval. See §85.65 of this title; or

(B) the youth is approved by the committing court to attain parole status prior to completion of serving the MPC; or

(C) the youth's sentence expires before the MPC expires; or

(D) the executive commissioner waives such placement.

(d) Program Completion Criteria.

(1) A sentenced offender youth whose committing offense occurred before September 1, 2005 will be eligible for release/transfer from a high restriction facility as described in paragraph (3) of this subsection when the following criteria have been met:

(A) no major rule violations confirmed through a Level I or II due process hearing within 90 days prior to the SSC exit interview or during the approval process; and

(B) participation in or completion of assigned specialized treatment programs or curriculum as required under §87.51 of this title; and

(C) assignment by the multi-disciplinary team to the highest stage in the assigned rehabilitation program as described in §87.3 of this title, which reflects that the youth:

(i) is consistently participating in academic and workforce development programs commensurate with abilities as reflected in the youth's educational plan; and

(ii) is consistently participating in skills development groups, as reflected in the youth's individual case plan; and

(iii) is consistently demonstrating learned skills, as reflected in the individual youth log and daily rating of performance expectations; and

(iv) has completed a community re-integration plan, approved by the multi-disciplinary team, that demonstrates the youth's:

(I) understanding of his/her risk and protective factors;

(II) development of skills, abilities, and knowledge to reduce risk factors and increase protective factors;

(III) identification of goals and a plan of action to achieve those goals; and

(IV) identification of obstacles that may hinder successful re-entry and plans to deal with those obstacles; and

(D) completion of the MPC.

(2) A sentenced offender youth whose committing offense occurred on or after September 1, 2005, may be considered for release/transfer from a high restriction facility as described in paragraph (3) of this subsection when he/she:

(A) meets criteria listed in paragraph (1)(A) - (C) of this subsection; and

(B) meets the following:

(i) completes all but nine months of the sentence if the sentence expires before the MPC or simultaneously with the MPC; or

(ii) completion of the MPC if the sentence expires after the MPC.

(3) Release will be to TYC parole unless, at the time the youth meets program completion criteria, he/she is:

(A) within two months prior the 19th birthday if committed to TYC on or after June 9, 2007, in which case the youth will be transferred to TDCJ-PD; or

(B) at least 19 years of age if committed to TYC before June 9, 2007, in which case the youth will be transferred to TDCJ-PD.

(e) Release/Transfer Approval. The executive commissioner or designee shall approve the youth's release or transfer upon a determination that the youth meets program completion criteria as set forth in this rule.

(f) Loss of Release/Transfer Eligibility.

(1) Eligibility for release/transfer is lost when any of the following occurs after the exit interview:

(A) youth commits a major rule violation that is confirmed through a Level I or II due process hearing; or

(B) the youth's multi-disciplinary team determines that the youth no longer meets the required rehabilitation program criteria.

(2) Except as described in paragraph (3) of subsection, a youth who loses release or transfer eligibility will not be eligible for release/transfer until such time as the youth meets program completion criteria and a subsequent SSC exit interview confirms release/transfer eligibility.

(3) If a youth whose committing offense occurred on or after September 1, 2005, is being considered for release/transfer nine months prior to his/her sentence completion loses eligibility for release/transfer, he/she will remain in high restriction until his/her sentence has expired.

(g) Release/Transfer Date.

(1) The SSC must hold an exit interview within 14 calendar days from the date a youth meets program completion criteria as set forth in subsection (d) of this section.

(2) If the SSC confirms the youth meets program completion criteria, the youth shall be:

(A) released to TYC parole within 120 calendar days after the date the youth met program completion criteria, unless the youth loses release eligibility as described in subsection (f) of this section in which case the release process is re-initiated when the youth meets program completion criteria; or

(B) transferred to TDCJ parole within 120 calendar days after the date the youth met program completion criteria, unless:

(i) the youth loses transfer eligibility as set forth in subsection (f) of this section in which case the transfer process is re-initiated when the youth meets program completion criteria; or

(ii) the Department of Sentenced Offender Disposition has not received notification of parole conditions from TDCJ to confirm the transfer date, in which case the 120-day deadline will be extended to determine the status of the transfer request. The Department of Sentenced Offender Disposition will determine the duration of the extension.

(h) Notification. TYC will notify the committing juvenile court, the prosecuting attorney, the parole officer, and the chief juvenile probation officer in the county to which the youth is being moved no later than ten calendar days prior to the release.

§85.65. Discharge of Sentenced Offenders upon Transfer to TDCJ or Expiration of Sentence.

(a) Purpose. The purpose of this rule is to establish criteria and an approval process for requesting court approval to transfer sentenced offenders to adult prison, and for discharging sentenced offenders whose sentences have expired, or who have not qualified for release or transfer based on completing required programming.

(b) Applicability.

(1) Definitions pertaining to this rule are under §85.1 of this title.

(2) This rule only applies to the disposition of the original determinate sentence.

(3) This rule applies only to sentenced offenders. This rule does not apply to:

(A) sentenced offenders who qualify for release or transfer to parole due to completion of required programming; or

(B) sentenced offenders adjudicated for capital murder.

(c) General Requirements.

(1) Sentenced offenders shall by law, be transferred from TYC's custody no later than the youth's:

(A) 19th birthday for youth committed to TYC on or after June 9, 2007; or

(B) 21st birthday for youth committed to TYC prior to June 9, 2007.

(2) Sentenced offenders must serve the entire Minimum Period of Confinement (MPC) applicable to the youth's committing offense in high restriction facilities unless:

(A) the youth is transferred to Texas Department of Criminal Justice-Institutional Division (TDCJ-ID) in accordance with legal requirements or committing court approval; or

(B) the youth is approved by the committing court to attain parole status prior to completion of serving the MPC; or

(C) the youth's sentence expires before the MPC expires.

(D) The executive commissioner waives such placement.

(3) the Special Services Committee (SSC) or designee shall evaluate the youth:

(A) six (6) months after admission to TYC;

(B) when the minimum period of confinement (MPC) is complete;

(C) to determine eligibility for transfer to TDCJ-ID or TDCJ-PD, on or before

(i) 18 years of age and 18 years and six months of age for youth sentenced on or after June 9, 2007; or

(ii) 20 years of age and 20 years and six months of age for youth sentenced before June 9, 2007; and

(D) at other times as requested by the committee.

(4) Staff shall notify the youth, parent/guardian, any designated advocate for the youth, and any identified victim(s) of a pending SSC exit review/interview at least 30 days prior to the date of the review. The notification shall inform the recipients that they have the opportunity to submit written comments to the SSC. Victims may also submit a written request to participate in the exit review in accordance with §81.35 of this title. Any information received from a youth's family members, victims, local officials, or the general public will be considered by the SSC or designee and included in the release/transfer packet.

(5) A plan to minimize risk factors for re-offending shall be developed for each youth prior to transfer to TDCJ-PD.

(6) TYC jurisdiction shall be terminated and a sentenced offender discharged when he/she is transferred to TDCJ or his/her sentence has expired, except when the youth is committed to TYC under concurrent determinate and indeterminate commitment orders as specified in §85.25 of this title.

(7) TYC shall comply with Chapter 57, Family Code, and Article 56.02, Code of Criminal Procedure, regarding victim notification. Refer to §81.35 of this title.

(8) All residential programs transferring an undocumented foreign national youth to TDCJ must notify Immigration and Customs Enforcement (ICE). Refer to §85.79 of this title for procedures.

(9) TYC shall comply with the Sex Offender Registration Program, pursuant to Chapter 62, Code of Criminal Procedure, regarding youth who are subject to sex offender registration. Refer to §87.85 of this title.

(10) Parents or guardians of youth under the age of 18 will be notified of all movements. Youth 18 or older must give consent to disclose any movement information to a parent.

(d) Transfer Criteria.

(1) Sentenced Offenders Whose Parole has been Revoked or Who have been Adjudicated or Convicted for a Felony Offense. TYC may request a juvenile court hearing for transfer to TDCJ-ID for a youth whose parole has been revoked or who has been adjudicated or convicted for a felony offense and the following criteria have been met:

(A) youth is at least age 16; and

(B) youth has not completed his/her sentence; and

(C) youth's conduct indicates that the welfare of the community requires the transfer; and

(D) youth's conduct occurred while on parole status.

(2) Sentenced Offenders in High Restriction Transferring to TDCJ-ID. TYC may request a juvenile court hearing to transfer a sentenced offender in high restriction to TDCJ-ID if the following criteria have been met:

(A) youth is at least age 16; and

(B) youth has spent at least six (6) months in a high restriction facility; and

(C) youth has not completed his/her sentence; and

(D) youth has met at least one of the following behavior criteria:

(i) youth has committed a felony or Class A misdemeanor; or

(ii) youth has committed major rule violations as confirmed through a Level I or II due process hearing on three or more occasions; or

(iii) youth has engaged in chronic disruption of program (five security admissions or extensions in one month or ten in three months); or

(iv) youth has demonstrated an inability to progress in his/her rehabilitation program due to persistent non-compliance with objectives; and

(E) alternative interventions have been tried without success; and

(F) youth's conduct indicates that the welfare of the community requires the transfer.

(3) Sentenced Offenders in High Restriction Transferring to TDCJ-PD. A youth in a high restriction facility who has not completed transfer criteria as outlined in §85.59 of this title and who has not received court approval for transfer to TDCJ-ID, shall be transferred to TDCJ-PD to complete the sentence:

(A) no later than the youth's 19th birthday, for youth committed on or after June 9, 2007; or

(B) no later than the youth's 21st birthday, for youth committed before June 9, 2007.

(4) Sentenced Offenders on TYC Parole Transferring to TDCJ-PD. A youth on TYC parole who has not completed his/her sentence shall be transferred to TDCJ-PD (court approval not required) no later than the youth's:

(A) 19th birthday, for youth committed on or after June 9, 2007; or

(B) 21st birthday, for youth committed before June 9, 2007.

(5) Sentenced Offenders Committed on or after June 9, 2007 Who Will Not Complete the Minimum Period of Confinement Prior to Age 19. For youth sentenced on or after June 9, 2007 who will not have completed the minimum period of confinement upon reaching the 19th birthday, TYC shall request a court hearing to determine whether the youth will be transferred to TDCJ-ID or TDCJ-PD. TYC will consider the following in forming a recommendation for the committing court:

(A) length of stay in TYC;

(B) youth's progress in the rehabilitation program;

(C) youth's behavior while in TYC;

(D) youth's offense/delinquent history; and

(E) any other relevant factors, such as:

(i) risk factors and protective factors the youth possesses as identified in his/her psychological evaluation; and

(ii) the welfare of the community.

(e) Discharge Criteria. A sentenced offender shall be discharged from TYC jurisdiction when one of the following occurs:

(1) expiration of the sentence imposed by the juvenile court, unless the youth is under concurrent commitment orders as described in §85.25 of this title; or

(2) the youth has been transferred to TDCJ-ID under court order or transferred to TDCJ-PD.

(f) Decision Authority for Approval to Transfer.

(1) A youth shall not be transferred from high restriction to TDCJ-PD until the executive commissioner or designee has determined that the youth's plan adequately addresses risk factors to minimize re-offending.

(2) When a determination has been made that the youth meets transfer criteria to TDCJ, the executive commissioner or designee approves the request for a hearing by the committing juvenile court to transfer the youth to TDCJ-ID or approves the transfer process to TDCJ-PD.

(3) The final transfer approval authority for transfer to TDCJ-ID is the committing juvenile court.

(g) Notification. TYC will notify the committing juvenile court, the prosecuting attorney, parole officer, and the county chief juvenile probation officer in the county to which the youth is being moved no later than ten calendar days prior to the discharge.

§85.69. Transfer of Sentenced Offenders Adjudicated for Capital Murder.

(a) Purpose. The purpose of this rule is to establish criteria and the approval process for transferring sentenced offenders adjudicated for capital murder to the Texas Department of Criminal Justice-Parole Division (TDCJ-PD) or the Texas Department of Criminal Justice-Institutional Division (TDCJ-ID).

(b) Applicability.

(1) Definitions pertaining to this rule are under §85.1 of this title.

(2) For specific information regarding the rehabilitation program and assessment, see §87.3 of this title.

(3) This rule does not apply to sentenced offender youth adjudicated for any offense other than capital murder.

(c) General Provisions.

(1) A detainer or bench warrant is not an automatic bar to earned release. The agency shall release a youth to authorities pursuant to a warrant.

(2) The Special Services Committee (SSC) shall evaluate the youth six (6) months after admission to TYC, when the minimum period of confinement (MPC) is complete, and at other times as requested by the committee.

(A) For youth committed before June 9, 2007, the SSC will also complete a review when the youth reaches 20 years of age and 20 years and six months of age to determine eligibility for transfer to TDCJ-ID or TDCJ-PD.

(B) For youth committed on or after June 9, 2007, the SSC will also complete reviews:

(i) on or about the youth's 18th birthday, and

(ii) on or about the date a youth reaches 18 years and six months of age to determine eligibility for transfer to TDCJ-ID or TDCJ-PD.

(3) Staff shall notify the youth, parent/guardian, any designated advocate for the youth, and any identified victim(s) of a pending SSC exit review/interview at least 30 days prior to the date of the review. The notification shall inform the recipients that they have the opportunity to submit written comments to the SSC. Victims may also submit a written request to participate in the exit review in accordance with §81.35 of this title. Any information received from a youth's family members, victims, local officials, or the general public will be considered by the SSC or designee and included in the release/transfer packet.

(4) A plan to minimize risk factors for re-offending shall be developed for each youth prior to transferring him/her to TDCJ-PD.

(5) TYC shall comply with Chapter 57, Family Code, and Article 56.02, Code of Criminal Procedure, regarding victim notification. Refer to §81.35 of this title for victim notification procedures.

(6) Immigration and Customs Enforcement must be notified when transferring an undocumented foreign national youth to TDCJ-PD. Refer to §85.79 of this title for notification procedures regarding undocumented foreign national youth.

(7) TYC shall comply with the Sex Offender Registration Program, pursuant to Chapter 62, Code of Criminal Procedure, regarding youth who are subject to sex offender registration. Refer to §87.85 of this title for sex offender registration procedures.

(8) Parents or guardians of youth under the age of 18 will be notified of all movements. Youth 18 or older must give consent to disclose any movement information to a parent.

(9) Youth whose committing offense is capital murder shall serve the entire MPC applicable to the youth's committing offense in high restriction facilities unless:

(A) the youth is transferred to TDCJ-Institutional Division in accordance with legal requirements or committing court approval; or

(B) the youth is approved by the committing court to attain parole status prior to completion of serving the MPC; or

(C) the youth's sentence expires before the MPC expires.

(10) A youth who has not received court approval to transfer to TDCJ-ID will be transferred to TDCJ-PD no later than the age at which TYC jurisdiction ends.

(11) TYC jurisdiction shall be terminated and a sentenced offender discharged when he/she is transferred to TDCJ or his/her sentence has expired, except when the youth is committed to TYC under concurrent determinate and indeterminate commitment orders as specified in §85.25 of this title.

(d) Program Completion Criteria. TYC will review youth for program completion and possible transfer to TDCJ-PD when the following criteria have been met:

(1) no major rule violations confirmed through a Level I or II due process hearing, within 90 days prior to the SSC exit interview or during the approval process; and

(2) completion of at least three (3) years toward the MPC; and

(3) participation in or completion of assigned specialized treatment programs or curriculum as required under §87.51 of this title; and

(4) assignment by the multi-disciplinary team to the highest stage in the assigned rehabilitation program as described in §87.3 of this title, which reflects that the youth:

(A) is consistently participating in academic and workforce development programs commensurate with abilities as reflected in the youth's educational plan;

(B) is consistently participating in skills development groups, as reflected in the youth's individual case plan;

(C) is consistently demonstrating learned skills, as reflected in the individual youth log and daily rating of performance expectations; and

(D) has completed a community re-integration plan, approved by the multi-disciplinary team, that demonstrates the youth's:

(i) understanding of his/her risk and protective factors; and

(ii) development of skills, abilities, and knowledge to reduce risk factors and increase protective factors; and

(iii) identification of goals and a plan of action to achieve those goals; and

(iv) identification of obstacles that may hinder successful re-entry and plans to deal with those obstacles.

(e) Youth Who do Not Meet Program Completion Criteria. If the youth does not meet the criteria in subsection (d) of this section, TYC will recommend transfer to TDCJ-PD or TDCJ-ID to the committing juvenile court and will consider the following in forming its recommendation:

(1) length of stay in TYC;

(2) youth's progress in the rehabilitation program;

(3) youth's behavior while in TYC;

(4) youth's offense/delinquent history; and

(5) any other relevant factors, such as:

(A) risk factors and protective factors the youth possesses as identified in his/her psychological evaluation; and

(B) the welfare of the community.

(f) Transfer to TDCJ-ID Prior to Termination of TYC's Jurisdiction. TYC may request a court hearing at any time in order to recommend transfer to TDCJ-ID if the following criteria have been met:

(1) youth is at least age 16; and

(2) youth has spent at least six (6) months in a high restriction facility; and

(3) youth has not completed his/her sentence; and

(4) youth has met at least one of the following behavior criteria:

(A) youth has committed a felony or Class A misdemeanor while assigned to residential placement; or

(B) youth has committed major rule violations on three or more occasions as proven though Level I or II due process hearings; or

(C) youth has engaged in chronic disruption of program (five security admissions or extensions in one month or ten in three months); or

(D) youth has demonstrated an inability to progress in his/her rehabilitation program due to persistent noncompliance with objectives; and

(5) alternative interventions have been tried without success; and

(6) youth's conduct indicates that the welfare of the community requires the transfer.

(g) Decision Authority.

(1) No later than five months before a youth reaches the age at which TYC's jurisdiction ends, the executive commissioner must:

(A) determine whether the youth meets criteria under this rule for transfer to TDCJ-PD, or transfer to TDCJ-ID; and

(B) approve the request for a hearing by the committing juvenile court to transfer to TDCJ-PD or TDCJ-ID.

(2) For a youth committed for capital murder, the committing juvenile court is the final decision authority for transfer to TDCJ-PD or TDCJ-ID.

(h) Notification. TYC will notify the committing juvenile court, the prosecuting attorney, the parole officer, and the chief juvenile probation officer in the county to which the youth is being moved no later than ten (10) calendar days prior to the discharge.

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 May 1, 2009.

TRD-200901669

Cheryln K. Townsend
Executive Commissioner
Texas Youth Commission
Earliest possible date of adoption: June 14, 2009
For further information, please call: (512) 424-6014

SUBCHAPTER E. PAROLE PLACEMENT AND DISCHARGE

37 TAC §85.95

The new rule is proposed under Human Resources Code §61.075, which provides the commission with the authority to discharge a child from control when it is satisfied that discharge will best serve the child's welfare and the protection of the public, and §61.084, which requires the commission to discharge from its custody a person not already discharged on the person's 19th birthday.

The proposed rule implements Human Resources Code §61.034.

§85.95. Parole Completion and Discharge.

(a) Purpose. The purpose of this rule is to establish criteria for discharge from agency jurisdiction for any youth committed to the Texas Youth Commission (TYC).

(b) Applicability. This policy does not apply to sentenced offenders. Refer to §85.65 of this title for information relating to discharge of sentenced offenders.

(c) Discharge Criteria.

(1) Discharge Due to Successful Completion of Parole.

(A) Youth who have never been classified as a Type A Violent Offender and whose committing offense(s) are of moderate or low severity may qualify for discharge upon completion of the following criteria:

(i) successful completion of the pre-discharge Level of surveillance and supervision;

(ii) compliance with the youth's conditions of parole, based on the individual needs assessment; and

(iii) no pending delinquency petitions or criminal charges;

(iv) completion of 60 hours of community service as specified in the youth's conditions of Parole (credit will be granted for community service performed while in a medium restriction facility, if applicable); and

(v) completion of 40 hours of constructive activities as defined on the conditions of parole each week for at least 30 days. This includes time spent working, attending school, attending treatment/counseling, completing community service, actively searching for employment, and time spent providing direct supervision to a child.

(B) The executive commissioner or designee may approve the discharge of a youth prior to completion of the requirements in paragraph (1)(A) of this subsection when consideration of a youth's committing offense, behavior, history, and progress towards completion of parole conditions justifies an earlier discharge.

(2) Direct Discharge from Residential Placement by Release Review Panel. Pursuant to §85.57 of this title, the Release Re-

view Panel may discharge a youth directly from a residential placement upon a finding that the youth is no longer in need of rehabilitation or that TYC is no longer the most suitable location to provide the needed rehabilitation.

(3) Discharge Due to Age.

(A) Youth committed to TYC before February 1, 2009 who were ever classified as Type A Violent offenders or youth committed to TYC on or after February 1, 2009 with committing or revocation offenses of high severity will not be discharged prior to reaching age 19. These youth must be discharged on:

(i) the day before the 19th birthday, if the youth is assigned to a residential placement; or

(ii) the last working day prior to the 19th birthday, if the youth is assigned to a non-residential placement.

(B) Any youth who has not previously been discharged due to successful completion of parole or by the Release Review Panel shall be discharged on:

(i) the day before the 19th birthday, if the youth is assigned to a residential placement; or

(ii) the last working day prior to the 19th birthday, if the youth is assigned to a non-residential placement.

(C) A youth on parole status who is discharged due to age will be considered to have successfully completed parole if the youth:

(i) is not in jail or on abscond status

(ii) has no pending delinquency petitions or criminal charges; and

(iii) has substantially complied with all parole requirements.

(4) Special Circumstances.

(A) Youth who have never been classified as a Type A Violent Offender and do not have a committing offense of high severity may be discharged prior to completion of parole requirements to enlist in the military. The executive commissioner must approve such a discharge.

(B) Youth placed out of the state may be discharged when requested by the placement state for satisfactory adjustment or when court action is taken by the placement state in accordance with §85.85 of this title. The parole director must approve such a discharge.

(C) Youth who have completed length of stay requirements and who are unable to progress in the agency's rehabilitation program because of mental illness or mental retardation may be discharged as specified in §87.79 of this title.

(D) Youth who have never been classified as a Type A violent offender and do not have a committing offense of high severity who are age 18 or older may be discharged prior to completion of parole requirements in order to obtain appropriate services. The executive commissioner must approve such discharge.

(E) Youth may be discharged for special circumstances, other than those addressed in subparagraphs (A) - (D) of this paragraph, upon the executive commissioner's approval.

(5) Other Types of Discharges.

(A) Youth shall be discharged under the following circumstances:

(i) placement on actively supervised adult probation for conduct which occurred while on TYC parole status; or

(ii) the youth is sentenced for a minimum of six months in a state or county jail as part of the disposition of a criminal case.

(B) Youth shall be discharged:

(i) if the court orders the reversal of the commitment; or

(ii) upon closing of records following a youth's death or recommitment.

(C) Youth shall be discharged when sentenced or transferred to Texas Department of Criminal Justice-Institutional Division (TDCJ-ID).

(d) Notification.

(1) A youth's primary service worker shall immediately notify the youth of the discharge. The primary service worker shall provide the youth a written explanation on procedures for sealing records and a copy will be provided to the parent/guardian or custodian.

(2) TYC will notify the committing juvenile court, the prosecuting attorney, parole officer, and the county chief juvenile probation officer in the county to which the youth is being moved not later than ten calendar days prior to the discharge.

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 May 1, 2009.

TRD-200901670
Cheryln K. Townsend
Executive Commissioner
Texas Youth Commission
Earliest possible date of adoption: June 14, 2009
For further information, please call: (512) 424-6014

CHAPTER 87. TREATMENT

The Texas Youth Commission (TYC) proposes the repeal of §87.1 (concerning case planning), §87.2 (concerning Resocialization Program), §87.3 (concerning resocialization phase requirements and assessment), §87.4 (concerning resocialization earned privilege system), and §87.51 (concerning special needs offenders).

The repeal of §§87.1 - 87.3 and §87.51 will allow for significantly revised rules to be published in their place. The revised rules are proposed in this issue of the *Texas Register.*

The repeal of §87.4 will allow for a new rule concerning youth privileges to be published as new §95.2. The new section is proposed in this issue of the *Texas Register.*

Robin McKeever, Director of Administrative Services, has determined that for the first five-year period the repeals are in effect there are no anticipated significant fiscal implications for state or local government as a result of enforcing or administering the repeals.

Dianne Gadow, Director of Integrated Treatment and Support, has determined that for each year of the first five years the repeals are in effect the public benefit anticipated as a result of en-

forcing the repeals will be the availability of accurate and up-to-date information concerning TYC programming and operations.

There will be no effect on small businesses or micro-businesses. There is no anticipated economic cost to persons who are required to comply with the repeals as proposed. No private real property rights are affected by adoption of this repeal.

Comments on the proposal may be submitted within 30 days of the publication of this notice to Steve Roman, Policy Coordinator, Texas Youth Commission, P.O. Box 4260, Austin, Texas 78765, or email to steve.roman@tyc.state.tx.us.

SUBCHAPTER A. PROGRAM PLANNING

37 TAC §§87.1 - 87.4

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

The repeals are proposed under Human Resources Code §61.034, which provides the commission with the authority to adopt rules appropriate to the proper accomplishment of its functions.

The proposed repeals implement Human Resources Code §61.034.

§87.1. Case Planning.

§87.2. Resocialization Program.

§87.3. Resocialization Phase Requirements and Assessment.

§87.4. Resocialization Earned Privilege System.

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 May 1, 2009.

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Cheryln K. Townsend
Executive Commissioner
Texas Youth Commission
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For further information, please call: (512) 424-6014

SUBCHAPTER B. SPECIAL NEEDS OFFENDER PROGRAMS

37 TAC §87.51

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

The repeal is proposed under Human Resources Code §61.034, which provides the commission with the authority to adopt rules appropriate to the proper accomplishment of its functions.

The proposed repeal implements Human Resources Code §61.034.

§87.51. Special Needs Offenders.

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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Cheryln K. Townsend
Executive Commissioner
Texas Youth Commission
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SUBCHAPTER A. PROGRAM PLANNING

37 TAC §§87.1 - 87.3

The Texas Youth Commission (TYC) proposes new §87.1 (concerning case planning), §87.2 (concerning rehabilitation program overview), and §87.3 (concerning rehabilitation stage requirements and assessment).

New §87.1 will make several changes from the current text of §87.1. Updates to individual case plan objectives will be provided every 30 days for all youth in residential facilities, regardless of the committing offense or facility restriction level. The new rule will also reflect that individual case plans will be developed with the goal of reducing individual risk factors and increasing individual protective factors, which is one of the foundational principles of TYC's rehabilitative strategy as described in new §87.2 and §87.3.

New §87.2 will provide an overview of TYC's approach to juvenile delinquency rehabilitation. The rehabilitative strategy will focus on helping each youth learn how to reduce the individual factors that make him/her more likely to engage in future delinquent conduct, and to increase the individual factors that help to keep him/her away from delinquent conduct.

New §87.3 will establish the system for assessing youth progress through the rehabilitation program. The new rule will also provide an outline of the basic areas in which a youth must demonstrate progress in order to successfully complete each stage of the rehabilitation program.

Robin McKeever, Director of Administrative Services, has determined that for the first five-year period the sections are in effect there are no anticipated significant fiscal implications for state or local government as a result of enforcing or administering the sections.

Dianne Gadow, Director of Integrated Treatment and Support, 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 will be a reduction in recidivism through the establishment of a juvenile delinquency rehabilitation strategy that implements evidence-based techniques and therapies and is flexible enough to be individualized for each youth.

There will be no effect on small businesses or micro-businesses. There is no anticipated economic cost to persons who are required to comply with the sections as proposed. No private real property rights are affected by adoption of these rules.

Comments on the proposal may be submitted within 30 days of the publication of this notice to Steve Roman, Policy Coordinator, Texas Youth Commission, P.O. Box 4260, Austin, Texas 78765, or email to steve.roman@tyc.state.tx.us.

The new rules are proposed under Human Resources Code §61.076, which provides the commission with the authority to

require children committed to its care to participate in academic, vocational, physical, and correctional training and activities.

The proposed rules implement Human Resources Code §61.034.

§87.1. Case Planning.

(a) Purpose. The purpose of this rule is to ensure the case management of each youth is individualized and flexible, and is based on the youth's risk and protective factors and need for services. Risk and protective factors are identified and correspond to long and short-term objectives that are developed to facilitate the youth's progress in the rehabilitation program. The resulting case plan is reviewed regularly and revised when necessary.

(b) Definitions. Definitions for terms used in this rule are under §85.1 of this title.

(c) Case Planning.

(1) An Individual Case Plan (ICP) will be developed with and for each youth by the case manager in consultation with the multidisciplinary team. The ICP will be individualized for each youth and will identify objectives with specific strategies to address development of skills to reduce individual risk factors and increase individual protective factors.

(2) The ICP will be developed in accordance with the assessment of the youth's risk and protective factors and progress in the rehabilitation program.

(3) The ICP will specify measurable objectives, expected outcomes and a means to evaluate progress.

(4) ICP objectives will be updated every 30 days to reflect adjustments as the youth progresses or as new needs are identified.

(5) The ICP will be developed with individualized strategies to facilitate youth progress through the rehabilitation program.

(6) The ICP will be initiated during the assessment process.

(7) ICP development will include a review of youth progress and objectives and will be developed with the youth and family when possible.

§87.2. Rehabilitation Program Overview.

(a) Purpose. The purpose of this rule is to identify the agency's philosophy and approach to rehabilitation of juvenile delinquents in order to reduce future delinquent behavior and increase youth accountability.

(b) Definitions. See §85.1 of this title for definitions of terms used in this rule.

(c) General Provisions.

(1) Each Texas Youth Commission (TYC) operated residential facility will utilize an integrated, system-wide rehabilitative strategy that offers a menu of therapeutic techniques, tools, and program components to help individual TYC youth increase their ability to be productive citizens and avoid re-offending.

(2) To the extent possible, TYC's rehabilitative strategy will offer programs in an adequate manner so that youth receive appropriate rehabilitation services recommended by the committing court.

(3) All aspects of the TYC rehabilitation program will be individualized and performance-based with clearly defined expectations as set forth in §87.3 of this title.

(4) Individual progress will be measured monthly and be based on all identified risk and protective factors. Youth in residential placements will be assessed by a multi-disciplinary team. Youth on parole in the community will be assessed by the assigned parole officer.

(5) As youth progress in the rehabilitation program, there are increased expectations for demonstrating developed skills and social responsibility, a decreased need for direct staff supervision, and an increase in earned privileges as set forth in §95.2 of this title.

(6) TYC facilities shall maintain a structured, 16-hour day for all youth. During each day, the youth will work on components of the rehabilitation program.

(7) TYC facilities shall provide for and youth will participate in a structured, individually appropriate educational program or equivalent.

(8) TYC facilities shall provide and eligible youth may participate in work experiences.

(9) TYC facilities shall provide and youth will participate in regular physical training programs.

(10) TYC facilities shall provide and youth will participate in skills development groups.

(11) Staff will receive appropriate training and certification related to their role in the rehabilitation program and the type of services they provide.

§87.3. Rehabilitation Stage Requirements and Assessment.

(a) Purpose. Texas Youth Commission (TYC) youth earn release from high and medium restriction placements by progressing through a stage system that measures progress in the rehabilitation program. The purpose of this rule is to provide a general outline of the areas in which a youth must demonstrate progress and to describe the process for how progress is assessed.

(b) Applicability. This rule applies to all residential facilities operated by the TYC. This rule does not apply to youth in contract care programs that are not required to provide the TYC rehabilitation program.

(c) Definitions. See §85.1 of this title for definitions of terms used in this rule.

(d) General Themes in the Rehabilitation Program. In each stage, there are objectives for the youth to complete which will:

(1) demonstrate an understanding of risk and protective factors and show a decrease in risk factors and an increase in protective factors over the course of the rehabilitation program;

(2) demonstrate a youth's increased understanding of how those personal risk factors relate to success/lack of success in the community and assist the youth in understanding how his/her committing offense was related to risk factors;

(3) move the youth toward developing a concrete community reintegration plan from the time of admission; and

(4) engage the youth's family in programming.

(e) General Process for Stage Assessment.

(1) For each stage, a youth completes objectives around the four general themes. Once those objectives are completed, the youth presents and discusses stage-related indicators with the multi-disciplinary team (MDT).

(2) The MDT assesses whether the youth has adequately completed the required indicators. The MDT is the primary decision authority regarding whether a youth earns stage promotion.

(3) If the MDT determines the stage objectives have been met, the MDT also evaluates whether the youth has consistently participated in the following other areas of programming:

(A) participation in development and completion of case plan objectives;

(B) participation in groups and individual counseling sessions;

(C) participation in specialized treatment programs (if applicable);

(D) participation in academic and workforce development programs; and

(E) application of learned skills in daily behavior, as defined in the positive behavior change system.

(4) If the MDT determines that a youth meets the required indicators for the stage and has consistently participated in the other areas of programming, the youth will be promoted to the next stage.

(5) If the MDT determines the youth has not met the indicators required for the stage or has not consistently participated in the other areas of programming, the youth remains on his/her current stage until the next MDT review (28-35 days).

(6) Youth may not be demoted in stage.

(7) The MDT gives the youth specific feedback on his/her areas of positive progress and assists the youth in focusing on what needs to be improved for the next review period.

(f) Stage Requirements for Promotion.

(1) Stage 1--this stage is completed when the MDT determines that the youth has demonstrated basic knowledge of the stage objectives. The youth attends the foundational skills development groups and participates in individual sessions with his/her case manager to develop an assessment of risk and protective factors. In order to complete stage 1, the youth must:

(A) complete the following objectives in accordance with the specified indicators for each objective:

(i) understand the definition of risk and protective factors;

(ii) explore risk factors related to TYC commitment;

(iii) attempt to involve family member or adult mentor in coordination with family liaison and case manager; and

(iv) establish a personal goal and identify strategies to achieve that goal;

(B) present and discuss his/her progress with the MDT as specified in the stage indicators; and

(C) consistently participate in other areas of programming as described in subsection (e)(3) of this section.

(2) Stage 2--this stage is completed when the MDT determines that the youth has identified and discussed his/her personal risk and protective factors, has identified patterns in his/her thoughts, feelings, attitudes, values and beliefs that relate to TYC commitment and ongoing behaviors, has created an initial community re-integration plan, and has participated with the MDT in targeting specific skills for development related to his/her risk and protective factors. In order to complete stage 2, the youth must:

(A) complete the following objectives in accordance with the specified indicators for each objective:

(i) explore personal risk and protective factors;

(ii) share identified risk and protective factors with family or adult mentor;

(iii) identify patterns in thoughts, feeling, attitudes, beliefs and values;

(iv) create an initial community re-integration plan;

(B) present and discuss his/her progress with the MDT as specified in the stage indicators; and

(C) consistently participate in other areas of programming as described in subsection (e)(3) of this section.

(3) Stage 3--this stage is completed when the MDT determines that the youth has completed skill lessons assigned by the case manager and MDT necessary to reduce risks and enhance protective factors. The youth is expected to take responsibility for the committing offense, identify patterns in thinking, and be able to discuss the impact of the offense on direct and indirect victims. The youth is expected to incorporate the new skills learned while in the facility into daily living situations and into a community re-integration plan. In order to complete stage 3, the youth must:

(A) complete the following objectives in accordance with the specified indicators for each objective:

(i) show a reduction of risk factors and an increase in protective factors;

(ii) take responsibility for the committing offense;

(iii) share progress on reducing risk factors and increasing protective factors with family member or adult mentor;

(iv) complete the community re-integration plan;

(B) present and discuss his/her progress with the MDT as specified in the stage indicators; and

(C) consistently participate in other areas of programming as described in subsection (e)(3) of this section.

(4) Stage 4--this stage is completed when the MDT determines that the youth demonstrates and practices skills learned in skills groups through daily application in situations that present increased risk for the youth. Youth are expected to engage in responsible behaviors that are consistent with identified protective factors on a regular basis. Additional skills are learned as assigned and the community re-integration plan is revised as needed and reviewed. The community re-integration plan is considered complete when the case manager, youth and the youth's parent/guardian/adult mentor approve the document. In order to complete stage 4, the youth must:

(A) complete the following objectives in accordance with the specified indicators for each objective:

(i) show a reduction of risk factors and an increase in protective factors;

(ii) identify new thoughts, feelings, attitudes, beliefs and values that might increase success in the community;

(iii) share the community re-integration plan with family or adult mentor;

(iv) finalize the community re-integration plan;

(B) present and discuss his/her progress with the MDT as specified in the stage indicators; and

(C) consistently participate in other areas of programming as described in subsection (e)(3) of this section.

(5) Stage 5--youth who have completed stage 4 in a high or medium restriction facility and remain in a medium restriction facility are assigned to stage 5. The youth updates the community re-integration plan as they encounter real situations and influences in the community. The youth reviews risk and protective factors and completes thinking reports on specific situations, identifying patterns in thinking. In order to complete stage 5, the youth must:

(A) complete the following objectives in accordance with the specified indicators for each objective:

(i) review any changes to risk factors and protective factors in the halfway house environment;

(ii) review thoughts, feelings, attitudes, values, and beliefs related to community re-integration;

(iii) comply with, review, and revise the community re-integration plan;

(iv) share the revised community re-integration plan with family or adult mentor;

(B) present and discuss his/her progress with the MDT as specified in the stage indicators;

(C) consistently participate in other areas of programming as described in subsection (e)(3) of this section.

(6) Youth Empowerment Status--youth who complete stage 4 and remain in a high restriction facility or who complete stage 5 and remain in a medium restriction facility are assigned to Youth Empowerment Status. This status ensures that youth continue to work in the program to maintain their gains, continue to reduce risk factors and increase protective factors, continue their skills development, update their community re-integration plan as circumstances change, and contribute positively to their living environment. If the MDT determines that the youth has met all objectives, the youth is placed on "active" status. If the MDT determines that the youth has not met all objectives, the youth is placed on "inactive" status. The objectives are:

(A) youth shows a reduction of risk factors and an increase in protective factors;

(B) youth reviews and revises the community re-integration plan;

(C) youth participates in the development and completion of the case plan;

(D) youth attends all scheduled groups;

(E) youth participates in specialized treatment program(s) or supplemental groups, if applicable;

(F) youth participates in academic and workforce development programs commensurate with abilities; and

(G) youth consistently applies learned skills in daily behavior.

(g) Roles and Responsibilities for Multi-Disciplinary Team Meetings.

(1) Members of the MDT make stage decisions collaboratively, providing input in their areas of expertise. The MDT facilitates and confirms stage progression by reviewing progress and interviewing the youth. The youth's case manager serves as the MDT facilitator.

(2) The multi-disciplinary team for each dormitory or living unit meets weekly to discuss each youth's weekly performance ratings and other living unit issues.

(A) Based on a each youth's weekly performance status rating (demonstration of skills relative to assigned stage), the MDT may adjust a youth's standard privileges for the week, and may reduce or remove consequences imposed for prior major or minor rule violations if the youth's improved behavior warrants it.

(B) On a weekly basis, the MDT makes decisions about youth participation in campus programs, participation in leisure skills building groups or extracurricular activities, approves various youth requests/suggestions, and makes recommendations to facility administration regarding youth movement due to specialized program need, program completion, or lack or progress in the assigned program.

(3) The MDT meets monthly for an integrated and comprehensive assessment of each youth's progress in the rehabilitation program.

(A) Prior to the meeting, assigned staff members are responsible for collecting specific information in their area of expertise and making it available for the meeting.

(B) The case manager is responsible for contacting the family to invite them to the meeting and ensuring their input into the process.

(C) The youth is responsible for being prepared to discuss information related to his/her program and preparing any information to present relative to stage progression.

(D) During the monthly assessment, the youth's general progress in the program and on specific case plan objectives is reviewed, risk and protective factors are reviewed, medical and mental health information is discussed (where applicable), feedback is provided to the youth on areas of strength and areas needing improvement, interventions to assist the youth's progress are discussed and developed, community re-entry planning is discussed and the youth's stage is assigned.

(E) An updated individual case plan is developed for youth following the meeting.

(F) Every 90 days the youth's assessment of risk and protective factors is reviewed and updated, and a progress report is provided to the parent following the MDT meeting.

(4) The MDT will address and make rehabilitation recommendations that also reflect:

(A) specialized treatment needs of the youth to include chemical dependency, mental health, cognitive, aggressive, sexual behavior and language proficiency;

(B) any other relevant specialized needs not identified specifically in this policy; and

(C) individualized strategies to facilitate youth progress based on the youth's strengths and needs.

(h) Documentation and Youth Interview. A stage assessment is conducted on the basis of documentation related to the youth's performance during the previous 30-day period. The MDT conducts a face-to-face interview with the youth:

(1) monthly at the stage assessment;

(2) weekly if the youth's behavior indicates that a loss of privilege or privilege adjustment may be necessary (see §95.2 of this title for more information on the youth privilege system); and

(3) prior to movement to a less restrictive placement;

(i) Opportunity to Demonstrate Completion of Requirements.

(1) Some objectives may be completed in a single month. Completion of all stage requirements for promotion are demonstrated primarily through consistent participation in scheduled activities and development of skills to address risk factors, which will generally take longer than one month to achieve. The stage requirements are generally sequential.

(2) During each monthly assessment period, the youth is provided an equal opportunity, as the youth's behavior warrants, to participate in the scheduled activities needed to progress. With reasonable effort by the youth, the requirements of stage 4 will be completed by the youth's minimum length of stay or minimum period of confinement. For youth whose minimum length of stay or minimum period of confinement exceeds 12 months, the schedule must provide an opportunity for completion of stage 4 requirements within one year.

(j) Documentation and Youth Notification of Results of Stage Assessment. The following activities are required of the primary service worker (PSW) after a stage assessment:

(1) within two workdays of the stage assessment, the PSW meets with the youth to review the results of the assessment. The PSW discusses with the youth the strengths and specific areas needing improvement;

(2) within three workdays, the PSW enters the stage assessment results into the automated data entry system; and

(3) within seven calendar days, the PSW attempts to contact the youth's family by telephone to share the outcome of the stage assessment.

(k) Development of the Individual Case Plan. The following case planning activities are required of the PSW after a stage assessment:

(1) within seven calendar days of the stage assessment, the PSW completes the monthly Individual Case Plan (ICP) with and for the youth, reviews its content and obtains the youth's signature; and

(2) youth who have completed stage 3 and who are within 90 days of their minimum length of stay or minimum period of confinement will have a transition ICP initiated. The plan will be developed based upon the youth's individualized risk factors, strengths, and needs.

(l) Stage Assessment Upon Return to a High Restriction Facility.

(1) Youth who are returned to high restriction from a medium restriction facility as a result of a due process hearing (other than parole revocation hearing) are placed on stage 3, or are retained on the current stage if currently assigned to stage 1 or 2.

(2) Youth who are returned to high restriction as a result of a parole revocation hearing or who are recommitted to TYC are placed on stage 1.

(m) Appeal of Assessment. The youth may appeal the results of a stage assessment, or of the lack of opportunity to demonstrate completion of requirements, by filing a grievance in accordance with §93.31 of this title. The person assigned to respond to the grievance must be a staff member who is not a member of the MDT or a person who has been involved in the youth's current assessment.

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 May 1, 2009.

TRD-200901674
Cheryln K. Townsend
Executive Commissioner
Texas Youth Commission
Earliest possible date of adoption: June 14, 2009
For further information, please call: (512) 424-6014

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SUBCHAPTER B. SPECIAL NEEDS OFFENDER PROGRAMS

37 TAC §87.51

The Texas Youth Commission (TYC) proposes new §87.51, concerning special needs offenders. The new section will establish TYC's process for assessing youth for specialized treatment needs and providing youth with treatment programs and interventions that are best suited to address those needs.

Robin McKeever, Director of Administrative Services, has determined that for the first five-year period the section is effect there are no anticipated significant fiscal implications for state or local government as a result of enforcing or administering the section.

Dianne Gadow, Director of Integrated Treatment and Support, has determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of enforcing the section will be the establishment of a system that provides specialized programming opportunities for more youth, and that more appropriately matches the level of specialized treatment intervention with each youth's assessed treatment need.

There will be no effect on small businesses or micro-businesses. There is no anticipated economic cost to persons who are required to comply with the section as proposed. No private real property rights are affected by adoption of this rule.

Comments on the proposal may be submitted within 30 days of the publication of this notice to Steve Roman, Policy Coordinator, Texas Youth Commission, P.O. Box 4260, Austin, Texas 78765, or email to steve.roman@tyc.state.tx.us.

The new rule is proposed under Human Resources Code §61.0315, which requires the commission to offer or make available certain specialized treatment programs in an adequate manner so that a child in the custody of the commission receives appropriate rehabilitation services recommended for the child by the committing court, and §61.076, which provides the commission with the authority to require children committed to its care to participate in academic, vocational, physical, and correctional training and activities.

The proposed rule implements Human Resources Code §61.034.

§87.51. Special Needs Offenders.

(a) Purpose. The purpose of this rule is to identify the process by which youth committed to the Texas Youth Commission (TYC) are assessed for specialized treatment needs and determined eligible for specialized treatment programs. The purpose of all provisions in this rule is to promote successful youth re-entry and reduce risk to the community by addressing individual specialized treatment needs through programs that are shown to reduce risk to re-offend.

(b) Definitions. Except as indicated in this rule, definitions for terms used in this rule are found in §85.1 of this title.

(1) Psychoeducational Curriculum--a short term education program delivered by appropriately trained staff to address youth with a low need for specialized treatment. These programs are provided to youth who are participating in the general rehabilitation program. Youth are temporarily pulled out of general rehabilitation programming to participate in specialized groups, and return to general rehabilitation programming upon completion of the curriculum.

(2) Short-Term Treatment Program--a treatment program delivered by a licensed or appropriately trained staff that addresses youth with a medium need for specialized treatment. These programs are provided to youth who are participating in the general rehabilitation program. Youth are temporarily pulled out of general rehabilitation programming to participate in specialized groups and individual counseling, and return to general rehabilitation programming upon completion of the short-term program.

(3) Sex Offense--a reportable adjudication as defined in Article 62.001 of the Code of Criminal Procedure.

(4) Sexual Misbehavior--a documented report of conduct which meets the elements of a sex offense but did not result in an adjudication for a sex offense or any diagnosis of Paraphilia as defined in the most current edition of the Diagnostic and Statistical Manual of Mental Disorders.

(c) General Provisions.

(1) Upon admission to TYC, various assessments are conducted to determine whether youth have certain specialized treatment needs and to identify the type of specialized program that is best suited to address those needs. Specialized treatment needs may be re-assessed at any time during a youth's stay in TYC. Re-assessment may also be conducted following a youth's return to a high restriction facility upon request of a parole officer, case manager, psychologist, or placement unit staff.

(2) Each youth assessed as having a specialized treatment need will be provided specialized programming. If, due to program resources, a youth cannot be provided the type of specialized treatment program designated herein for his/her assessed need level in his/her highest priority treatment area, the youth will be provided with the most appropriate alternate form of specialized intervention for that treatment need.

(3) Youth with multiple specialized needs will have these needs addressed while under TYC jurisdiction. Some specialized treatments may be provided concurrently and others successively. Youth may have specialized needs addressed while in a high or medium restriction facility or on parole based on assessment results and treatment team recommendations.

(d) Specialized Treatment Needs. The areas of specialized treatment need are set forth in paragraphs (1) - (6) of this subsection, with each area given priority for placement and treatment in the order listed. These rankings are designed to reflect a hierarchy based on urgency of need, ability to meaningfully participate in the program, and duration of the treatment programs.

(1) Medical. Each youth is provided comprehensive medical and dental examinations. Based on the results of these examinations, each youth is assigned a need level for medical or dental services.

(A) High Need--includes youth who have an acute illness, an exacerbation of a chronic medical/dental condition, a serious injury, and/or a need for hospitalization. These youth generally have unstable or unpredictable conditions, and require 24-hour nursing care or supervision beyond the scope of normal infirmary services. Examples include the need for extensive surgery or a complex or invasive treatment necessary to stabilize an acute or chronic condition (e.g., chemotherapy, HIV treatment, late stage or complicated pregnancy, severe systemic infection, or complex bone fracture). The medical needs, until resolved, take precedence over other therapeutic interventions and may temporarily prevent active participation in the agency's delinquency rehabilitation program. High need youth will be assigned to a placement providing readily available intensive in-patient services and specialty medical resources.

(B) Medium Need--includes youth who have a diagnosed serious medical or dental condition that will likely require frequent access to off-site clinical services and potential access to hospital services for symptom exacerbation. Examples include uncontrolled diabetes, seizure disorder, hypertension, hernia repair, or a functional disability requiring ongoing evaluation or rehabilitation. Functional impairment may require adaptations to the agency's delinquency rehabilitation program on a short or long-term basis. Medium need youth will be assigned to a placement providing readily available specialty medical resources.

(C) Low Need--includes youth diagnosed with a condition that is mild - moderate in severity and does not require ongoing off-site treatment or monitoring. Low need youth are able to participate meaningfully in the agency's delinquency rehabilitation program but may be temporarily restricted from an activity due to an accident, injury, or illness of mild - moderate severity. Low need youth will be assigned to a placement with access to routine medical care.

(D) None--includes youth with no medical or dental diagnosis requiring ongoing attention.

(2) Mental Health. The mental health assessment is provided by psychology and psychiatry staff through comprehensive psychological and psychiatric evaluations, using the most current edition of the Diagnostic and Statistical Manual of Mental Disorders. Based on this assessment, each youth is assigned a need level for mental health treatment services.

(A) High Need--includes any youth with a diagnosed mental disorder (other than a singly diagnosed behavioral or chemical use disorder) who, because of the signs or symptoms of the disorder, is suffering significant impairment in reality testing or communication or major impairment in two or more of the following areas: school, interpersonal relationships, staff relationships, judgment, thinking, or mood. High need youth will be assigned to a TYC-operated stabilization unit or a psychiatric hospital.

(B) Medium Need--includes youth who have a diagnosed mental disorder (other than a singly diagnosed behavioral or chemical use disorder) with moderate to serious signs or symptoms of that disorder, and who is having moderate to serious impairment in daily living expectations, interpersonal and staff relationships, judgment, thinking, or mood. Youth with a medium need for mental health treatment are assigned to a mental health treatment program.

(C) Low Need--includes youth who have a diagnosed mental disorder (other than a singly diagnosed behavioral or chemical use disorder) but who are able to adequately function in the areas of daily living, interpersonal and staff relationships, judgment, thinking, and mood with supportive psychiatric and psychological services. Low need youth will be assigned to any TYC placement offering appropriate psychological and psychiatric services.

(D) None--includes youth who have no diagnosed condition(s) that meet the criteria listed in subparagraphs (A) - (C) of this paragraph.

(3) Mental Retardation. The diagnosis of mental retardation is made by a psychologist based on the results of an assessment

of cognitive functioning and adaptive behavior as defined in the latest edition of the Diagnostic and Statistical Manual of Mental Disorders. Based on this diagnosis, each youth is assigned a need level for mental retardation services.

(A) High Need--includes youth who have a diagnosis of Moderate Mental Retardation on Axis II. High need youth will be assigned to a placement offering individualized mental retardation services.

(B) Medium Need--includes youth who have a diagnosis of Mild Mental Retardation on Axis II and a mental health treatment need rating of medium or low. Medium need youth will be assigned to a mental health treatment program for specialized services.

(C) Low Need--includes youth who have a diagnosis of Mild Mental Retardation on Axis II of the Diagnostic and Statistical Manual of Mental Disorders. Low need youth may be assigned to any placement.

(D) None--includes youth who have no diagnosis of Mental Retardation on Axis II of the Diagnostic and Statistical Manual of Mental Disorders.

(4) Sexual Behavior. The sexual behavior treatment assessment is provided by a psychologist, associate psychologist, or licensed sex offender treatment provider through a clinical interview and the agency-approved juvenile sexual offender assessment instrument. The assessment is provided for youth who have been adjudicated for a sex offense or have a credible, documented history of sexual misbehavior. Based on this assessment, each youth is assigned a need level for sexual behavior treatment services.

(A) High Need--includes youth who have an adjudicated sex offense and received an assessment rating of high need for sexual behavior treatment, based on the results of the clinical interview and the agency-approved juvenile sexual offender assessment instrument. High need youth will be assigned to participate in a residential sexual behavior treatment program.

(B) Medium Need--includes youth who have an adjudicated sex offense and received an assessment rating of medium need for sexual behavior treatment based on the results of the clinical interview and the agency-approved juvenile sexual offender assessment instrument. Medium need youth will be assigned to participate in a short-term sexual behavior treatment program.

(C) Low Need--includes youth who have a history of sexual misbehavior and receive an assessment rating of low need for sexual behavior treatment based on the results of the clinical interview and the agency-approved juvenile sexual offender assessment instrument. Low need youth will be assigned to participate in a psychosexual education curriculum.

(D) None--includes youth who have no history of sexual misbehavior or adjudicated sex offenses.

(5) Capital and Serious Violent Offender. A psychologist or associate psychologist makes a determination of need for capital and serious violent offender treatment for any youth who was found by a court or TYC administrative law judge to have engaged in conduct that resulted in the death of a person, resulted in serious bodily injury to a person, involved using or exhibiting a deadly weapon, and any youth referred by a psychologist based on a reasonable belief the youth is need of capital serious violent offender treatment. The determination is based on the youth's offense history and psychological assessment of the youth's need for specialized treatment intervention.

(A) High Need--will be assigned to participate in a residential capital and serious violent offender program.

(B) Medium Need--will be assigned to participate in a short-term program to address aggression and violent behavior issues.

(C) Low Need--will be assigned to participate in a psychoeducational anger management supplemental curriculum.

(D) None--includes youth who are assessed as not having a need for capital and serious violent offender treatment.

(6) Alcohol or Other Drug Treatment. Youth identified through a screening process as needing further alcohol or other drug (AOD) assessment will be assessed and diagnosed by a psychologist or associate psychologist using the latest edition of the Diagnostic and Statistical Manual of Mental Disorders. Based on a clinical interview and the results of an agency-approved comprehensive assessment instrument, each youth is assigned a need level for AOD programming.

(A) High Need--includes youth with diagnoses of substance abuse or dependency and who require a residential AOD treatment program based on the results of the agency-approved comprehensive assessment. High need youth will be assigned to participate in a residential AOD program.

(B) Medium Need--includes youth with diagnoses of substance abuse or dependency and who do not require residential treatment based on the results of the agency-approved comprehensive assessment. Medium need youth will be assigned to participate in a short-term AOD program.

(C) Low Need--includes youth without a formal diagnosis of chemical dependency or substance abuse disorders, but who have a risk of drug abuse or dependency based on a history of experimentation, family use, or history of abuse. Low need youth will be assigned to participate in a psychoeducational AOD curriculum.

(D) None--includes youth who have no history of substance abuse or risk of use.

(e) Requirement to Complete Specialized Treatment.

(1) This subsection applies only to youth assessed as having a high or medium treatment need in the following treatment areas: Sexual Behavior; Capital and Serious Violent Offender; or Alcohol or Other Drug Treatment. This subsection does not apply to youth assigned to complete psychoeducational supplemental curricula in these treatment areas.

(2) This subsection does not apply to decisions made by the Release Review Panel under §85.57 of this title.

(3) In order to qualify for transition to a medium restriction placement under §85.45 of this title or to earn release to parole under §85.55, §85.59, or §85.69 of this title, a youth who has been assessed as having a high or medium need must:

(A) complete the assigned specialized treatment program while in a high restriction facility; or

(B) as recommended by the youth's treatment team and determined by the final decision authority in consultation with the division director over treatment programming or designee, make sufficient progress in the assigned specialized treatment program with a corresponding reduction in risk in order to allow for the youth to continue the specialized treatment in a less restrictive setting. Risk reduction will be assessed by appropriate assessment instruments. Requirements to continue or complete treatment will be included in the youth's conditions of placement or conditions of parole, as appropriate.

(f) Individual Exceptions.

(1) The requirement to complete specialized treatment as described in subsection (e) of this section may be waived if the divi-

sion director over treatment programming or designee determines that the youth is unable to participate in the assigned specialized treatment program or curriculum due to a medical, mental health, or mental retardation condition.

(2) Each youth's individual circumstances will be considered when determining the most appropriate type of specialized treatment intervention to assign. A youth may be assigned to a specialized program or curriculum designated herein for a higher or lower need level than the youth's assessed need level for any reason deemed appropriate by the division director over treatment programming or designee.

(g) Specialized Aftercare. Youth who successfully complete one of the following specialized treatment programs, or who otherwise need specialized aftercare as determined by the youth's treatment team, will receive specialized aftercare on an outpatient basis as needed, recommended by the treatment team, and available:

(1) mental health treatment program;

(2) residential or short-term sexual behavior treatment program; or

(3) residential or short-term alcohol or other drug treatment 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 May 1, 2009.

TRD-200901673
Cheryln K. Townsend
Executive Commissioner
Texas Youth Commission
Earliest possible date of adoption: June 14, 2009
For further information, please call: (512) 424-6014

37 TAC §87.67

The Texas Youth Commission (TYC) proposes an amendment to §87.67, concerning Corsicana Stabilization Unit. The amended rule will require that a due process hearing to extend a youth's stay in the unit a second time must be held within 90 days of the first extension hearing, rather than within 12 months of the first extension hearing. The amended rule will also specify that a Level II due process hearing (as described in §95.55 of this title) is the required level of due process in order to extend a parole-status youth in the unit.

Robin McKeever, Director of Administrative Services, has determined that for the first five-year period the section is in effect there are no anticipated significant fiscal implications for state or local government as a result of enforcing or administering the section.

Toysha Martin, General Counsel, has determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of enforcing the section will be increased legal protections for youth admitted to the Corsicana Stabilization unit as a result of more frequent hearings to prove admission criteria continue to exist.

There will be no effect on small businesses or micro-businesses. There is no anticipated economic cost to persons who are required to comply with the rule as proposed. No private real property rights are affected by adoption of this rule.

Comments on the proposal may be submitted within 30 days of the publication of this notice to Steve Roman, Policy Coordinator, Texas Youth Commission, P.O. Box 4260, Austin, Texas 78765, or email to steve.roman@tyc.state.tx.us.

The amendment is proposed under Human Resources Code §61.075, which provides the commission with the authority to order a committed child's confinement under conditions it believes best designed for the child's welfare and the interests of the public, and §61.076, which provides the commission with the responsibility and authority to provide any medical or psychiatric treatment that is necessary.

The proposed rule implements Human Resources Code §61.034.

§87.67. Corsicana Stabilization Unit.

(a) (No change.)

(b) Applicability.

(1) The mental health status review due process procedures are found in §95.71 of this title [(relating to Mental Health Status Review Hearing Procedure)].

[(2) See §95.55 of this title (relating to Level II Hearing Procedure).]

[(3) See §95.51 of this title (relating to Level I Hearing Procedure).]

(2) [(4)] For emergency mental health placements, see §87.71 of this title [(relating to Emergency Mental Health Admission)].

(3) [(5)] Certain basic rights are recognized for each youth in TYC, see §93.1 of this title [(relating to Basic Youth Rights)].

(c) Admissions.

(1) (No change.)

(2) Admission Process.

(A) Referrals. Complete current psychiatric and psychological evaluations by a licensed psychiatrist and a psychologist must be included in order to be considered. Referral information should be sent directly to the stabilization unit [admissions panel].

(B) Emergency Referrals. If an emergency exists, procedures in §87.71 of this title [(relating to Emergency Mental Health Admission)] must be followed. Consistent with emergency criteria, staff may request of the superintendent immediate placement of the youth in the CSU. On admission, requirements in this policy are effective for all emergency admissions.

(3) 96 Hour Admission Review Process. A mental health status review hearing shall be held for all youth within 96 hours of arrival at the unit. If the 96 hour period ends on a Saturday, Sunday or official holiday [Legal Holiday], the hearing must be held on the next regular working day. The hearing is held to determine whether criteria for unit admission have been met.

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

(C) If the youth's treatment needs and appropriateness for admission cannot be determined during the 96 hour mental status review hearing, the youth may be temporarily admitted for diagnostic and assessment purposes up to 45 days from the date of arrival provided the hearing manager [panel] concludes:

(i) - (iv) (No change.)

(d) Program Requirements.

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

(5) By the end of 90 days from the date of the admission due process hearing, a youth shall be returned to the referring source or referred to the centralized placement unit (CPU) [CPU] for appropriate placement unless an extension becomes effective at that time.

(e) Extension of Time Beyond 90 Days to Treat the Psychiatric Dysfunction.

(1) (No change.)

(2) Extension Due Process Requirements.

(A) The due process required to determine whether extension criteria have been met is[:]

[(i) a level I hearing for all youth on parole. Parole is not revoked; or]

[(ii)] a mental health status review hearing [for all non-parole youth]. A youth on parole status, as defined in §95.50 of this title, will remain on parole status.

(B) The due process hearing shall be conducted:

(i) two weeks immediately preceding the [youth's] 90th day from the admission hearing or two weeks preceding the 90th day from the previous extension hearing [anniversary date of the latest extension hearing] unless the youth is being considered for transition out of the unit before the end of the initial 90 day stay or latest extension hearing; or

(ii) (No change.)

(3) The Effect of an Extension.

(A) (No change.)

(B) An extension granted means that the period of time[, beyond the initial 90 day stay,] during which a youth may be treated for a psychiatric dysfunction under rules of this policy[,] shall be extended for up to 90 days [12 months] from the date of the extension due process hearing. Successive extension hearings may be held.

(4) (No change.)

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

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Cheryln K. Townsend
Executive Commissioner
Texas Youth Commission
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For further information, please call: (512) 424-6014

CHAPTER 91. PROGRAM SERVICES
SUBCHAPTER D. HEALTH CARE SERVICES
37 TAC §91.98

The Texas Youth Commission proposes new §91.98, concerning Therapeutic Restraints. The new rule will contain provisions for administering restraints when clinically indicated for medical or mental health purposes. The provisions regarding medical restraints are new to the commission's rules, whereas the provisions regarding mental health restraints have been moved from §97.23 (relating to use of force), which is also published for proposal in this issue of the *Texas Register*.

Robin McKeever, Chief Financial Officer, has determined that for the first five-year period the new section is in effect there will be no significant fiscal implications for state or local government as a result of enforcing or administering the new section.

Rajendra Parikh, M.D., Medical Director has determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of enforcing the section will be the protection of youth from serious harm caused by self-injury or refusal of medical treatment. There will be no effect on small businesses or micro-businesses. There is no anticipated economic cost to persons who are required to comply with the new section as proposed. No private real property rights are affected by adoption of this rule.

Comments on the proposal may be submitted within 30 days of the publication of this notice to Steve Roman, Policy Coordinator, Texas Youth Commission, P.O. Box 4260, Austin, Texas 78765, or email to steve.roman@tyc.state.tx.us.

The new section is proposed under the Human Resources Code, §61.076, which provides the commission with the authority to provide any medical or psychiatric treatment that is necessary for a child committed to the commission.

The proposed rule implements the Human Resources Code, §61.034.

§91.98. Therapeutic Restraints.

(a) Purpose. This rule establishes the criteria, procedures, and limitations for use of therapeutic restraints when clinically indicated for medical or mental health purposes.

(b) Applicability. This rule applies to all Texas Youth Commission (TYC) residential facilities.

(c) Additional References.

(1) For criteria and procedures relating to use of force, see §97.23 of this title.

(2) For criteria and procedures on administering a psychotropic drug in a psychiatric emergency when a youth will not give consent for the administration, see §91.92 of this title.

(d) Definitions.

(1) Mental Health Professional--has the meaning assigned by §91.87 of this title.

(2) Therapeutic Restraint--a restraint used solely for medical or mental health purposes.

(3) Medical Provider--a:

(A) physician; or

(B) mid-level practitioner, such as a nurse practitioner or physician's assistant, acting under the direction of a physician.

(4) Psychiatric Provider--a:

(A) psychiatrist, or

(B) psychiatric physician's assistant or psychiatric nurse practitioner acting under the direction of a psychiatrist.

(e) General Provisions.

(1) Therapeutic restraint equipment must be used only in a manner consistent with its intended design and purpose.

(2) Only therapeutic restraint equipment approved by the executive commissioner or designee may be used in TYC facilities.

(3) TYC staff who may be expected to participate in application of therapeutic restraints or monitoring, managing, or approving of the restraint must receive special training and will not participate in its implementation until the training has been received. The training will include proper use and application of restraint devices and applicable TYC policies and guidelines regarding the implementation, documentation, and possible continuation of the restraint.

(4) If facility resources are not sufficient to support the procedural requirements as specified in this rule, therapeutic restraint must not be employed.

(5) Prior to placing a youth in any therapeutic restraint device designed to secure a person in a face-upward position, a medical provider shall be consulted if the youth is pregnant or has a seizure disorder or any other medical condition that contraindicates such restraint.

(6) The facility administrator or designee will ensure that the parent/guardian of a youth placed in therapeutic restraint is notified within 24 hours after the restraint is initiated.

(f) Therapeutic Restraints for Medical Purposes.

(1) Authorized Facilities. Medical restraints are authorized only at high restriction facilities that operate an on-site infirmary.

(2) Criteria for Use. Medical restraints may be used only to administer medical treatment to a resistant youth when failure to administer the treatment could have serious health implications.

(3) Authorization for Use.

(A) Only a medical provider may authorize a medical restraint. The authorization must be based on a determination that all appropriate less restrictive interventions have proved unsuccessful in controlling the youth's behavior.

(B) An order for medical restraint must specify the type of restraint to be used, duration of the restraint, and justification for the restraint.

(C) No order for medical restraint may exceed 12 hours in duration.

(4) Procedural Requirements.

(A) A medical provider or nurse must be present during the application of restraints.

(B) Health care staff must check the youth every 15 minutes and assess the youth's condition, including circulation, position, and open airway if wrist and/or ankle soft restraints are used.

(C) A nurse will perform range-of-motion exercises at least every 30 minutes for a period of at least five minutes if wrist and/or ankle soft restraints are used;

(D) regularly scheduled meals and drinks served on appropriate food ware for safety;

(E) As soon as possible, but no later than 12 hours after application of restraints, the medical provider will consult with the facility administrator or designee to develop and implement a less restrictive treatment plan.

(F) Staff will provide continuous visual supervision of the youth while in restraints.

(G) Staff will provide an opportunity for elimination of bodily waste at least every two hours.

(H) A medical restraint must be terminated upon the earlier of:

(i) a determination by the medical provider that the youth's behavior no longer justifies application of medical restraints; or

(ii) expiration of the provider's order.

(g) Therapeutic Restraints for Mental Health Purposes.

(1) Authorized Facilities. Mental health restraints are authorized only at facilities designated by the executive commissioner or designee.

(2) Criteria for Use. Therapeutic restraints for mental health purposes are authorized for use only when the restraint is necessary to prevent serious self-injury.

(3) Authorization for Use.

(A) Only a licensed doctoral psychologist or psychiatric provider may authorize a mental health restraint. The authorization must be based on a determination that all appropriate less restrictive interventions have proven unsuccessful in controlling the youth's self-injurious behavior.

(B) At least one staff trained specifically in mental health restraint techniques must be involved in any mental health restraint procedure. If at least one trained staff is not available to supervise, the restraint shall not be employed.

(C) Prior to the expiration of the first hour of restraint, the youth shall be evaluated face-to-face by a mental health professional who may recommend approval to continue the restraint.

(D) In order to recommend continuation of the restraint, the mental health assessment will verify that the current use of the restraint is not having a psychologically damaging effect and that the need for the restraint is not due to an immediate psychiatric crisis which requires alternative interventions.

(E) Approval from a psychiatric provider or a licensed doctoral psychologist must be obtained to continue the restraint beyond one hour. If a determination is made that the behavior is due to a mental health problem, the youth shall be provided appropriate mental health services, including referral to the Corsicana Stabilization Unit or state hospital if he/she meets the admission criteria under §87.67 or §87.69 of this title.

(F) Additional face-to-face assessment by a mental health professional is required to extend the restraint beyond four hours and at least every four hours thereafter if the restraint continues. Only a psychiatric provider or licensed doctoral psychologist may approve a recommended extension.

(G) The facility administrator or designee may direct additional mental health assessment at any time.

(H) The restraint shall be terminated as soon as the youth's behavior indicates the threat of imminent self-injury is absent, as determined by a psychiatric provider or licensed doctoral psychologist.

(I) No order or approval for mental health restraint may be in force for longer than 12 hours. If the restraint is still required for the youth's safety, a psychiatric provider must directly observe the

youth and provide written orders, which may include psychotropic medication when clinically indicated.

(4) Procedural Requirements.

(A) The only approved mental health restraint method is full-body restraint, face-upward, on a bed equipped with cloth or leather mechanical restraint straps/devices.

(B) Staff shall ensure the youth's personal dignity by providing a protected environment and as much privacy as possible.

(C) Youth shall be provided:

(i) regular checks, performed by a nurse, of the physical condition of the youth and the placement of the restraints within the first 30 minutes and every hour during the restraint;

(ii) an assessment of circulation, position, and open airway checks at least every 15 minutes by trained staff;

(iii) opportunity for range of motion exercises at least every 30 minutes for a period of at least five minutes;

(iv) regularly scheduled meals and drinks served on appropriate food ware for safety;

(v) opportunity for elimination of bodily waste at least every two hours; and

(vi) continuous visual supervision by staff.

(D) A psychiatric provider or licensed doctoral psychologist must develop a detailed plan for clinical follow-up.

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 May 4, 2009.

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Cheryln K. Townsend
Executive Commissioner
Texas Youth Commission
Earliest possible date of adoption: June 14, 2009
For further information, please call: (512) 424-6014

CHAPTER 93. YOUTH RIGHTS AND REMEDIES

37 TAC §93.31, §93.53

The Texas Youth Commission (TYC) proposes amendments to §93.31 (concerning youth grievance system) and §93.53 (concerning appeals to the executive commissioner).

The amended §93.31 will require that grievances involving healthcare issues must be assigned for resolution to an individual with the appropriate clinical expertise and credentials to properly resolve the grievance. The amended rule will also establish that appeals of responses to grievances involving healthcare issues will be routed to the executive commissioner's office for resolution. There will be no local-level appeal for such issues.

The amended §93.53 will contain a corresponding revision to reflect the change in §93.31 which requires direct appeal to the executive commissioner for appeals involving healthcare grievance resolutions. The amended rule will also contain corresponding revisions to reflect the proposed changes in Chapter 95 and Chapter 97, which are also published in this issue of the *Texas Register.*

Robin McKeever, Director of Administrative Services, has determined that for the first five-year period the amended sections are in effect there are no anticipated significant fiscal implications for state or local government as a result of enforcing or administering the sections.

Toysha Martin, General Counsel, 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 will be the operation of a more effective and responsive youth grievance system and the availability of accurate and current policies concerning TYC operations and programming. There will be no effect on small businesses or micro-businesses. There is no anticipated economic cost to persons who are required to comply with the sections as proposed. No private real property rights are affected by adoption of this rule.

Comments on the proposal may be submitted within 30 days of the publication of this notice to Steve Roman, Policy Coordinator, Texas Youth Commission, P.O. Box 4260, Austin, Texas 78765, or email to steve.roman@tyc.state.tx.us.

The amendments are proposed under the Human Resources Code §61.034, which provides the commission with the authority to make rules appropriate to the proper accomplishment of its functions, and §61.0422, which requires the commission to keep information about each written complaint filed with the commission by a child receiving services from the commission or the child's parent or guardian.

The proposed rules implement the Human Resources Code, §61.034.

§93.31. Youth Grievance System.

(a) Policy.

(1) Youth, parents or guardians of youth, and youth advocates have a right to file grievances concerning the care, treatment, services, or conditions provided for youth under the jurisdiction of the Texas Youth Commission (TYC). TYC will resolve grievances in a prompt, fair, and thorough manner; however, grievances alleging criminal violations or abuse, neglect, and exploitation will be referred to law enforcement for investigation and disposition.

(2) (No change.)

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

(d) Grievances.

(1) Methods for Filing a Grievance.

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

(C) Youth Grievance Forms.

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

(iii) In residential facilities, secure drop boxes will be provided in easily accessible locations for youth to submit completed grievance forms. Access to the drop boxes is restricted to staff members designated by the executive commissioner [~~director~~] or designee.

(iv) - (v) (No change.)

(2) Resolution of a Grievance.

(A) (No change.)

(B) Each grievance will be assigned to a staff member who is not directly involved in the grievance and has the authority to implement an appropriate corrective measure or has knowledge or access to provide clarifying information. Grievances involving healthcare issues must be assigned to a person with appropriate clinical expertise and credentials. The assigned staff member will provide a written response to the grievant within 15 workdays of submission of the grievance.

(3) Appeal of a Grievance Resolution.

(A) A grievant may file an appeal if dissatisfied with the response. Except for healthcare-related grievances, TYC will designate a staff member to provide a written response to the appeal. Appeals of responses to healthcare-related grievances will be submitted as direct appeals to the executive commissioner or designee in accordance with §93.53 of this title.

(B) For grievances that are not healthcare-related, [Pursuant to §93.53 of this title,] a grievant may submit an appeal to the executive commissioner [director] or designee if dissatisfied with the appeal response in accordance with §93.53 of this title.

(C) A grievant may submit a direct appeal to the executive commissioner [director] or designee if no written response is received within 15 workdays after submitting a grievance or an appeal of a grievance response.

(D) An appeal to the executive commissioner [director] or designee exhausts all administrative remedies on the issue(s) raised in the grievance.

§93.53. Appeals [Appeal] to the Executive Commissioner [Director].

(a) Purpose. The purpose of this rule is to permit Texas Youth Commission (TYC) youth and their parents or guardians to appeal decisions made by TYC or contract program employees to the TYC executive commissioner [director].

[(b) Appeal of Youth Complaint Resolutions to the Executive Director. Any disposition of any complaint made under §93.31 of this title (relating to Complaint Resolution System) may be appealed to the executive director, only after all levels of appeal have been exhausted locally.]

(b) [(c)] Direct Appeals to the Executive Commissioner [Director]. A direct appeal to the executive commissioner or designee [director] may be filed in matters limited to:

(1) results of a Level I or II hearing;

(2) assignment of minimum length of stay;

(3) response to a healthcare-related grievance;

(4) response to an appeal of a grievance not related to healthcare issues;

(5) lack of written response within 15 workdays after submission of a grievance;

(6) lack of written response within 15 workdays after submission of a grievance appeal;

[(1) parole revocation;]

[(2) reclassification;]

[(3) classification;]

[(4) a disciplinary transfer or assigned disciplinary length of stay under §95.11 of this title (relating to Disciplinary Consequences);]

[(5) Behavior Management Program length of stay under §95.17 of this title (relating to Behavior Management Program);]

[(6) Aggression Management Program length of stay under §95.21 of this title (relating to Aggression Management Program);]

(7) a disapproved home evaluation;

(8) an appeal of a Level IV hearing [when a youth is being detained in a location other than a TYC operated institution];

[(9) a result of the second and subsequent Level IV hearing pursuant to §95.59 of this title (relating to Level IV Hearing Procedure) when a youth is in an institution detention program;]

(9) [(10)] a decision to extend the youth's stay in the Security Program, if the youth has already been in the Security Program for 120 [240] continuous hours or longer;

(10) [(11)] a decision from a mental health status review hearing [pursuant to §95.71 of this title (relating to Mental Health Status Review Hearing Procedure)];

(11) [(12)] a decision from a Title IV-E hearing;

(12) [(13)] the findings of an alleged mistreatment investigation; and [pursuant to §93.33 of this title (relating to Alleged Abuse, Neglect, and Exploitation).]

(13) the decision of the administrator of chaplaincy services regarding a request for accommodation of religious practices.

(c) [(d)] Filing Deadline. All appeals [to the executive director] must be submitted in writing and clearly describe the grounds for the appeal and filed within six (6) months of the decision being appealed. Appeals filed after that time may be considered at the discretion of the executive commissioner or designee [director].

(d) [(e)] Action of the Executive Commissioner [Director].

(1) The executive commissioner or designee [director] responds in writing to each appeal. Failure to respond to an appeal within 30 working days will constitute an exhaustion of administrative remedies for purposes of appeal to the courts, but will not be construed as acceptance or rejection of any contention made in the appeal.

(2) The executive commissioner or designee [director] will consider the recommendations of the Office of General Counsel in reaching a decision on appeals of investigation findings, including any additional findings or information that resulted from further investigation.

(3) The executive commissioner or designee [director] may uphold, reverse or modify the grievance [complaint] resolution or return the grievance [complaint] to the chief local administrator [CLA] with directions. The executive commissioner or designee's [director's] disposition of a youth grievance [complaint] may also be in the form of a determination that the grievance [complaint] involves operational issues that have been adequately addressed and resolved at the facility level.

(4) The executive commissioner [director] or [his/her] designee may determine that an issue has not been sufficiently developed to render an informed appeal resolution. If so, the executive commissioner [director] or [his/her] designee may, prior to the issuance of a response:

(A) conduct further investigation;

(B) provide specific direction or instruction about information needed concerning the investigation and state a time frame in which to comply with the direction or instruction; or

(C) re-open the investigation, and if the investigation finding(s) are changed, the parties entitled to notification will be notified of their right to appeal the new finding(s).

(e) [~~(f)~~] Distribution of Appeal Decisions. Appeal decisions are distributed to the following:

(1) the complainant;

(2) the complainant's attorney or representative, if any;

(3) the chief local administrator [~~(CLA)~~] where the report is filed; and

(4) other persons as deemed appropriate.

(f) [~~(g)~~] Appropriate TYC staff must [~~shall~~] assist youth in interpreting appeal decisions from TYC's executive commissioner or designee [~~director~~].

(g) [~~(h)~~] The appeal decision of the executive commissioner or designee [~~director~~] is the final administrative resolution of an issue appealed and constitutes an exhaustion of administrative remedies for purposes of appeal to the courts.

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 May 4, 2009.

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CHAPTER 93. YOUTH RIGHTS AND REMEDIES

The Texas Youth Commission (TYC) simultaneously proposes the repeal of §93.33, concerning Alleged Abuse, Neglect, and Exploitation, and new §93.33, concerning Alleged Abuse, Neglect, and Exploitation. The new section will reflect the creation of the Office of Inspector General (OIG) within the TYC. Because the OIG has authority to conduct criminal investigations, the amended rule will clarify that the standards for investigations described in the rule apply only to administrative investigations of abuse, neglect, or exploitation conducted under the Family Code, Chapter 261. The new rule will also establish that every allegation of abuse is screened by OIG staff to determine whether a criminal investigation is warranted.

In addition to changes reflecting the creation of the OIG, the new rule also revises the provisions regarding the release of reports of alleged abuse, neglect, or exploitation to the public. In compliance with recently enacted changes to Family Code §261.201, the rule will establish that TYC will release reports of alleged abuse or neglect when it is not prohibited from doing so by Government Code Chapter 552 or other law. The new rule also establishes standards for redaction of information when reports of abuse or neglect are publicly disclosed.

Robin McKeever, Director of Administrative Services, has determined that for the first five-year period the section is in effect there are no anticipated significant fiscal implications for state or local government as a result of enforcing or administering the section.

Cris Love, Chief Inspector General, has determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of enforcing the section will be compliance with recently enacted legislation, as well as the availability of current information concerning TYC's investigative operations.

There will be no effect on small businesses or micro-businesses. There is no anticipated economic cost to persons who are required to comply with the section as proposed. No private real property rights are affected by adoption of this rule.

Comments on the proposal may be submitted within 30 days of the publication of this notice to DeAnna Lloyd, Manager of Policy and Accreditation, Texas Youth Commission, P.O. Box 4260, Austin, Texas 78765, or email to deanna.lloyd@tyc.state.tx.us.

37 TAC §93.33

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

The repeal is proposed under Human Resources Code, §61.034, which provides the commission with the authority to adopt rules appropriate to the proper accomplishment of its functions.

The proposed repeal implements the Human Resources Code, §61.034.

§93.33. Alleged Abuse, Neglect, and Exploitation.

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 May 4, 2009.

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Cheryln K. Townsend
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37 TAC §93.33

The new section is proposed under Family Code, §261.201, which requires the commission to release a report of alleged or suspected abuse or neglect if the commission is not prohibited by Chapter 552, Government Code, or other law from disclosing the report; and to edit the report to protect the identity of certain persons. The section is also proposed under the Human Resources Code, §61.034, which provides the commission with the authority to adopt rules appropriate to the proper accomplishment of its functions.

The proposed rule implements the Human Resources Code, §61.034.

§93.33. Alleged Abuse, Neglect, and Exploitation.

(a) Purpose. This rule provides for the administrative investigation of allegations of abuse, neglect or exploitation in programs and

facilities under Texas Youth Commission (TYC) jurisdiction. This rule provides standards for investigations and for the compilation of investigation information. The purpose of all provisions in this rule is the protection of youth.

(b) Applicability.

(1) This rule applies to all programs and facilities under TYC jurisdiction including institutions, halfway houses, contracted residential services, and parole services.

(2) This rule applies only to administrative investigation of abuse, neglect, or exploitation conducted under Chapter 261 of the Family Code. Except as specifically noted herein, this rule does not apply to criminal investigations conducted by the TYC Office of Inspector General under Human Resources Code §61.0451.

(3) See §93.31 of this title for procedures regarding the resolution of youth grievances.

(4) See §93.53 of this title for procedures regarding appeals to the chief executive officer.

(c) Explanation of Terms Used.

(1) Abuse--an intentional, knowing, or reckless act or omission that causes or may cause emotional harm or physical injury to, or death of, a youth.

(2) Case Closure Disposition--the finding made upon official closure of a case of alleged abuse, neglect, or exploitation. The following dispositions shall be used for all allegations:

(A) Administratively Closed--the circumstances, facts, and/or evidence show that there is no merit to the allegation, or that the likelihood of solving the case is so negligible that further investigation is not warranted. (However, if additional information is later received, the case may be re-opened for investigation)

(B) Administratively Confirmed--the circumstances, facts, and/or evidence are sufficient that no additional investigation is needed to confirm that the allegation or violation did occur.

(C) Confirmed--an investigation established that the allegation is supported by a preponderance of evidence that the allegation did occur.

(D) Exonerated--an investigation established that the incident occurred but was lawful and proper or was justified under existing conditions.

(E) Not Confirmed--an investigation resulted in insufficient evidence to prove or disprove the allegations.

(F) Unfounded--an investigation established that the allegation is false, not factual.

(3) Chief local administrator (CLA)--the person employed in a TYC facility or district office that is responsible for overseeing the operations of a facility, contract program or parole services.

(4) Emotional harm--an impairment in the youth's growth, development, or psychological functioning that normally requires evaluation or treatment by a trained mental health or health care professional, whether or not evaluation or treatment is actually received. Sexual conduct in residential facilities is presumed to cause substantial emotional harm.

(5) Exploitation--the illegal or improper use of a youth or the resources of a youth, for monetary or personal benefit, profit, or gain.

(6) Neglect--a negligent act or omission, including failure to comply with an individual case plan, that causes or may cause substantial emotional harm or physical injury to, or death of a youth.

(7) Office of Inspector General (OIG)--a section of the agency with statutory authority to investigate crimes committed at a TYC facility, a residential facility operated under contract with TYC, by TYC employees, or individuals working under contract with TYC.

(8) Physical injury--an injury that normally requires examination or treatment by a trained health care professional, whether or not examination or treatment is actually received.

(9) Preponderance of the evidence--a standard of proof meaning the greater weight and degree of credible evidence; e.g., whether the credible evidence makes it more likely than not that abuse, neglect, or exploitation occurred.

(10) Report--a report that alleged or suspected abuse, neglect, or exploitation of a child has occurred or may occur.

(11) Sexual conduct--a lewd exhibition or a sexual contact with another person, including orifice penetration, fondling or sexual stimulation, whether or not the conduct is consensual.

(d) Reporting Requirements.

(1) Any person having cause to believe that a youth has been or may be adversely affected by abuse, neglect, or exploitation has an obligation under state law to report the matter to a law enforcement agency or to the Department of Family and Protective Services (DFPS). The OIG is an appropriate law enforcement agency for reports of suspected abuse, neglect or exploitation of youths subject to the jurisdiction of the agency. Any TYC employee, volunteer, or contractor in programs or facilities under TYC jurisdiction who has cause to believe a youth committed to the care and custody of TYC has been or may be adversely affected by abuse, neglect, or exploitation or receives such a report must immediately report the matter to law enforcement in accordance with the agency's reporting policies and procedures.

(2) The person making a report will provide as much detailed information as possible regarding the circumstances of the report, including the identity of persons involved, the location and time of relevant events, and the identity of others who may provide further information.

(3) The requirement to report under this section applies without exception to a person whose personal communications may otherwise be privileged, including an attorney, a member of the clergy, a medical practitioner, a social worker, or a mental health professional.

(4) Except for investigation purposes, the identity of a person making a report is confidential.

(e) Actions Taken upon Receipt of the Report. Upon receipt of a report of alleged abuse, neglect or exploitation, the chief local administrator will:

(1) in coordination with TYC OIG and/or local law enforcement, immediately take any action necessary to protect the youth and to preserve evidence that may be pertinent to an investigation of the matter;

(2) notify the youth's parents or guardian of the report and notify the youth if the report was made by a third party;

(3) determine whether or not the person accused of wrongdoing must be suspended, temporarily reassigned, or temporarily barred from assignment to TYC facilities pending the outcome of the investigation; and

(4) take any action necessary to ensure that the investigation or review is conducted with the full cooperation of staff and youth, that adequate resources are provided, and that the youth and witnesses are protected from retaliation or improper influence regarding the subject of the report.

(f) Assignment for Investigation.

(1) The OIG will promptly review each report of alleged abuse, neglect, or exploitation. Each report will be entered into a centralized database and assigned for an official administrative and/or criminal investigation if the allegation meets the definition of abuse, neglect, or exploitation.

(2) Whether to assign a report for criminal investigation by a peace officer from the OIG or appropriate outside law enforcement shall be determined on a case-by-case basis considering all relevant factors, including the severity and immediacy of potential harm.

(3) If a report presents an immediate risk of physical or sexual abuse of a youth that could result in the death or serious harm to the youth, the initial response by an OIG investigator will take place not later than 24 hours after the OIG is notified of the report.

(4) If deemed to be warranted by the chief inspector general or the administrative head of the agency, a report of abuse, neglect, or exploitation may be referred to appropriate outside law enforcement for investigation.

(5) Regardless of whether the case is investigated administratively, criminally, or both, the OIG will provide a prompt and thorough administrative report in accordance with the provisions of this rule.

(g) Standards for Administrative Investigations.

(1) Only a person with qualified experience and training will be assigned to conduct an administrative investigation of a report of abuse, neglect, or exploitation.

(2) In the event the OIG or other law enforcement agency has assumed a criminal investigation of a report, a person who has been assigned to conduct an administrative investigation in this section will cooperate and assist with the law enforcement agency's criminal investigation and not take any action that might be detrimental to it.

(3) All evidence that is relevant and reasonably available will be gathered and preserved, including documents, physical evidence, witness interviews and statements, photographs, and security videos.

(4) For any report of alleged abuse, neglect, or exploitation, a preliminary investigation may be conducted to determine whether there is any evidence to corroborate the report or to provide cause to believe that any abuse, neglect, or exploitation has occurred. In cases where no such evidence is found, the case will be administratively closed and/or referred to the appropriate TYC department for resolution.

(5) The administrative investigation will be prompt, thorough, and directed at resolving all the relevant issues raised by the report.

(A) With regard to a report of alleged abuse, the investigator will find whether the:

(i) alleged act or failure to act occurred;

(ii) act or failure to act caused emotional harm or physical injury to the youth; and

(iii) person who took the action or who failed to act did so intentionally, knowingly, or recklessly.

(B) With regard to a report of alleged neglect, the investigator will find:

(i) whether there was substantial emotional harm or physical injury of the youth as alleged;

(ii) the standard of care or duty expected under the circumstances that are alleged;

(iii) whether the actions or failure to act under the circumstances violated the standard of care or duty; and

(iv) whether the actions or failure to act caused the substantial emotional harm or physical injury of the youth.

(C) With regard to a report of alleged exploitation, the investigator will find whether:

(i) a youth or a youth's resources were used by the accused person in the manner alleged;

(ii) the use was for monetary or personal benefit, profit, or gain; and

(iii) the use was illegal or improper.

(6) The investigator's findings will be based on a preponderance of the evidence.

(7) The investigator will prepare a written report of the findings, including a summary and analysis of the evidence relied upon in reaching the findings. Copies of relevant documents and photographs will be attached to the report.

(8) The investigator may make findings on misconduct other than abuse, neglect or exploitation that is established by the evidence. However, the absence of such findings should not be regarded as exoneration of the respondent or other employees as to policy violations or other misconduct indicated by the evidence.

(h) Administrative Investigation Report--Submission and Closure.

(1) The investigator will submit a written investigation report to his/her supervisor upon completion of the investigation.

(2) The investigator's supervisor will indicate approval of the investigation findings by officially closing the report and indicating the final case closure disposition. The supervisor will then notify the appropriate facility of the findings.

(3) All officially closed investigation reports must contain the signature of the supervisor who was responsible for making the final closure determination and the signature of the investigator who gathered the evidence in the case.

(4) In the event the investigator's supervisor disagrees with any part of the report submitted by the investigator upon completion of the investigation, the report must:

(A) include a statement by the supervisor which describes the reasons for his/her disagreement;

(B) be forwarded to the division director for resolution;

(C) include the signature of the division director or designee for official closure of the report.

(i) Actions in Response to a Closed Administrative Investigation Report.

(1) Upon receipt of a closed investigation report, the chief local administrator will review the report and:

(A) notify the youth, the youth's parents or guardian, and the person accused of wrongdoing of the results of the investigation; and

(B) notify the youth and the youth's parents of the right to appeal the investigation findings or file a complaint regarding the conduct of the investigation under §93.53 of this title; and

(C) if the report is confirmed, take whatever actions are necessary and appropriate to rectify the wrong and prevent future harm under the same or similar circumstances.

(2) If the allegation was reported by a health care professional who provides services to TYC youth through TYC's contract health care provider(s), the investigator's supervisor will notify the health care professional in writing of the results of the investigation and the right to appeal the findings of the investigation report under §93.53 of this title.

(3) Periodic summary reports of complaints and appeals regarding investigations conducted under this rule, and the final decision regarding the complaints or appeals, will be provided to the TYC executive commissioner or governing Board for review.

(4) The TYC executive commissioner or governing Board will take whatever action is determined to be appropriate with regard to the complaint to ensure the investigations are conducted properly.

(5) Pursuant to Family Code §261.403(b), the TYC executive commissioner or governing Board will ensure there is a periodic internal audit of procedures related to administrative investigations of alleged abuse, neglect, and exploitation.

(j) Standards for Compiling Investigation Information and Confidentiality of Reports.

(1) Accurate and timely investigation information will be compiled related to the number and nature of reports filed and case closure dispositions, the dates and locations of reported incidents, the average length of time required for investigations and the identification of significant trends. This information will be compiled at least twice each year and be available for public inspection.

(2) Additional information including a summary of the findings and corrective actions taken with regard to all confirmed reports will be prepared for periodic review and analysis by the TYC executive staff and the TYC executive commissioner or governing Board.

(3) To the extent required by state or federal law, TYC will release to the public upon request, a report of alleged or suspected abuse, neglect, or exploitation if:

(A) the report relates to a report of abuse, neglect, or exploitation involving a child committed to TYC during the period that the child is committed to TYC; and

(B) TYC is not prohibited by Chapter 552, Government Code, or other law from disclosing the report.

(4) Any information concerning a report of alleged or suspected abuse, neglect, or exploitation that is disclosed will be edited to protect the identity of:

(A) a child who is the subject of the report of alleged or suspected mistreatment;

(B) any other youth committed to the care and custody of TYC who is named in the report;

(C) the person who made the report; and

(D) any other person whose life or safety may be endangered by the disclosure.

(5) Notwithstanding any other provision permitting the release of information, TYC will not disclose any record or information which, if released to the requestor, would interfere with an ongoing criminal investigation or prosecution.

(6) A report will be provided to a law enforcement agency or other criminal justice agency for purposes of investigation and prosecution upon request.

(7) A report will be provided to a parent, managing conservator or other legal representative of a youth upon request. The information contained in the report will be redacted to protect the identity of the person making the report, other youth, and any other person who may be harmed by the disclosure.

(8) A report will be provided, upon request, to the healthcare provider who reported an allegation. The information contained in the report will be redacted to protect the identity of the person making the report, other youth, and any other person who may be harmed by the disclosure.

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 May 4, 2009.

TRD-200901686

Cheryln K. Townsend

Executive Commissioner

Texas Youth Commission

Earliest possible date of adoption: June 14, 2009

For further information, please call: (512) 424-6014

CHAPTER 95. YOUTH DISCIPLINE

The Texas Youth Commission (TYC) proposes the repeal of §95.1 (concerning discipline system overview), §95.3 (concerning rules of conduct), §95.7 (concerning reclassification consequence), §95.9 (concerning parole revocation consequence), §95.11 (concerning disciplinary consequences), §95.13 (concerning on-site disciplinary consequences), §95.15 (concerning parole minor disciplinary consequences), §95.16 (concerning primary intervention program), §95.17 (concerning behavior management program), §95.21 (concerning aggression management program), §95.51 (concerning level I hearing procedure), §95.55 (concerning level II hearing procedure), §95.57 (concerning level III hearing procedure), §95.59 (concerning level IV hearing procedure), and §95.71 (concerning mental health status review hearing procedure).

The repeal of §95.1 and §95.3 will allow for significantly revised rules to be published in their place. The revised rules are proposed as new rules in this issue of the *Texas Register.*

The repeal of §95.7 will reflect that TYC no longer reclassifies youth as a disciplinary consequence. Youth may be reclassified as result of changes in any number of individual factors, but not directly as a consequence for violating facility rules.

The repeal of §95.9 and §95.15 will allow for content relating to disciplinary consequences for youth on parole to be moved

to new §95.4, which is also proposed in this issue of the *Texas Register.*

The repeal of §95.11 and §95.13 will allow for content relating to disciplinary consequences for youth in residential facilities to be moved to new §95.3, which is also proposed in this issue of the *Texas Register.*

The repeal of §§95.16, 95.17, and 95.21 will reflect that TYC no longer operates these programs at its facilities.

The repeal of §§95.51, 95.55, 95.57, and 95.71 will allow for significantly revised rules to be published in their place. The revised rules are proposed as new rules in this issue of the *Texas Register.*

The repeal of §95.59 will allow for content relating to detention review hearings to be moved to new §95.59 and new §95.61, which are also proposed in this issue of the *Texas Register.*

Robin McKeever, Director of Administrative Services, has determined that for the first five-year period the repeals are in effect there are no anticipated significant fiscal implications for state or local government as a result of enforcing or administering the repeals.

James Smith, Director of Residential and Community Services, has determined that for each year of the first five years the repeals are in effect the public benefit anticipated as a result of enforcing the repeals will be the availability of accurate and up-to-date information concerning TYC programming and operations.

There will be no effect on small businesses or micro-businesses. There is no anticipated economic cost to persons who are required to comply with the repeals as proposed. No private real property rights are affected by adoption of these repeals.

Comments on the proposal may be submitted within 30 days of the publication of this notice to Steve Roman, Policy Coordinator, Texas Youth Commission, P.O. Box 4260, Austin, Texas 78765, or email to steve.roman@tyc.state.tx.us.

SUBCHAPTER A. DISCIPLINARY PRACTICES

37 TAC §§95.1, 95.3, 95.7, 95.9, 95.11, 95.13, 95.15 - 95.17, 95.21

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

The repeals are proposed under Human Resources Code §61.034, which provides the commission with the authority to adopt rules appropriate to the proper accomplishment of its functions.

The proposed repeals implement Human Resources Code §61.034.

§95.1. Discipline System Overview.

§95.3. Rules of Conduct.

§95.7. Reclassification Consequence.

§95.9. Parole Revocation Consequence.

§95.11. Disciplinary Consequences.

§95.13. On-Site Disciplinary Consequences.

§95.15. Parole Minor Disciplinary Consequences.

§95.16. Primary Intervention Program.

§95.17. Behavior Management Program.

§95.21. Aggression Management 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 May 1, 2009.

TRD-200901654
Cheryln K. Townsend
Executive Commissioner
Texas Youth Commission
Earliest possible date of adoption: June 14, 2009
For further information, please call: (512) 424-6014

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SUBCHAPTER B. DUE PROCESS HEARINGS PROCEDURES

37 TAC §§95.51, 95.55, 95.57, 95.59, 95.71

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

The repeals are proposed under Human Resources Code §61.034, which provides the commission with the authority to adopt rules appropriate to the proper accomplishment of its functions.

The proposed repeals implement Human Resources Code §61.034.

§95.51. Level I Hearing Procedure.

§95.55. Level II Hearing Procedure.

§95.57. Level III Hearing Procedure.

§95.59. Level IV Hearing Procedure.

§95.71. Mental Health Status Review Hearing Procedure.

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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Cheryln K. Townsend
Executive Commissioner
Texas Youth Commission
Earliest possible date of adoption: June 14, 2009
For further information, please call: (512) 424-6014

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CHAPTER 95. BEHAVIOR MANAGEMENT AND YOUTH DISCIPLINE

The Texas Youth Commission (TYC) proposes new §95.1 (concerning behavior management system overview), §95.2 (concerning youth privilege system), §95.3 (concerning rules and consequences for residential facilities), §95.4 (concerning

rules and consequences for youth on parole), §95.17 (concerning Redirect program), §95.20 (concerning cooling off period for youth out of control), §95.50 (concerning definitions for due process hearings), §95.51 (concerning level I hearing procedure), §95.55 (concerning level II hearing procedure), §95.57 (concerning level III hearing procedure), §95.59 (concerning detention for youth with pending charges), §95.61 (detention for youth pending level I or II hearing procedure), and §95.71 (concerning mental health status review hearings).

New §95.1 will establish the framework for TYC's new behavior management system. The system places increased emphasis on incentives for positive behavior and non-disciplinary interventions to manage youth misbehavior.

New §95.2 will establish a rating system for youth behavior and a privilege system that provides positive reinforcement for complying with behavioral objectives.

New §95.3 will define major and minor rule violations for youth in residential facilities, as well as the possible consequences for rule violations. The new rule will also establish the level of due process required to prove that a violation occurred and impose major or minor consequences.

New §95.4 will define rule violations for youth on parole, as well as the possible consequences for rule violations. The new rule will also establish the level of due process required to prove that a violation occurred.

New §95.17 will establish the Redirect Program as a means of delivering intensive interventions in a structured environment for youth who have engaged in certain serious rule violations. The rule will establish eligibility criteria, program requirements, release requirements and other elements of the program.

New §95.20 will republish the content of §97.35 under a new section number. Section 97.35 is proposed for repeal in this issue of the *Texas Register.*

New §95.50 will consolidate definitions used throughout the subchapter pertaining to due process hearings into one rule.

New §95.51 will establish the requirements of Level I due hearings, which are the highest level of due process available to TYC youth. As a result of changes to Chapter 85 of this title, which are also published in this issue of the *Texas Register,* the use of Level I hearings will be limited to determining whether to revoke a youth's parole. The new rule also establishes the required elements of a finding that a youth's parole will be revoked.

New §95.55 will establish the requirements of Level II due process hearings. The new rule will make several changes from the version of this rule currently in effect. Hearings for youth who are currently detained in a security unit will be held within five days from the alleged rule violation. The transfer of youth to a higher restriction facility for non-disciplinary reasons will require a Level II hearing, which may be waived by the youth. Individuals who wish to represent youth at Level II hearings will be required to receive training from TYC to serve in that capacity. The new rule will also contain corresponding revisions to reflect changes made to rules in Chapter 97 of this title, which are also proposed in this issue of the *Texas Register.*

New §95.57 will contain corresponding revisions to reflect changes made to rules in Chapter 97 of this title, which are proposed in this issue of the *Texas Register.*

New §95.59 will establish the requirements for detaining youth in TYC security units and holding review detention review hearings while criminal or delinquent charges are pending or the when awaiting a court hearing or trial.

New §95.61 will establish the requirements for detaining youth in TYC security units or community detention facilities and holding detention review hearings when a TYC Level I or II hearing is scheduled.

New §95.71 will establish the requirements for conducting a Level II hearing for the purpose of admission or extension in the Corsicana Stabilization Unit to treat youth with serious psychiatric dysfunction.

Robin McKeever, Director of Administrative Services, has determined that for the first five-year period the sections are in effect there are no anticipated significant fiscal implications for state or local government as a result of enforcing or administering the sections.

James Smith, Director of Residential and Community Services, 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 will be a more effective system for managing youth behavior which relies more on incentives for positive behavior and less on punitive measures including confinement in locked security rooms, as well as the availability of accurate and up-to-date information concerning TYC programming and operations.

There will be no effect on small businesses or micro-businesses. There is no anticipated economic cost to persons who are required to comply with the rules as proposed. No private real property rights are affected by adoption of these rules.

Comments on the proposal may be submitted within 30 days of the publication of this notice to Steve Roman, Policy Coordinator, Texas Youth Commission, P.O. Box 4260, Austin, Texas 78765, or email to steve.roman@tyc.state.tx.us.

SUBCHAPTER A. BEHAVIOR MANAGEMENT

37 TAC §§95.1 - 95.4, 95.17, 95.20

The new rules are proposed under Human Resources Code §61.045, which assigns the commission with responsibility for the welfare, custody, and rehabilitation of the children in a school, facility, or program operated or funded by the commission, and §61.075, which provides the commission with the authority to order a committed child's confinement under conditions it believes best designed for the child's welfare and the interests of the public. The new rules are also proposed under Human Resources Code §61.076, which provides the commission with the authority to require a committed child to participate in moral, academic, vocational, physical, and correctional training and activities, and to require the modes of life and conduct that seem best adapted to fit the child for return to full liberty without danger to the public.

The proposed rules implement Human Resources Code §61.034.

§95.1. Behavior Management System Overview.

(a) Purpose. This rule establishes the basic principles on which the Texas Youth Commission (TYC) will operate its behavior management system.

(b) General Provisions. TYC shall have a program that addresses incentives for youth adhering to rules and negative consequences for breaking them. The program shall foster accountability

for behavior and compliance with the residential community's rules and expectations. The program shall be designed to:

(1) maintain order and security;

(2) promote safety, respect for self and others, fairness, and protection of rights within the residential community;

(3) provide constructive discipline and a system of positive and negative consequences to encourage youth to meet expectations for behavior;

(4) provide opportunities for positive reinforcement and recognition for accomplishments and positive behaviors;

(5) promote alternative pro-social means for youth to meet their needs;

(6) promote constructive dialogue and peaceful conflict resolution;

(7) minimize separation of youth from the general population; and

(8) limit the need to use force when responding to youth behavior.

(c) Rules and Privileges.

(1) Purposeful rules are less likely to be broken; therefore, behavioral expectations and rules of conduct will be developed in a manner that both youth and staff will clearly understand each expectation or rule and its intended purpose.

(2) Youth conduct will be evaluated daily on a basic set of expectations. Youth will earn or lose privileges based on following the basic expectations. See §95.2 of this title for more information on the youth privilege system.

(3) Youth who violate specific major or minor rules of conduct will be subject to disciplinary consequences. See §95.3 and §95.4 of this title for more information on rules and consequences.

(d) Intervention Strategies.

(1) Staff members will address misconduct by progressively applying the most appropriate behavioral intervention strategies. Behavioral interventions will address the youth's misconduct, encourage the youth to recognize negative thoughts and feelings, and promote thinking skills that reduce risk of misconduct and contribute to positive decisions.

(2) Staff members will determine which interventions are employed based on their knowledge of the current situation and the youth involved. Behavioral interventions include, but are not limited to, the following:

(A) verbal prompts;

(B) discussion away from the group;

(C) check-in with peer group;

(D) time-out;

(E) cooling off period, in accordance with §95.20 of this title;

(F) completion of Thinking Report;

(G) unscheduled or scheduled behavior group;

(H) security referral, in accordance with §97.40 of this title; and

(I) Redirect program, in accordance with §95.17 of this title.

(3) In cases where a youth is displaying an ongoing behavioral problem, an individualized plan with alternative interventions may be created by the caseworker in consultation with the program staff, psychology staff, and/or other professionals.

(e) Disciplinary Consequences.

(1) Discipline will be administered with the goal of imposing only the least restrictive consequences which are effective in correcting the misbehavior and ensuring safety and order. Where feasible and appropriate, the consequences will be directly related to the nature and seriousness of the violation. Extenuating circumstances of the violation will be considered. See §95.3 and §95.4 of this title for procedures relating to issuing disciplinary consequences.

(2) Youth are made aware of rules and disciplinary consequences through verbal instruction and written documents.

(3) No disciplinary consequences shall be imposed except in accordance with the provisions of this chapter.

(4) The following are prohibited as sanctions for rule violations:

(A) corporal or unusual punishment;

(B) subjecting youth to humiliation, harassment, or physical or mental abuse;

(C) personal injury;

(D) subjecting youth to property damage or disease;

(E) punitive interference with the daily functions of living, such as eating or sleeping;

(F) purposeless or degrading work, including group exercise as a sanction.

(5) Youth shall not be permitted to impose disciplinary consequences against other youth. Youth or groups of youth are not given control or authority over other youth.

(6) Consequences shall be applied on an individual basis and only for a youth's own actions or failure to act when responsible for doing so. Group discipline is prohibited. Actions taken for the purpose of maintaining safety and security (e.g. temporary lockdown to locate a missing tool) are not considered group discipline.

(7) Disciplinary consequences shall not deny youth the following:

(A) regular meals (from the established menu) or snacks;

(B) sufficient sleep;

(C) physical exercise;

(D) mail;

(E) contact through visitation or telephone with parents, attorneys, or personal ministers, pastors, or religious counselors;

(F) legal assistance; or

(G) medical attention.

(8) More than one disciplinary consequence may be imposed for the same offense if:

(A) the criteria and conditions for the imposition of each disciplinary consequence are met;

(B) the appropriate level of due process is dictated by the most severe of the disciplinary consequences imposed.

(f) Use of Force. TYC's behavior management system is designed so that the least severe interventions are used when possible to manage youth behavior before it escalates to the point when force is necessary. While the development and modeling of pro-social and interpersonal skills is the basis of TYC policy, the agency permits its employees to use reasonable force as a last resort in accordance with §97.23 of this title.

§95.2. Youth Privilege System.

(a) Purpose. The purpose of this rule is to establish a system of rewards and positive reinforcement to bring out the best in youth, offering them strong incentives to behave in ways that contribute to a safe, therapeutic culture.

(b) Applicability. This rule applies to Texas Youth Commission (TYC) residential facilities.

(c) Explanation of Terms Used. The following terms, as used in this rule, shall have the following meanings unless the context clearly indicates otherwise.

(1) Privilege--an activity or possession that a youth earns by complying with behavioral expectations and progressing in the rehabilitation program.

(2) Privilege Grid--a document which establishes a series of privileges for youth. The privileges are organized by stage with increasing stages associated with greater privilege.

(3) Neutral--when a youth meets expectations of his/her assigned stage in the rehabilitation program.

(4) Stage--has the meaning assigned under §85.1 of this title.

(5) Multi-disciplinary team--has the meaning assigned under §85.1 of this title.

(d) General Provisions.

(1) Each facility will establish a privilege grid. The specific privileges offered may vary between facilities due to local opportunities or limitations. Privileges will be developmentally appropriate for the youth and gender specific.

(2) A multi disciplinary team will determine the privileges a youth receives based on the agency-approved rating system. The rating system will score youth performance in following the five basic performance expectations:

(A) show respect for others;

(B) follow directions;

(C) participate in activities;

(D) be in the right place at the right time; and

(E) accept consequences.

(3) Youth are assessed on a daily basis for performing in accordance with the expectations of his/her stage. The daily assessments will be averaged for a weekly performance rating. Youth who have a performance rating of "neutral" will receive the standard privileges assigned to their stage for the current week. Youth with a performance rating above neutral will receive additional privileges. Youth with a performance rating below neutral, or who engage in specific rule violations as defined in §95.3 of this title, are subject to a loss of privileges.

(4) In addition to the weekly privileges awarded to a youth based on his/her stage, youth may earn additional daily privileges based on positive conduct.

(5) Provisions in this policy may be restated or otherwise adapted to accommodate a particular program. All adapted or restated provisions shall remain consistent with the general provisions in this policy.

(e) Privilege Adjustments. Privileges are reviewed weekly by the multi-disciplinary team for any required adjustments. Privileges may also be suspended pursuant to §95.3 of this title for violations of rules of conduct.

§95.3. Rules and Consequences for Residential Facilities.

(a) Purpose. The purpose of this rule is to establish the actions that constitute violations of the rules of conduct youth will be expected to follow while in residential facilities. Violations of the rules may result in disciplinary consequences that are proportional to the severity and extent of the violation. Appropriate due process must be followed before imposing consequences.

(b) Applicability. This rule applies to youth assigned to a residential facility.

(c) Definitions. The following terms, as used in this rule, have the following meanings.

(1) Bodily Injury--physical pain, illness, or impairment of physical condition. Fleeting pain or minor discomfort does not constitute bodily injury.

(2) Multi-Disciplinary Team--has the meaning assigned by §85.1 of this title.

(3) Residential Facility--includes both high and medium restriction residential placements.

(4) Attempting to Commit--engaging in conduct that amounts to more than mere planning, but failing to commit the intended rule violation.

(d) General Provisions.

(1) Rules in this policy may be restated or otherwise adapted to accommodate a particular program to help clarify expected behavior in that program. All adapted or restated rules shall remain consistent with the general rules of conduct.

(2) The rules of conduct must be posted in a visible area accessible to youth in each facility and program.

(3) Repeated violations of any rule of conduct may result in more serious disciplinary consequences.

(4) Youth may be issued more than one disciplinary consequence for a rule violation proven in a Level II or III due process hearing held in accordance with §95.55 or §95.57 of this title, respectively.

(5) Major rule violations require the completion of a formal incident report. A copy of the incident report must be given to the youth within 24 hours after the alleged violation.

(6) A youth's disciplinary record shall consist only of rule violations that are proven through a Level I or II due process hearing in accordance with §95.51 or §95.55 of this title, respectively.

(7) Within 24 hours after a report of a major rule violation or a minor rule violation resulting in a security referral, a case worker, program specialist, or other appropriate non-involved staff member will review the incident and assess whether to request a Level II due process hearing in order to pursue major consequences and/or place-

ment of the violation on the youth's disciplinary record. The facility administrator or designee will determine whether or not to hold a Level II due process hearing. When a youth is found to be in possession of prohibited money as defined in this rule, a Level II due process hearing is required to seize the money. Seized money will be placed in the student benefit fund in accordance with §95.55 of this title.

(8) Except as noted in paragraph (9) of this subsection, minor rule violations will be documented on the appropriate activity log. A formal incident report is not required.

(9) A minor rule violation that escalates to the point that the current program/activity cannot continue due to the disruption, or that poses a substantial risk to personal safety or facility security, must be documented on a formal incident report. In high restriction facilities, this type of minor rule violation will also include a referral to the security unit.

(10) Although certain rule violations may not result in immediate disciplinary consequences, a rule violation proven through a Level II due process hearing may be considered upon expiration of the youth's minimum length of stay in determining whether a youth is in need of additional rehabilitation.

(11) Each multi-disciplinary team will review all privilege suspensions for youth on its caseload at least once per week. The multi-disciplinary team may:

(A) lessen the duration of the suspension or allow the youth to accrue certain privileges for use after the period of suspension is complete as an incentive to display positive behavior; or

(B) extend (one time only) or modify an on-site privilege suspension issued by direct care staff if warranted by the youth's behavior.

(e) Consequences for High Restriction Facilities.

(1) Major Disciplinary Consequences.

(A) Major Suspension of Privileges--a youth has all privileges suspended for 30 calendar days from the date of the hearing. This consequence may be issued only for minor rule violations resulting in a referral to the security unit or major rule violations, and only if the rule violation is proven through a Level II due process hearing in accordance with §95.55 of this title.

(B) Loss of Transition Eligibility--a youth who has not completed the minimum length of stay will serve an additional month in high restriction facilities prior to becoming eligible for transition to a medium restriction facility under §85.45 of this title. This consequence may only be issued if it is proven through a Level II due process hearing that the youth committed:

(i) assault causing bodily injury to youth or staff, as defined in subsection (i)(3) - (4) of this section; or

(ii) sexual misconduct as defined in subsection (i)(21)(A) - (B) of this section.

(2) Minor Disciplinary Consequences.

(A) Suspension of Privileges by Multi-Disciplinary Team. A youth has one or more privileges removed for up to 14 calendar days from the date of the multi-disciplinary team meeting, or has his/her privileges adjusted to those associated with a lower stage until the next scheduled meeting. This consequence may be issued for major or minor rule violations. In order to issue this consequence, the multi-disciplinary team must:

(i) meet with the youth to discuss the youth's behavior and potential consequences;

(ii) consider any on-site suspension of privileges already imposed for the behavior; and

(iii) document the discussion of the youth's conduct and consequence imposed.

(B) On-Site Suspension of Privileges. A youth has one specific privilege removed for up to seven calendar days from the date of the violation or all privileges removed for up to three calendar days. This consequence may be issued by a staff member with direct supervisory responsibility for the youth after witnessing a major or minor rule violation. This consequence should be issued only after non-disciplinary interventions have been attempted. The staff member must document the conduct and consequence and discuss the consequence and the reasons for it with the youth.

(f) Consequences for Medium Restriction Facilities.

(1) Major Consequences.

(A) Disciplinary Transfer--a youth assigned to a medium restriction facility is transferred to a high restriction facility. Disciplinary transfer may be issued only for major rule violations that are proven through a Level II due process hearing in accordance with §95.55 of this title. This consequence does not apply to youth who are on parole status and who are currently assigned to a medium restriction facility.

(B) Major Suspension of Privileges--a youth has all privileges suspended for 30 calendar days from the date of the hearing. This consequence may be issued only for major rule violations that are proven through a Level II due process hearing.

(2) Minor Consequences. Minor disciplinary consequences include but are not limited to consequences described herein. Minor consequences may only be imposed following a Level III due process hearing held in accordance with §95.57 of this title.

(A) Privilege Suspension--a suspension of one or more privileges for no more than 14 calendar days.

(B) Community Service Hours--disciplinary assignment of up to 40 hours in an approved community service assignment.

(C) Trust Fund Restriction--youth is restricted from accessing his/her accrued personal funds for up to seven calendar days.

(D) Facility Restriction--youth is restricted for up to 48 hours from participating in any activity outside the assigned placement other than the approved constructive activities.

(g) Review and Appeal of Consequences.

(1) All minor disciplinary consequences issued by staff other than the youth's multi-disciplinary team will be reviewed for policy compliance by the youth's assigned case worker or dorm supervisor within one workday of issuance. All minor consequences issued by the youth's multi-disciplinary team will be reviewed for policy compliance and consistency by the facility administrator or designee.

(2) The facility administrator or designee:

(A) must review any minor consequence issued for longer than 24 hours within 24 hours after issuance of the consequence; and

(B) may overturn or modify any privilege suspension determined to be excessive or not validly related to the nature or seriousness of the conduct.

(3) Youth may appeal major disciplinary consequences by filing an appeal in accordance with §95.51 or §95.55 of this title.

(h) Placement Disposition Options. In accordance with §95.17 of this title, youth in high restriction facilities may be placed in the Redirect program when the youth is found to have engaged in certain major rule violations. Placement in the Redirect program is not a disciplinary consequence.

(i) Major Rule Violations. It is a violation to knowingly violate, attempt to violate, or help someone else violate any of the following:

(1) Assault--Unauthorized Physical Contact with another Youth (No Injury)--making unauthorized physical contact with another youth that does not result in bodily injury, such as, but not limited to, pushing, poking, and grabbing.

(2) Assault--Unauthorized Physical Contact with Staff (No Injury)--intentionally making unauthorized physical contact with a staff member, contract employee, or volunteer that does not result in bodily injury, such as, but not limited to, pushing, poking, and grabbing.

(3) Assault Causing Bodily Injury to Another Youth--intentionally and knowingly or recklessly engaging in conduct that causes another youth to suffer bodily injury.

(4) Assault Causing Bodily Injury to Staff--intentionally and knowingly or recklessly engaging in conduct that causes a staff member, contract employee, or volunteer to suffer bodily injury.

(5) Attempted Escape--committing an act that amounts to more than mere planning but that fails to effect an escape.

(6) Chunking Bodily Fluids--causing a person to contact the blood, seminal fluid, vaginal fluid, saliva, urine, and/or feces of another with the intent to harass, alarm, or annoy another person.

(7) Distribution of Prohibited Substances--distributing or selling any prohibited substances or items.

(8) Escape--leaving a high or medium restriction residential placement without permission or failing to return from an authorized leave.

(9) Extortion or Blackmail--demanding or receiving favors, money, actions, or anything of value from another in return for protection against others, to avoid bodily harm, or in exchange for not reporting a violation.

(10) Fighting Not Resulting in Bodily Injury--engaging in a mutually instigated physical altercation with another person or persons that does not result in bodily injury.

(11) Fighting that Results in Bodily Injury--engaging in a mutually instigated physical altercation with another person or persons that results in bodily injury.

(12) Fleeing Apprehension--running from or refusing to come to staff when called and such act results in disruption of facility operations.

(13) Two or More Failures to Comply with Written Reasonable Request (for Youth in Medium Restriction Residential Placement)--failing on two or more occasions to comply with a written reasonable request of staff. If the expectation is daily or weekly, the two failures to comply must be within a 30-day period. If the expectation is monthly, the two failures to comply must be within a 90-day period.

(14) Misuse of Medication--using medication provided to the juvenile by authorized personnel in a manner inconsistent with specific instructions for use, including removing the medication from the dispensing area.

(15) Participating in a Major Disruption of Facility Operations--intentionally participating with two (2) or more persons in conduct that poses a threat to persons or property and substantially disrupts the performance of facility operations or programs.

(16) Possession of Prohibited Items--possessing the following prohibited items:

(A) cellular telephone;

(B) matches or lighters;

(C) jewelry, unless allowed by facility rules;

(D) money in excess of the amount or in a form not permitted by facility rules (see §95.55 of this title for procedures concerning seizure of such money);

(E) pornography;

(F) items which have been fashioned to produce tattoos or body piercing;

(G) cleaning products when the youth is not using them for a legitimate purpose; or

(H) other items that are being used inappropriately in a way that poses a danger to persons or property or threatens facility security.

(17) Possession of a Weapon--possessing a weapon or item(s) which has been made or adapted for use as a weapon.

(18) Possession or Use of Prohibited Substances and Paraphernalia--possessing or using any unauthorized substance, including controlled substances or intoxicants (including alcohol and tobacco), medications not prescribed for the juvenile by authorized medical or dental staff, tobacco products, similar intoxicants, or related paraphernalia such as that used to deliver or make any prohibited substance.

(19) Refusing a Drug Screen--refusing to take a drug screen when requested to do so by staff or tampering with or contaminating the urine sample provided for a drug screen. (Note: If the youth says he/she cannot provide a sample, the youth must be given water to drink and two hours to provide the sample.)

(20) Refusing a Search--refusing to submit to an authorized search of person or area.

(21) Sexual Misconduct--intentionally and knowingly engaging in any of the following:

(A) causing contact, including penetration (however slight), between the penis and the vagina or anus; between the mouth and penis, vagina or anus; or penetration (however slight) of the anal or genital opening of another person by hand, finger or other object;

(B) touching or fondling, either directly or through clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of another person;

(C) kissing for sexual stimulation;

(D) exposing the anus, buttocks, breasts, or genitals to another or exposing oneself knowing the act is likely to be observed by another person;

(E) masturbating in an open and obvious way, whether or not the genitals are exposed.

(22) Stealing--intentionally taking property from another without permission and the property has an estimated value of $100 or more.

(23) Tampering with Safety Equipment--intentionally tampering with, damaging, or blocking any device used for safety or security of the facility. This includes, but is not limited to, any locking device or item that provides security access or clearance, any fire alarm or fire suppression system or device, video camera, radio, telephone (when the tampering prevents it from being used as necessary for safety and/or security), handcuffs, or shackles.

(24) Tattooing/Body Piercing--engaging in tattooing or body piercing of self or others. Tattooing is defined as making a mark on the body by inserting pigment into the skin.

(25) Threatening another with a Weapon--intentionally and knowingly threatening another with a weapon. A weapon is something that is capable of inflicting bodily injury in the manner in which it is being used.

(26) Vandalism--intentionally causing $100 or more in damage to state or personal property of another.

(27) Violation of any Law--violating a Texas or federal law that is not already defined as a major or minor rule violation.

(j) Minor Rule Violations. It is a violation to knowingly violate, attempt to violate, or help someone else violate any of the following:

(1) Breaching Group Confidentiality--disclosing or discussing information provided in a group session to another person not present in that group session.

(2) Disruption of Program--engaging in behavior that requires intervention to the extent that the current program of the youth and/or others is disrupted. This includes, but is not limited to:

(A) disrupting a scheduled activity;

(B) being loud or disruptive without staff permission;

(C) using profanity or engaging in disrespectful behavior toward staff or peers; or

(D) refusing to participate in a scheduled activity or abide by program rules.

(3) Failure to Abide by Dress Code--failing to follow the rules of dress and appearance as provided by facility rules.

(4) Failure to do Proper Housekeeping--failing to complete the daily chores of cleaning the living environment to the expected standard.

(5) Gang Activity--participating in an activity or behavior that promotes the interests of a gang or possessing or exhibiting anything related to or signifying a gang, such as, but not limited to, gang-related literature, symbols, or signs.

(6) Gambling or Possession of Gambling Paraphernalia--engaging in a bet or wager with another person or possessing paraphernalia that may be used for gambling.

(7) Horseplay--engaging in wrestling, roughhousing, or playful interaction with another person or persons that does not rise to the level of an assault. Horseplay does not result in any party getting upset or causing injury to another.

(8) Improper Use of Telephone/Mail/Computer--using the mail, a computer, or the telephone system for communication that is prohibited by facility rules, at a time prohibited by facility rules, or to inappropriately access information.

(9) Lending/Borrowing/Trading Items--lending or giving to another youth, borrowing from another youth, or trading with another youth possessions, including food items, without permission from staff.

(10) Lying/Falsifying Documentation/Cheating--lying or withholding information from staff, falsifying a document, and/or cheating on an assignment or test.

(11) Possession of an Unauthorized Item--possessing an item the youth is not authorized to have (possession of which is not a major rule violation), including items not listed on the youth's personal property inventory. This does not include personal letters or photographs.

(12) Refusal to Follow Staff Verbal Instructions--deliberately failing to comply with a specific reasonable verbal instruction made by a staff member.

(13) Stealing--intentionally taking property from another without permission and the property has an estimated value of less than $100.

(14) Threatening Others--making verbal or physical threats toward another person or persons.

(15) Undesignated Area--being in any area without the appropriate permission to be in that area.

(16) Vandalism--intentionally causing less than $100 in damage to state or personal property.

§95.4. Rules and Consequences for Youth on Parole.

(a) Purpose. The purpose of this rule is to establish what actions constitute violations of the rules of conduct youth will be expected to follow while under parole supervision. Violations of the rules may result in disciplinary consequences, including revocation of parole, that are proportional to the severity and extent of the violation. Appropriate due process must be followed before imposing consequences.

(b) Applicability.

(1) This rule applies to youth on parole to a home placement.

(2) For parole revocation purposes, this rule applies to youth on parole status assigned to a residential placement as a home substitute.

(3) For daily rules of conduct for youth on parole status assigned to a residential placement as a home substitute, see §95.3 of this title.

(c) General Provisions.

(1) The rules of conduct are provided to the youth when they initially register with their parole officers and other times as necessary.

(2) Repeated violations of any rule of conduct may result in more serious disciplinary consequences.

(d) Parole Rule Violations. It is a violation to knowingly violate, attempt to violate, or help someone else violate any of the following:

(1) Abscond--leaving a home placement or failing to return from an authorized leave without permission of his/her primary service worker and the youth's whereabouts are unknown to his/her primary service worker.

(2) Escape--leaving a high or medium restriction residential placement without permission or failing to return from an authorized leave.

(3) Failure to Comply with Sex Offender Conditions of Parole--intentionally and knowingly failing to comply with one of the following conditions of parole present in his/her Sex Offender Conditions of Parole addendum:

(A) not having unsupervised contact with children under the age specified by the conditions of parole;

(B) not babysitting or participating in any activity where the youth is responsible for supervising or disciplining children under the age specified by the conditions of parole; or

(C) not initiating physical contact or touching of any kind with a child, victim, or potential victim.

(4) Possession of a Weapon--possessing a weapon or item(s) which has been made or adapted for use as a weapon.

(5) Use of Unauthorized Substances--using an unauthorized substance or intoxicant including controlled substances or intoxicants (including alcohol and tobacco if youth is underage), medications not prescribed for the juvenile by authorized medical or dental staff, or similar intoxicants.

(6) Refusing a Drug Screen--refusing to take a drug screen when requested to do so by staff or tampering with or contaminating the urine sample provided for a drug screen.

(7) Repeated Non-Compliance with a Written Reasonable Request of Staff--failing on two or more occasions to comply with a specific condition of release under supervision and/or a specific written reasonable request of staff. If the expectation is daily or weekly, the two failures to comply must be within a 30-day period. If the expectation is monthly, the two failures to comply must be within a 90-day period.

(8) Tampering with Monitoring Equipment--a youth intentionally and knowingly tampers with monitoring equipment assigned to any youth.

(9) Violation of any law--violating a federal or state law or municipal ordinance.

(e) Possible Consequences.

(1) A parole rule violation may result in a Level I Hearing or a Level III Hearing conducted in accordance with §95.51 or §95.57 of this title, respectively. Parole officers are encouraged to be creative in determining a consequence appropriate to address and correct the youth's behavior. All assigned consequences should be related to the misconduct when possible.

(2) Consequences through a Level III Hearing for a youth on parole include but are not limited to:

(A) Verbal Reprimand--conference with a youth including a verbal reprimand drawing attention to the misbehavior and serving as a warning that continued misbehavior could result in more severe consequences. A verbal reprimand may not be considered as a less severe disciplinary consequence for the purpose of parole revocation.

(B) Curfew Restriction--an immediate change in existing curfew requirements outlined in the youth's Conditions of Parole.

(C) Community Service Hours--disciplinary assignment of a specific number of hours the youth is to perform community service in addition to the hours assigned when the youth was placed on parole. In no event may more than 20 community service hours be assigned through a Level III Hearing.

(D) Increased Level of Surveillance--an assigned increase in the number of primary contacts between the youth and parole officer in order to increase the youth's accountability.

(E) Electronic Tracking--assignment to a system whereby a youth's movement and location can be tracked electronically.

(F) Intensive Surveillance Supervision--assignment to an intensive surveillance supervision program designed to restrict the youth's access to the community by establishing a stricter curfew and increased supervision by the parole officer.

(G) Writing Assignment--an assignment designed for the youth to address the misbehavior and identify appropriate behavior in similar situations.

(3) Consequences through a Level I Hearing for a youth on parole, including youth assigned to a residential placement as a home substitute, include:

(A) Parole revocation and placement in any high restriction program operated by or under contract with TYC; and

(B) Assignment of a length of stay consistent with §85.25 of this title.

§95.17. Redirect Program.

(a) Purpose. The Redirect program functions as a means for delivering intensive interventions in a structured environment for youth who have engaged in certain serious rule violations. This rule sets forth eligibility criteria, program completion requirements, and services to be provided to youth in the program.

(b) Applicability. This rule applies only to high restriction facilities operated by the Texas Youth Commission.

(c) Explanation of Terms Used.

(1) Admission, Review, and Dismissal (ARD) Committee--a committee that makes decisions on educational matters relating to special education-eligible youth.

(2) Behavior Intervention Plan--a written plan developed as a result of a functional behavioral assessment to address specific behavioral concerns that are impeding a youth's learning or the learning of others. The plan is part of a youth's individualized education program and includes positive behavioral interventions and supports and other strategies to address the behavior.

(3) Functional Behavioral Assessment--a process for observing and collecting data on specific behaviors that are impeding a youth's progress and determining the function the behavior plays for a youth (e.g., seeking attention, peer acceptance, avoidance, etc.).

(4) Individualized Education Program (IEP)--the program of special education and related services developed by a youth's ARD committee.

(5) Manifestation Determination Review--a review conducted by a youth's ARD committee when a decision has been made to change a special education-eligible youth's school placement due to a violation of the code of conduct. The committee determines whether a youth's conduct is a manifestation of the youth's disability and whether the youth's IEP was fully implemented.

(6) Multi-Disciplinary Team--a team which assesses youth progress through the steps of the Redirect program. At a minimum, the team must include representatives from the following departments: psychology, case management, education, and dorm supervision.

(d) Program Eligibility. A youth who engages in one or more of the following rule violations as defined in §95.3 of this title meets criteria for placement in the Redirect program:

(1) assault or fighting resulting in bodily injury;

(2) assault--unauthorized physical contact with staff (no injury);

(3) escape or attempted escape;

(4) vandalism (major rule violation only);

(5) sexual misconduct (excluding kissing);

(6) possessing or threatening others with a weapon or item which could be used as a weapon;

(7) chunking bodily fluids; or

(8) tampering with safety equipment.

(e) Request to Pursue Placement in Redirect Program. The facility administrator or designee may approve a request to pursue placement of a youth in the Redirect program only when it is determined that:

(1) the youth poses a continuing risk for the admitting behavior(s);

(2) less restrictive methods of documented intervention have been attempted when appropriate;

(3) the mental status of the youth has been assessed by a psychologist and there are no therapeutic contraindications for admission to the Redirect program; and

(4) there are no additional considerations concerning special education services which would make the youth ineligible for placement in the Redirect program, as described in subsection (f) of this section.

(f) Additional Considerations for Youth Receiving Special Education Services.

(1) Except as noted in paragraph (2) of this subsection, if the youth is receiving special education services, a manifestation determination review must be held to determine if the youth's conduct was a direct result of the failure to implement the youth's IEP, and if the conduct was caused by or had a direct and substantial relationship to the youth's disability.

(A) If the determination is that there was a failure to implement the youth's IEP, the youth may not be placed in the Redirect program.

(B) If the determination is that the conduct was caused by or had a direct and substantial relationship to the youth's disability, the youth may not be placed in the Redirect program unless the youth's parent/guardian consents to such placement as part of the youth's behavior intervention plan.

(2) A manifestation determination review is not required if the rule violation includes possession of a weapon or the infliction of serious bodily injury upon another person. In such cases, the youth may be placed in the Redirect program if all other eligibility and due process requirements in this policy are met.

(A) For purposes of paragraph (2) of this subsection only, weapon means a weapon, device, instrument, material, or substance, animate or inanimate, that is used for, or is readily capable of, causing death or serious bodily injury, not including a pocket knife with a blade of less than 2 1/2 inches in length.

(B) For purposes of paragraph (2) of this subsection only, serious bodily injury means bodily injury which involves:

(i) a substantial risk of death;

(ii) extreme physical pain;

(iii) protracted and obvious disfigurement; or

(iv) protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

(g) Admission Process. A Level II due process hearing must be held in accordance with §95.55 of this title. If there is a finding of true with no extenuating circumstances that the youth committed a rule violation listed in subsection (d) of this section, the youth may be admitted to the Redirect program.

(h) Program Requirements.

(1) The Redirect program is administered in a special unit designated for such purpose. If the Redirect program is administered in a designated location within the security unit, the doors will remain unlocked except during sleeping hours or emergencies.

(2) A youth's placement in the Redirect program shall not exceed 42 calendar days.

(3) At least 5 1/2 hours of education services will be provided on scheduled academic days.

(4) If a youth is currently receiving special education services, staff must ensure that the youth continues to receive educational services that will enable the youth to meet the goals of the youth's IEP.

(5) An individual plan must be developed for each youth. The plan must be written in a language clearly understood by the youth. The plan must:

(A) address the specific target behavior or cluster of behaviors that led to admission to the Redirect program, taking into consideration the psychologist's recommendations to address the motivation for the behavior;

(B) involve strategies for intervention and prevention of the target behavior through skills development;

(C) include a component which addresses transition to the general campus population; and

(D) provide clearly written objectives for release from the Redirect program.

(6) Staff must explain the individual plan to the youth. Youth will be provided an opportunity to sign the plan in acknowledgment.

(7) The individual plan and youth's progress with regard to target behaviors and skills development is reviewed and evaluated at least once every seven days by the multi-disciplinary team.

(8) Youth shall be gradually reintegrated into campus programming as soon as he/she demonstrates comprehension of the goals established in the treatment plan.

(9) Youth who are placed in the Redirect program are afforded living conditions and privileges approximating those available to the general campus population.

(10) Youth will receive a minimum of 30 minutes of counseling per day with the assigned case manager or designee.

(11) Youth will be provided with at least one hour of large muscle exercise seven days per week.

(i) Temporary Removal from the Redirect Program. Youth may be referred to the security program while currently assigned to the Redirect program if the youth meets criteria as set forth in §97.40 of this title. Any time spent in the security program is counted toward the 42-day maximum in the Redirect program.

(j) Criteria for Release from Redirect Program. A youth shall be released from the Redirect program and returned to his/her assigned dorm upon the earliest of the following events:

(1) a determination by the multi-disciplinary team that the youth has met goals set forth in his/her individual plan; or

(2) a determination by the superintendent or designee that the program has failed to be implemented as designed for reasons other than non-compliance of the youth; or

(3) a decision by the superintendent or designee to return the youth to his/her assigned dorm or transfer to an alternative placement based on:

(A) population concerns in the Redirect program; or

(B) a recommendation by a mental health professional due to the youth's mental health condition; or

(C) other administrative concerns.

(4) a decision by the receiving superintendent or designee not to continue the Redirect program after an administrative transfer of the youth to another high restriction facility while assigned to the Redirect program; or

(5) the youth has completed 42 calendar days in the program.

(k) Right to Appeal. The youth shall be notified in writing of his/her right to appeal placement in the Redirect program in accordance with §93.53 of this title. The pendency of an appeal shall not preclude implementation of the decision.

(l) Family Notification. In accordance with §87.5 of this title, a youth's parents or guardian shall be notified within 24 hours after the due process hearing of the youth's admission to the Redirect program.

§95.20. Cooling Off Period for Youth Out of Control.

(a) Purpose. The purpose of this rule is to provide for the temporary segregation of a youth as a "cooling off" time when he or she appears to have temporarily lost control of behavior. The segregation is intended to allow the youth time to regain self-control. Segregation addressed here is generally to a location near the activity in process.

(b) Applicability. This rule does not apply to disciplinary restrictions as consequences. For restrictions for a disciplinary purpose rather than a control purpose, see §95.3 of this title.

(c) General Restrictions.

(1) Either staff or the youth but not the youth's group may request the youth's removal from an activity.

(2) The youth may be removed to any room in the same building away from regular activity. Doors are not locked.

(3) The reason for any segregation will be explained to the youth and he will be given the opportunity to explain his behavior.

(4) The youth will be joined by staff every 15 minutes for counseling during the first hour.

(5) The youth may assist in determining his readiness to resume regular activity.

(d) Institutions. Segregation shall be limited to 55 minutes. If youth are unable to regain control after 55 minutes, staff should take other measures.

(e) Halfway Houses.

(1) Segregation shall be limited to two hours. If youth are unable to regain control after two hours, staff should take other measures.

(2) Youth will not be segregated to their bedrooms.

(3) Rooms shall not be locked.

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 May 1, 2009.

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Cheryln K. Townsend
Executive Commissioner
Texas Youth Commission
Earliest possible date of adoption: June 14, 2009
For further information, please call: (512) 424-6014

SUBCHAPTER B. DUE PROCESS HEARINGS PROCEDURES

37 TAC §§95.50, 95.51, 95.55, 95.57, 95.59, 95.61, 95.71

The new rules are proposed under Human Resources Code §61.075, which provides the commission with the authority to order a committed child's confinement under conditions it believes best designed for the child's welfare and the interests of the public. The new rules are also proposed under §61.076, which provides the commission with the responsibility to provide any medical or psychiatric treatment that is necessary.

The proposed rules implement Human Resources Code §61.034.

§95.50. Definitions--Due Process Hearings.

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

(1) Administrative Law Judge--an attorney employed by Texas Youth Commission (TYC) who is responsible for determining if there is a preponderance of evidence presented at a Level I hearing to prove the youth committed an alleged rule violation and if the requested dispositions will be imposed.

(2) Advocate--a TYC employee, contract employee, or enrolled volunteer assigned to represent the youth at a Level II, III, or IV hearing who is trained by TYC to serve as an advocate.

(3) Community Detention--temporary placement of a youth in a community detention facility pending a Level I or II due process hearing.

(4) Community Detention Facilities--local detention facilities designed for either juveniles or adults, including jails.

(5) Detention Hearing--the court hearing required by the Texas Family Code to determine whether conditions exist to justify the detention of a juvenile.

(6) Extenuating Circumstances--facts that do not rise to the level of a legal defense but that do provide a reasonable explanation for the youth's behavior. Examples of such facts include, but are not limited to, acts in which:

(A) the only property involved in the offense was of minimal value and the youth returned it undamaged to its owner;

(B) the only bodily injury intended or inflicted by the youth consisted of brief of minor discomfort;

(C) the youth's conduct was an impulsive response to perceived provocation and posed no threat to persons or property; or

(D) the youth was persuaded to participate in the offense by a parent or other authority figure.

(7) Hearing Manager--an impartial person who will determine if there is a preponderance of evidence presented at a Level II hearing to prove the youth committed an alleged rule violation and if the requested dispositions will be imposed.

(8) High Restriction Facility--has the meaning assigned under §85.27 of this title.

(9) Institution Detention--temporary placement of youth in a high-restriction facility security unit as described in §85.59 and §95.61 of this title.

(10) Institutional Status--the status assigned to all youth who have not yet been released on parole or who have had their parole status revoked through a Level I due process hearing. Youth may be on institutional status while assigned to high or medium restriction placements.

(11) Level I Hearing--an administrative due process hearing used within TYC to determine if a youth's parole will be revoked.

(12) Level II Hearing--an administrative due process hearing used within TYC to determine if major disciplinary consequences will be imposed, contraband money will be deposited in the student benefit fund, whether a youth will be admitted to or extended in a psychiatric stabilization unit, and whether to move a youth to a higher restriction level for non-disciplinary reasons.

(13) Level III Hearing--an administrative due process hearing used within TYC to determine whether a youth will be admitted to or extended in the security unit, and whether minor disciplinary consequences will be issued to a youth in a medium restriction program or on parole.

(14) Level IV Hearing (Detention Review Hearing)--an administrative due process hearing used within TYC, held in lieu of a detention hearing for the same purpose.

(15) Non-Disciplinary Reasons--reasons not related to a violation of rules that transfer to a higher restriction assignment is necessary, including but not limited to:

(A) the youth has treatment, educational, medical, or other needs that cannot be met at the current placement; or

(B) there is no longer a home placement available for the youth.

(16) Parole Status--the status assigned to all youth who have been released on parole. Youth may be on parole status while assigned to a medium restriction placement or an approved home or home substitute.

(17) Preponderance of the evidence--a standard of proof meaning the greater weight and degree of credible evidence admitted at the hearing, e.g., whether the credible evidence makes it more likely than not that a particular proposition is true.

(18) Staff representative--the person assigned to assemble and present the allegation(s) and evidence at a hearing.

(19) Referring Staff--the TYC employee or contract employee who requests a youth's detention.

§95.51. Level I Hearing Procedure.

(a) Purpose. The purpose of this rule is to establish a due process procedure to be followed when seeking to revoke the parole status of a youth as a disciplinary consequence for behavior that presents an unacceptable risk to the safety of persons and property. Parole revocation is considered a major consequence.

(b) Definitions. Definitions pertaining to this rule are under §95.50 of this title.

(c) General Provisions.

(1) A Level I hearing is required in order to revoke a youth's parole status. Parole may be revoked if it is found that a youth has committed a law violation or a parole rule violation as established in §95.4 of this title and:

(A) revocation is determined to be in the best interest of the youth or community; and/or

(B) the youth is in need of further rehabilitation at a Texas Youth Commission (TYC) or contract placement.

(2) The following information will be considered to determine if parole revocation is appropriate:

(A) the severity of the offense(s) found true at the hearing;

(B) any behavioral or adjustment issues while on parole and the steps taken by the staff representative to address those issues;

(C) whether or not the youth's conduct while on parole presents a threat to persons or property;

(D) reasons the youth is in need of services offered at a TYC or contract placement;

(E) whether appropriate community-based alternatives have been exhausted;

(F) any impact statement(s) written by the victim(s);

(G) any participation in constructive activity; and

(H) any extenuating circumstances.

(3) A Level I hearing on any allegation(s) shall be scheduled as soon as possible but no later than seven days from the date of the alleged offense, excluding weekends and holidays, except when:

(A) staff documents that it was impossible, impractical, or inappropriate to have scheduled the hearing sooner; or

(B) local authorities make a written request that TYC defer an allegation to their jurisdiction for prosecution; or

(C) unless the pending criminal charge(s) concern a first degree felony offense, TYC staff elects to defer a Level I hearing on all allegations of misconduct due to criminal allegation(s) pending or filed as adult charges.

(4) TYC may re-issue a directive and request a Level I hearing concerning new or previously deferred allegation(s) if later circumstances make such action appropriate.

(5) The hearing shall be conducted by an administrative law judge appointed by the TYC hearings section chief. The administrative law judge shall be impartial.

(6) The hearing shall be conducted in two parts: fact-finding and disposition.

(A) The purpose of the fact-finding shall be to establish whether there is a preponderance of evidence to prove the youth engaged in the alleged misconduct.

(B) The purpose of the disposition shall be to determine whether revocation of parole is appropriate under the circumstances.

(7) A youth whose parole is revoked will be assigned a minimum length of stay in accordance with §85.25 of this title.

(8) The person requesting a hearing shall appoint a staff representative to appear at the hearing and present the reasons for the proposed action. The staff representative shall also be responsible for making relevant information available to all parties to the hearing.

(9) The youth shall be assisted by legal counsel at the hearing. The agency will arrange counsel for indigent youth.

(10) If the youth's parole is not revoked, lesser disciplinary consequences may be imposed for any rule violation(s) proved at the hearing.

(11) If the youth is on parole from another state and is being supervised by TYC under agreement with the other state, a parole revocation hearing may be held by TYC and the youth may be returned to the sending state. Such a hearing is coordinated by the TYC interstate compact administrator and general counsel.

(12) If a TYC parolee commits an offense in another state, the return of such youth is coordinated by the TYC interstate compact administrator and the general counsel. A parole revocation hearing is coordinated by and held at the request of the assigned staff representative.

(13) The hearing shall be held in the community where the alleged rule violation occurred unless the administrative law judge directs that it be held in another locale.

(14) All necessary parties shall be present at the hearing site unless it is conducted pursuant to §95.53 of this title.

(15) The staff representative shall provide the youth with written notice of the date and time of the hearing not less than three (3) working days before the scheduled date. This notice shall include:

(A) the reason(s) for the hearing;

(B) the proposed action to be taken; and

(C) the youth's rights in connection with the hearing.

(16) If the youth is under 18 years of age, the staff representative shall make reasonable efforts to inform the youth's parent(s) of the date, time, place of, and reasons for the hearing not less than three (3) working days prior to the scheduled hearing date. If the youth is 18 years of age or older, such notice shall be provided only with the youth's authorization to release information.

(17) The staff representative shall provide counsel for the youth with written notice of the date, time, place of, and reasons for the hearing not less than three (3) working days prior to the scheduled hearing date. The notice to counsel shall also include:

(A) the name, address, and telephone number of the staff representative and the administrative law judge;

(B) a list of all witnesses the staff representative intends to call;

(C) an indication of the expected testimony of each witness;

(D) copies of any statements made by the youth;

(E) copies of any statements, affidavits, reports, or other documentation relied upon as grounds for the proposed action; and

(F) copies of any reports or summaries which will be relied upon at disposition.

(18) The staff representative shall provide counsel for the youth with reasonable access to all information held by TYC concerning the youth. Counsel for the youth will respect the confidential nature of such information and will comply with reasonable requests to withhold sensitive information from the youth or the youth's family.

(19) As soon as possible following receipt of the notice of hearing, and no later than the commencement of the hearing, counsel shall inform the staff representative of any witnesses he/she wishes to call on behalf of the youth. The staff representative will, if necessary and possible, assist counsel in contacting those witnesses and securing their attendance at the hearing.

(20) The staff representative will ensure that all witnesses are given written notice of the time, date, and location of the hearing at least three days in advance of the hearing.

(21) At the staff representative's request, the TYC chief administrative law judge may sign and issue a subpoena to compel the attendance of a necessary witness at the hearing or the production of books, records, papers, or other objects. A person who testifies falsely, fails to appear when subpoenaed, or fails or refuses to produce material under the subpoena is subject to the same orders and penalties to which a person taking those actions before a court is subject.

(22) The administrative law judge may, upon his/her own motion or the good cause motion of any party, recess or continue the hearing for such periods of time as may be necessary to ensure an informed fact finding.

(23) Prior to the hearing, the administrative law judge may review copies of any documentation previously provided to counsel except for those documents which relate solely to dispositional criteria. The administrative law judge shall review such information only if the hearing proceeds to disposition.

(24) A victim who appears as a witness should be provided a waiting area which eliminates or minimizes contact between the victim and the youth, the youth's family, or witnesses on behalf of the youth.

(25) To protect the confidential nature of the hearing, persons other than the youth, counsel for the youth, the staff representative, and the youth's parent(s) may be excluded from the hearing room at the discretion of the administrative law judge, however:

(A) observers may be permitted with the consent of the youth;

(B) any person except the youth's counsel or staff representative may be excluded from the hearing room if their presence causes undue disruption or delay of the hearing. The reason(s) for the youth's exclusion are stated on the record.

(26) The hearing shall be recorded and the administrative law judge shall retain copies of all documents admitted into evidence. Physical evidence may be retained at the discretion of the administrative law judge; if not retained, an adequate description of the item(s) shall be entered in the record by oral stipulation.

(27) Factual issues not in dispute may be stipulated to by the staff representative and counsel for the youth. Such stipulations shall be made on the record of the hearing.

(28) A youth accused of misconduct shall be given the opportunity to respond "true" or "not true" to each allegation of such conduct prior to any evidence being heard on such allegations.

(A) The youth shall have a right to respond "not true" to any such allegation and require that proof of the allegation be presented at the hearing.

(B) A response of "true" to any such allegation shall be sufficient to establish each and every element necessary to proof of that allegation without the presentation of any other evidence.

(29) The administrative law judge may administer an oath to all witnesses to testify truthfully.

(30) With the exception of the youth and the staff representative, any person designated as a witness may be excluded from the hearing room during the testimony of other witnesses and may be instructed to refrain from discussing his/her testimony with anyone until all the witnesses have been dismissed.

(31) The administrative law judge may question each witness at his/her discretion. Counsel for the youth and the staff representative shall be given an opportunity to question each witness.

(32) The administrative law judge may permit a witness to testify outside the presence of the youth if such appears reasonable and necessary to secure the testimony of the witness. If the youth is excluded from the hearing room during testimony, counsel for the youth shall be present during the testimony and shall have the opportunity to review the testimony with the youth before questioning the witness.

(33) The youth shall not be called as a witness unless, after consulting with counsel, the youth waives his/her right to remain silent on the record.

(A) The youth's failure to testify shall not create a presumption against him/her.

(B) A youth who waives his/her right to remain silent may only be questioned concerning those issues addressed by the youth's testimony.

(34) All factual issues shall be determined by a preponderance of the evidence.

(35) The administrative law judge shall determine the admissibility of evidence. Irrelevant, immaterial, or unduly repetitious evidence will be excluded.

(36) The rules of evidence will generally be applicable to the fact-finding portion of the hearing. Unless specifically precluded by statute, evidence not admissible under those rules may be admitted if it is of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs. Criminal exclusionary rules are not applicable in TYC hearings.

(37) A judgment from a court indicating a youth has pled guilty or true to an offense and has not received deferred adjudication is sufficient to prove the youth committed the offense.

(38) Copies of due process hearing documents need not be certified if such document(s) are part of the youth's record(s) or have been received through Interstate Compact. Such documents are considered reliable and admissible for all purposes.

(39) Accomplice testimony is sufficient to prove an allegation if it is corroborated by other evidence tending to connect the youth with the alleged violation. The corroboration is not sufficient if it merely shows the commission of the violation alleged. If two accomplices testify, the testimony of each can serve to corroborate the other.

(40) Legally recognized privileges of relationships will be given effect.

(41) Evidence otherwise admissible may be received in written form if so doing will expedite the hearing and will not significantly prejudice the rights or interests of the youth. This includes but is not limited to use of affidavits admitted to show the following:

(A) ownership and lack of consent;

(B) identity of signature on instrument and lack of consent of complaining witness in a forgery case;

(C) lack of permission to leave designated placement;

(D) chain of custody;

(E) identity of substance found in a urine sample;

(F) identity of a controlled substance found in possession of a youth.

(42) A youth's written statement concerning his/her possible involvement in illegal activities is admissible if it is signed by the youth and accompanied by evidence indicating that the youth made the statement voluntarily after being advised of:

(A) the right to remain silent;

(B) the possible consequences of giving the statement;

(C) the right to consult with an attorney prior to giving the statement; and

(D) the right to have an attorney provided if the youth is indigent.

(43) A youth's non-recorded oral statement is admissible if it:

(A) relates facts which are found to be true and which tend to establish the youth's guilt; or

(B) was res gestae of the conduct that is the subject of the hearing or of the arrest; or

(C) even if it does not meet subparagraph (A) or (B) of this paragraph, the statement does not stem from law enforcement or agency staff questioning of youth; or

(D) even if the statement does stem from law enforcement or agency staff questioning, the statement is voluntary and bears on the youth's credibility as a witness.

(44) A youth's recorded oral statement (tape recorded, videotaped, or otherwise electronically recorded) concerning his/her possible involvement in illegal activities is admissible if it is accompanied by evidence on the recording that it was given after the youth was advised of the rights in paragraph (38) of this subsection. All voices on the recording must be identified and the recording must be accurate and unaltered. A transcript of the recordings is not sufficient.

(45) A youth's admissible out of hearing/court statement admitting he/she committed an offense is sufficient to prove the offense only if it is corroborated by other evidence that the offense was committed.

(46) The administrative law judge shall rule immediately on any motions or objections made in the course of the hearing. All such motions, objections, and rulings shall be included in the administrative law judge's written report.

(47) Following the presentation of all evidence pertaining to the factual issues raised at the hearing, the administrative law judge shall announce his/her findings as to those issues.

(A) The administrative law judge may find that the evidence suffices to prove conduct other than that originally alleged and enter the appropriate finding in the record if the original allegation gave sufficient notice of the conduct proved.

(B) Irrespective of the evidence, the administrative law judge may not find a criminal offense more serious than that originally alleged unless the original allegation has been amended on the record and after notice to counsel for the youth.

(C) If the administrative law judge finds any allegation to be true, the hearing shall proceed to disposition; if not, the hearing shall be adjourned with no change in the youth's status.

(48) The administrative law judge may receive additional evidence for purposes of disposition. The evidence received at disposition may be in the form of testimony from witnesses submitted during fact-finding or at disposition, as well as written reports offered by youth, staff, professionals, counselors, or consultants. Relevant documents contained in the youth's record may be admitted and considered. All written documents offered shall be provided to the parties three days prior to the hearing unless otherwise waived. Hearsay evidence is admissible in disposition.

(49) Parole will be revoked if the administrative law judge determines that revocation is in the youth's and/or the community's best interest and/or the youth is in need of further rehabilitation at a TYC facility.

(50) If parole is revoked, the youth will be assigned a minimum length of stay in accordance with §85.25 of this title, based on the most serious offense found true at the hearing. Such minimum length of stay may be reduced in accordance with §85.25 of this title.

(51) If, despite a finding of extenuating circumstances relevant to the proven offense, the administrative law judge finds revocation is appropriate under the circumstances, the youth's parole will be revoked but the assigned minimum length of stay will be reduced.

(52) Following announcement of the decision as to disposition, the administrative law judge shall inform the youth of the right to appeal any or all findings and decision made at the hearing.

(53) Immediately following the close of the hearing, the administrative law judge shall give the youth a copy of the hearing report form.

(54) A notice of appeal shall not suspend implementation of the administrative law judge's decision(s), which shall be effective when announced at the hearing.

(55) As soon as possible following the conclusion of the hearing, the administrative law judge shall prepare a written report which shall include:

(A) a summary of the evidence presented;

(B) findings of fact, including the reliability of the evidence and the credibility of the witnesses, and the reasons for those findings;

(C) conclusions of law;

(D) an explanation of the dispositional decision; and

(E) rulings made on motions and objections and the reasons therefore.

(56) Copies of the administrative law judge's report shall be provided to counsel for the youth and the staff representative.

(57) An edited copy of the administrative law judge's report is given to the youth.

§95.55. Level II Hearing Procedure.

(a) Purpose. The purpose of this rule is to establish a procedure to be followed when the second highest level of due process is afforded a youth. Rule violations proven through a Level II Hearing will be part of the youth's disciplinary record.

(b) Definitions. Definitions pertaining to this rule are under §95.50 of this title.

(c) Applicability. The Level II hearing procedure is appropriate due process in the following instances:

(1) imposing a major disciplinary consequence in accordance with §95.3 of this title;

(2) placing a youth in the Redirect program in accordance with §95.17 of this title;

(3) placement of a youth on parole assigned to a home or home substitute in a medium restriction facility for non-disciplinary reasons;

(4) placement of a youth whose initial assignment was to a medium restriction facility in a high restriction facility for non-disciplinary reasons;

(5) with a few exceptions in procedure as identified in §95.71 of this title:

(A) admission to the Corsicana Stabilization Unit; and

(B) extension of time to treat a psychiatric disorder in connection with a Corsicana Stabilization Unit placement (as appropriate); or

(6) deposit of contraband money into the student benefit fund found in possession of a youth while in a residential program.

(d) Criteria.

(1) To impose a major consequence, place a youth in the Redirect program, or place contraband money in the student benefit fund, the hearing manager must find:

(A) the youth committed an eligible rule violation; and

(B) there are no extenuating circumstances.

(2) To transfer a youth to a higher restriction level for non-disciplinary reasons; the hearing manager must find there are no less restrictive placements appropriate and available for the youth.

(3) For criteria for admission to or extension in the Corsicana Stabilization Unit, see §87.67 of this title.

(e) Procedure.

(1) When a youth in a residential facility is alleged to have committed a major rule violation or a minor rule violation requiring a security referral, an investigation into that violation must be started within 24 hours of the alleged offense and completed within 24 hours of the time started. A decision on whether or not to pursue a Level II Hearing must be made within 24 hours of the completion of the investigation. Any delay in these timelines must be justified with documentation of circumstances that made it impossible, impractical, or inappropriate to meet them. The investigation must be conducted by a staff member other than the one reporting the alleged violation.

(2) The appropriate staff person shall request permission to schedule a hearing from the facility administrator, parole supervisor, quality assurance administrator, or their designees.

(3) For hearings regarding rule violations or contraband money, the hearing shall be conducted as soon as practical but not later

than seven days, excluding weekends and holidays, after the alleged violation was committed or the money was found. A delay of more than seven days in holding the hearing must be justified by documentation of circumstances which made it impossible, impractical, or inappropriate to schedule the hearing earlier.

(4) For hearings regarding a non-disciplinary transfer, the youth may waive the hearing in writing and agree to the transfer. If the youth does not waive the hearing, the hearing must be held prior to the transfer. If good cause compels a pre-hearing transfer, the hearing shall be held within three calendar days after the transfer.

(5) If the youth is admitted to a security unit pending a Level II hearing, the hearing shall be conducted within five calendar days from the date of admission to detention. A delay of more than five days in holding the hearing must be justified by documentation of circumstances which made it impossible, impractical, or inappropriate to schedule the hearing earlier.

(6) Failure to document circumstances making it impossible, impractical, or inappropriate to timely investigate and hold the hearing may result in a dismissal or reversal of the decision of the hearing manager.

(7) The appropriate facility administrator, parole supervisor, quality assurance administrator, or their designees will appoint a hearing manager and staff representative.

(8) The hearing manager shall be a Texas Youth Commission (TYC) staff member who is trained to function as a hearing manager.

(A) The hearing manager shall not be a person who:

(i) witnessed any part of the alleged violation of which the youth is accused; or

(ii) made a decision to place the youth in the security unit or in a detention program pending the hearing.

(B) If the youth is currently assigned to an institution, the hearing manager shall be someone not directly responsible for supervising the youth.

(C) If the youth is currently assigned to a halfway house, the hearing manager shall not be a member of the halfway house staff.

(D) If the youth is currently assigned to a contract program, the hearing manager shall not be the TYC quality assurance specialist assigned to that youth.

(E) If the youth is currently assigned to his/her home, the hearing manager shall not be the parole officer assigned to the youth's case or the quality assurance specialist who works directly with the youth's supervising officer.

(9) The staff representative shall be responsible for assembling all evidence and giving all notices required for the hearing as well as presenting all evidence at the hearing.

(10) The youth shall be given written notice of his/her rights not less than 24 hours prior to the hearing. The youth's rights are:

(A) the right to remain silent;

(B) the right to be assisted by an advocate at the hearing;

(C) the right to confront and cross-examine adverse witnesses who testify at the hearing;

(D) the right to contest adverse evidence admitted at the hearing;

(E) the right to call readily available witnesses and present readily available evidence on his/her own behalf at the hearing; and

(F) the right to appeal the results of the hearing. The youth's right to appeal cannot be waived.

(11) The youth shall be assisted by a TYC employee, contract employee, or volunteer who has been trained to serve as an advocate. The youth shall be given the opportunity to choose an advocate from those trained. The youth's choice shall be honored unless there is a showing of unavailability for any reason. If the youth makes no choice, or the first choice is unavailable for any reason, the hearing manager shall appoint the advocate. In cases where the youth is not proficient in the English language, the appointed advocate shall be proficient in English as well as the primary language of the youth or an interpreter shall be used.

(12) The youth and the youth's advocate shall be given written notice of the reasons for calling the hearing, the proposed action to be taken, and the evidence to be relied upon not less than 24 hours prior to the hearing. After receipt of the written notice and consultation with the advocate, the youth may waive the 24-hour notice period by agreeing, in writing, to an earlier hearing time.

(13) All youth in TYC facilities and secure contract placements shall be given the hearing packet (all written materials relied upon and a list of witnesses) at least 24 hours in advance of the hearing. The paperwork may be taken away from the youth if the youth is misusing the papers in any way.

(14) If the youth is less than 18 years of age, reasonable efforts shall be made to inform the youth's parent(s) of the time and place of the hearing not less than 24 hours prior to the hearing. If the youth is 18 years of age or older, such notice shall be provided only with the youth's authorization to release information.

(15) Hearings to impose major consequences, to place a youth in the Redirect program, or to place contraband money in the student benefit fund shall consist of two parts: fact-finding and disposition, and shall be held where the youth resides unless the hearing manager determines that some other site is more appropriate. During the fact-finding portion of the hearing, only evidence concerning the alleged misconduct may be considered; the youth's prior behavior shall not be considered unless disposition is reached.

(16) Hearings regarding non-disciplinary transfers shall consist of fact finding to determine if the transfer is necessary because there are no less restrictive placement options appropriate and available for the youth.

(17) The hearing shall be recorded and the recording shall be the official record of the hearing. The recording and the hearing packet shall be preserved for six months following the hearing.

(18) The youth shall be present during the hearing unless the youth waives his/her presence or his/her behavior prevents the hearing from proceeding in an orderly and expeditious fashion.

(A) A voluntary waiver of the youth's presence shall be in writing and signed by the youth and his/her advocate. If the youth does not sign the waiver for any reason, his/her presence is not waived.

(B) If the youth waives his/her presence, the hearing may be conducted by teleconference.

(C) If a youth is excluded for behavioral reasons, or to secure the testimony of a witness, those reasons shall be documented in

the hearing record. The advocate shall be present during the testimony and shall have the opportunity to question the witness.

(D) A true plea cannot be entered on behalf of a youth who has waived his/her presence at the hearing.

(19) A victim who appears as a witness should be provided a waiting area where he/she is not likely to come in contact with the youth except during the hearing.

(20) Witnesses will take an oath prior to testifying. Witnesses may testify by telephone or videoconference if in-person testimony is impractical or unfeasible. If testimony is provided by phone, persons required to be present at the hearing must be able to simultaneously hear the testimony.

(21) The hearing manager, staff representative, and advocate may question each witness in turn. The staff representative and advocate may offer summation statements.

(22) To protect the confidential nature of the hearing, persons other than the youth, the youth's advocate, staff representative, and the youth's parent(s) may be excluded from the hearing room at the discretion of the hearing manager; however, any person except the staff representative or the youth's advocate may be excluded from the hearing room if his/her presence causes undue disruption or delay of the hearing. The reason(s) for the exclusions are stated on the record.

(23) With the exception of the youth or staff representative, any person designated as a witness may be excluded from the hearing room during the testimony of other witnesses and may be instructed to refrain from discussing his/her testimony with anyone until all the witnesses have been dismissed.

(24) The hearing manager may permit a witness to testify outside the presence of the youth if such appears reasonable and necessary to secure the testimony of the witness. If the youth is excluded from the hearing room during testimony, the advocate for the youth shall be present during the testimony and shall have the opportunity to review the testimony with the youth before questioning the witness.

(25) The youth shall not be called as a witness unless, after consulting with the advocate, he/she waives his/her right to remain silent on the record. Neither the hearing manager nor the staff representative may question the youth unless he/she waives the right to remain silent.

(A) The youth's failure to testify shall not create a presumption against him/her.

(B) A youth who waives the right to remain silent may only be questioned concerning those issues addressed by his/her testimony.

(26) All credible evidence may be considered, irrespective of its form.

(27) The standard of proof for all disputed issues is a preponderance of the evidence.

(28) The hearing manager may recess or continue the hearing for such period(s) of time as may be necessary to insure an informed and accurate fact-finding or to secure evidence the hearing manger determines may be relevant.

(29) The hearing manager will announce his/her findings of fact.

(30) If there is a finding of true, the hearing manager shall proceed to disposition and provide the youth an opportunity to present extenuating circumstances, with the exception that extenuating circumstances are not applicable to admissions or extensions of stay in the Corsicana Stabilization Unit or to transfers for non-disciplinary reasons. If no extenuating circumstances are found, the hearing manager shall order the disposition recommended by the staff representative.

(A) A hearing manager's decision that a youth will be transferred is final subject to approval by the parole director or administrator of halfway houses, as appropriate.

(B) A hearing manager's decision that a youth will be issued a consequence to be served at the youth's current placement is final subject to an appeal by the youth.

(C) If extenuating circumstances are found incident to the rule violation(s) proved at a Level II hearing, the youth shall not be assigned the requested dispositions or any other major consequences. However, the true finding will remain in the youth's record and can be considered by the youth's treatment team or parole officer in determining appropriate actions to address the youth's behavior. If extenuating circumstances are found incident to a youth's possession of prohibited money, the hearing manager determines the appropriate way to dispose of the money.

(31) The hearing manager shall prepare a report of his/her findings, which includes grounds for the hearing, evidence relied upon, and the decision.

(32) The youth is informed of his/her right to appeal to the chief executive officer at the close of the hearing. The pendency of an appeal shall not preclude implementation of the hearing manager's dispositional decision.

(33) A copy of the hearing report is given to the youth immediately following the close of the hearing.

§95.57. Level III Hearing Procedure.

(a) Purpose. The purpose of this rule is to establish a hearing procedure as the appropriate informal due process necessary in certain situations.

(b) Applicability. The Level III hearing procedure is appropriate due process in the following instances:

(1) to determine admission or extension to the security program in accordance with §97.40 of this title;

(2) to determine minor disciplinary consequences for youth in medium restriction facilities in accordance with §95.3 of this title; and

(3) to determine minor disciplinary consequences for youth on parole in accordance with §95.4 of this title.

(c) Procedures.

(1) To initiate the Level III hearing, the youth will be notified orally of the time and date of the hearing, the alleged misconduct, and the recommended actions to be taken.

(2) The youth has the right and will be given the opportunity to speak on his/her behalf regarding alleged misconduct or the appropriateness of the recommended action.

(3) If the Level III hearing involves a decision for an extension in the security program beyond the initial 24 hours, the youth shall be appointed an advocate to assist the youth in presenting his/her position during the extension hearing.

(4) The hearing administrator may consider any reasonably reliable information in reaching a decision regarding the truth of the youth's alleged misconduct and the appropriateness of the requested action.

(5) If the hearing administrator has reasonable grounds to believe a violation occurred, the hearing administrator will indicate which rule violation was committed and the appropriate disciplinary consequence may be imposed.

(6) If there is a finding of extenuating circumstances, no disciplinary consequence shall be imposed, but the youth may be admitted to the security unit if criteria in §97.40 of this title are met.

(7) The youth may appeal the decision to the facility administrator or parole supervisor or their designees, as appropriate, on grounds that:

(A) he/she did not commit the violation as alleged; or

(B) the disciplinary measure imposed was inappropriate; or

(C) there were extenuating circumstances to the commission of the violation.

(8) If the disciplinary decision is determined to be inappropriate, it will be removed from the youth's behavioral record and the appeal authority may determine some form of equitable relief for a youth who has already completed a disciplinary measure and/or has been adversely affected.

§95.59. Detention for Youth with Pending Charges.

(a) Purpose. The purpose of this rule is to establish criteria and procedures for detaining youth in a Texas Youth Commission (TYC) security unit when criminal or delinquent charges are pending or filed or when awaiting a court hearing or trial.

(b) Definitions. Definitions pertaining to this rule are under §95.50 of this title.

(c) Applicability.

(1) This rule applies only to TYC youth on institutional status, regardless of assigned placement.

(2) This rule does not apply to TYC youth on parole status, regardless of assigned placement.

(d) General Provisions.

(1) A youth may be held in institution detention if a court hearing or trial has been requested in writing or has been scheduled or criminal or delinquent conduct charges are pending or have been filed and:

(A) suitable alternative placement within the facility is unavailable due to on-going behavior of the youth that creates disruption of the routine of the youth's current program; or

(B) the youth is likely to interfere with the judicial process, to include failing to appear; or

(C) the youth represents a danger to others; or

(D) the youth has escaped or attempted to escape, as defined in §95.3 of this title, or is likely to engage in any of the foregoing rule violations.

(2) Charges are considered to be pending if there is reliable information that the district attorney intends to request an indictment or to file with the court a petition or other charging instrument.

(3) Charges are considered to be filed when an indictment has been issued or when a petition or other charging instrument has been filed with the court.

(4) If the youth is awaiting a court hearing for early transfer to the Texas Department of Criminal Justice-Institutions Division, the court hearing is considered to be "requested in writing" when TYC makes a written request to the court for a hearing date.

(5) Youth shall not be placed in detention for the purpose of punishment.

(6) All standard security unit requirements and services as set forth in §97.40 of this title, unless otherwise noted herein, shall be observed while the youth is detained in the security unit.

(e) Procedure.

(1) Approval for Detention.

(A) The referring staff must obtain approval from the appropriate supervisor prior to placing a youth in institution detention.

(B) Arrangements are made for the immediate release of the youth and return to the appropriate placement if:

(i) approval for detention is not granted;

(ii) it is determined that charges will not be filed or will be dropped; or

(iii) it is determined that the court hearing or trial will be cancelled.

(C) If approval is granted for a youth not assigned to a high-restriction facility, the referring staff will obtain from the facility administrator or designee approval to place the youth in institution detention.

(2) Admission to Institution Detention.

(A) The referring staff is responsible for ensuring the following documentation or information is present at the time of admission to institution detention:

(i) documentation that charges are pending or filed or that a court hearing or trial is scheduled or has been requested in writing;

(ii) a written statement including the purpose of admission with supporting documentation (i.e., any incident reports or arrest reports and expected length of stay); and

(iii) the medical file, if available, or copies of pertinent medical records, as well as any medication the youth is taking (applies to youth not assigned to the high-restriction facility where detained).

(B) The designated admitting staff shall review the information presented to determine whether there are reasonable grounds to believe criteria for admission have been met as outlined in subsection (d)(1) of this section. As a result of this review, the youth may be admitted to institution detention for up to 72 hours.

(C) The director of security designee (who shall not serve as the referring or admitting staff) will review all admission decisions within one workday to determine if admission criteria have been met. If criteria are not met or policy or procedures are not followed, the youth will be released from the security unit.

(3) Timing of Hearing.

(A) If a youth is admitted to detention, a Level IV hearing (detention review hearing) must be held:

(i) no later than 72 hours after admission to institution detention or the next workday if the 72nd hour falls on a weekend or holiday; and

(ii) within ten workdays of the previous Level IV Hearing.

(B) If a Level IV Hearing is not timely held or is not properly waived, the youth shall be released to his/her assigned location.

(4) Decision Maker.

(A) The appropriate supervisor shall appoint a decision-maker.

(B) The decision-maker shall be impartial and shall not have been the person who requested or admitted the youth to institution detention or to community detention.

(C) The decision maker must be knowledgeable of the policies involved in the decision.

(5) Youth Representation and Waiver Rights.

(A) The youth has a right and shall be informed of his/her right to be represented by an advocate. An advocate is a TYC employee, contract employee, or volunteer trained to serve as an advocate.

(B) The youth may waive the Level IV hearing after being advised by his/her advocate. Such waiver must be in writing.

(C) When a subsequent Level IV Hearing is required by policy timelines, the youth must be given the opportunity to have that hearing or to waive it. If the youth chooses to waive the hearing after speaking to his/her advocate, a new waiver form must be completed.

(6) Hearing Process.

(A) The staff requesting detention must show cause to detain the youth pending the hearing. The advocate may present evidence as to why the youth should not be detained.

(B) The standard of proof for all disputed issues is reasonable grounds to believe.

(C) All credible evidence may be considered, irrespective of its form.

(D) The hearing shall be recorded and the recording shall be the official record of the hearing. Recordings shall be preserved for six months following the hearing.

(E) The decision maker shall base his/her decision on criteria for detention. If criteria are not met, the youth must be released to his/her assigned location.

(7) Appeal.

(A) The youth is notified in writing of his/her right to appeal.

(i) The appeal of the first Level IV Hearing will be to the facility administrator.

(ii) The appeal of the second Level IV Hearing will be to the executive commissioner pursuant to §93.53 of this title.

(iii) An automatic appeal to the executive commissioner will be filed on the third and subsequent Level IV Hearing, even if the youth waives the hearing. The staff requesting the detention will initiate the automatic appeal.

(B) The pendency of an appeal shall not preclude implementation of the decision that a youth be detained.

§95.61. Detention for Youth Pending Level I or II Hearing.

(a) Purpose. The purpose of this rule is to establish:

(1) criteria and procedures for detaining certain youth in a community detention facility (juvenile or adult) or in a Texas Youth Commission (TYC) security unit prior to a Level I or Level II due process hearing; and

(2) the expectations for interaction between TYC staff and community detention staff.

(b) Definitions. Definitions pertaining to this rule are under §95.50 of this title.

(c) Applicability.

(1) This rule applies to:

(A) youth on parole status; and

(B) youth on institutional status who are assigned to a facility of less than high restriction.

(2) This rule does not apply to youth assigned to high-restriction facilities.

(d) General Provisions.

(1) Youth who are age 17 and younger may be referred to a juvenile community detention facility with the consent of local authorities. Youth who are age 17 and older may be referred to detention in an adult jail facility.

(2) TYC will utilize community detention facilities in a manner consistent with local policies.

(3) Youth shall not be placed in detention for the purpose of punishment.

(4) A Level I or Level II due process hearing will be scheduled as soon as practical but no later than seven days, excluding weekends and holidays, from the date of the alleged violation unless it was impractical, impossible, or otherwise inappropriate to have held the hearing sooner.

(5) Even if TYC staff receives information that additional criminal or delinquent proceedings against the youth are planned, pending, or anticipated by local authorities, TYC may continue to hold the youth in detention and may schedule and hold a Level I or Level II due process hearing.

(6) For youth held in community detention, the referring staff will visit the youth daily when possible. No more than three days may pass without a contact by the staff responsible for the youth.

(7) For youth held in institution detention:

(A) the referring staff will visit detained youth when possible. No more than three days may pass without the referring staff making telephone contact with the youth and the institutional placement coordinator or designated staff; and

(B) all standard security unit requirements and services as set forth in §97.40 of this title, unless otherwise noted herein, shall be observed while the youth is detained in a TYC security unit.

(e) Criteria for Detention. A youth in TYC custody may be detained when:

(1) there are reasonable grounds to believe the youth engaged in:

(A) criminal behavior, delinquent conduct, or a violation of the conditions of release under supervision that meets criteria for revocation as defined in §95.4 of this title; or

(B) a rule violation that meets criteria for disciplinary transfer as defined in §95.3 of this title; and

(2) a Level I or Level II due process hearing has been requested; and

(3) one of the following criteria is present:

(A) the youth is likely to abscond and not appear at a disciplinary hearing;

(B) suitable supervision, care, or protection for the youth is not being provided by the parent or guardian to ensure protection of the public safety or prevention of youth self-injury and a less restrictive temporary shelter is not available or is inappropriate; or

(C) the youth is accused of committing a felony offense and may be dangerous to him/herself or others if released.

(f) Procedure.

(1) Approval for Detention.

(A) If the referring staff determines there are reasonable grounds to believe a youth has committed an offense for which a Level I or Level II due process hearing will be requested, the staff will notify an appropriate supervisor to justify and obtain approval for holding the youth in detention.

(B) If approval for detention is not granted or it is determined that a Level I or Level II Hearing will not be sought, arrangements are made for the immediate release of the youth and return to the appropriate placement, unless the community is detaining the youth for reasons unrelated to TYC's detention of the youth.

(2) Admission Process for Youth Held in Institution Detention.

(A) The referring staff is responsible for ensuring the following documentation or information is present at the time of admission to institution detention:

(i) a copy of the written request for a Level I or Level II Hearing;

(ii) a written statement including purpose of admission with supporting documentation (i.e., any incident reports or arrest reports and expected length of stay); and

(iii) the medical file, if available, or copies of pertinent medical records, as well as any medication the youth is taking.

(B) The designated admitting staff shall review the information presented to determine whether there are reasonable grounds to believe criteria for admission have been met as outlined in subsection (e) of this section. As a result of this review, the youth may be admitted to institution detention for up to 72 hours.

(C) The director of security or designee (who shall not serve as the referring or admitting staff) will review all admission decisions within one workday to determine if admission criteria have been met. If criteria are not met or policy or procedures are not followed, the youth will be released and returned to the appropriate placement.

(D) Upon admission, the youth's case is assigned to the institution placement coordinator or designated staff, who is responsible for seeing the youth at least once each day.

(3) Timing of Hearing.

(A) Community Detention.

(i) If approval for detention is granted for a youth in community detention, a Level IV hearing (detention review hearing) must be held on or before the tenth workday of detention if:

(I) a detention hearing is not waived or conducted by the community detention staff;

(II) the Level I or II hearing cannot be held within ten workdays; and

(III) further detention is necessary and appropriate.

(ii) If a detention hearing is conducted or waived by community detention staff, pursuant to the Texas Family Code, TYC staff will participate as requested by the community and no other action is necessary.

(iii) If a Level IV Hearing is not timely held or is not properly waived, the youth shall be released to his/her assigned location or other appropriate non-secure placement.

(B) Institution Detention.

(i) If a youth is admitted to institution detention, a Level IV hearing (detention review hearing) must be held:

(I) on or before 72 hours from admission to institution detention or the next workday if the 72nd hour falls on a weekend or holiday; and

(II) within ten workdays of the previous Level IV Hearing.

(ii) If a Level IV Hearing is not timely held or is not properly waived, the youth shall be released to his/her assigned location or other appropriate non-secure placement.

(4) Decision Maker.

(A) The appropriate supervisor shall appoint a decision-maker.

(B) The decision-maker shall be impartial and shall not have been the person who requested or admitted the youth to institution detention or to community detention.

(C) The decision maker must be knowledgeable of the policies involved in the decision.

(5) Youth Representation and Waiver of Level IV Hearing.

(A) The youth has a right and shall be informed of his/her right to be represented:

(i) by counsel at the Level IV Hearing if the youth is awaiting a Level I Hearing. Counsel is an attorney obtained by the youth or appointed to represent the youth; or

(ii) by an advocate at the Level IV Hearing if the youth is awaiting a Level II Hearing.

(B) The youth may waive the Level IV hearing after being advised by an attorney (for a Level I Hearing) or advocate (for a Level II Hearing). Such waiver must be in writing.

(C) When a subsequent Level IV Hearing is required by policy timelines, the youth must be given the opportunity to have that hearing or to waive it. If the youth chooses to waive the hearing after speaking to his attorney or advocate, a new waiver form must be completed.

(6) Hearing Process.

(A) The referring staff must show cause to detain the youth pending the hearing. The attorney or advocate may present evidence as to why the youth should not be detained.

(B) The standard of proof for all disputed issues is reasonable grounds to believe.

(C) All credible evidence may be considered, irrespective of its form.

(D) The hearing shall be recorded and the recording shall be the official record of the hearing. Recordings shall be preserved for six months following the hearing.

(E) The decision maker shall base his/her decision on criteria for detention. If criteria are not met, the youth must be released to his/her assigned location.

(F) When a Level IV Hearing is necessary due to the adjournment of a Level I Telephone Hearing under §95.53 of this title, the administrative law judge may conduct a Level IV Hearing following adjournment of the telephone hearing.

(7) Appeal.

(A) The youth is notified in writing of his/her right to appeal.

(i) For youth in institution detention:

(I) appeal of the first Level IV Hearing will be to the superintendent;

(II) appeal of the second Level IV Hearing will be to the executive commissioner under §93.53 of this title; and

(III) an automatic appeal to the executive commissioner will be filed on the third and subsequent Level IV Hearing, even if the youth waives the hearing. The referring staff will initiate the automatic appeal.

(ii) For youth in community detention, Level IV Hearing appeals will be to the executive commissioner under §93.53 of this title.

(B) The pendency of an appeal shall not preclude implementation of the decision that a youth be detained.

(g) Detention following Level I or II Hearing. A youth may be held in institution detention without a Level IV Hearing when the youth is waiting for transportation to a different placement following a Level I or Level II hearing. Transportation should be arranged immediately to take place within 72 hours. Any delay in transportation beyond 72 hours must be approved by the facility administrator.

§95.71. Mental Health Status Review Hearing Procedure.

(a) Purpose. The purpose of this rule is to establish the rules and procedure to be followed when the mental health status of a youth must be evaluated by professionals in order to provide appropriate care. A mental health status review hearing is the appropriate due process to admit a youth into the Corsicana Stabilization Unit and also to extend the stay in order to treat the psychiatric disorder.

(b) Applicability.

(1) For criteria for admission to the Corsicana Stabilization Unit, see §87.67 of this title.

(2) A mental health status review hearing is a Level II due process hearing consistent with §95.55 of this title, with several procedural exceptions, as noted herein.

(c) Procedure.

(1) Decision Makers.

(A) The facility administrator of the Corsicana Residential Treatment Center will appoint a mental health professional, as defined in §91.87 of this title, to conduct the review hearing and serve as the hearing manager.

(B) The hearing manager shall not have direct or primary responsibility in the youth's current treatment or diagnosis.

(C) The hearing manager has the same authority and responsibility as that assigned to a hearing manager as set forth in §95.55 of this title.

(D) The hearing manager must be trained to conduct the review hearing.

(2) Single Function Hearing. A mental health status review hearing shall consist of a single function, to consider the facts presented relative to the criteria established.

(3) Location. All mental health status review hearings will be conducted at the Corsicana Residential Treatment Center and are the responsibility of the Corsicana staff.

(4) Advocate. The youth's advocate is appointed by the facility administrator or designee and must be a mental health professional or a caseworker assigned to the Corsicana Stabilization Unit.

(5) Timing of Hearing. A mental health status review hearing shall be held for each youth within 96 hours of arrival at the Corsicana Stabilization Unit. If the 96-hour period ends on a Saturday, Sunday, or official holiday, the hearing must be held on the next regular work day. If the hearing manager determines an unavoidable absence would prevent a key witness or party from attending the hearing, the hearing may be rescheduled to the earliest possible time but not later than 96 hours from the original scheduled hearing.

(6) Teleconference. The hearing shall not be conducted by teleconference. However, testimony may be accepted via telephone if the hearing manager determines in-person testimony is impractical or unfeasible. If testimony is accepted via telephone, all persons required to be present at the hearing must be able to simultaneously hear the testimony.

(7) Exclusion from the Hearing. To protect the confidential nature of the hearing, persons other than the youth, the youth's advocate, staff representative, and the youth's parent(s) may be excluded from the hearing room at the discretion of the chairperson; however, any person except the youth's advocate or staff representative may be excluded from the hearing room if their presence causes undue disruption or delay of the hearing or when hearing matters being discussed are of a very sensitive nature. The reason(s) for the exclusions are stated on the record.

(8) Decision.

(A) Following the presentation of evidence, the hearing manager shall decide whether the appropriate criteria have been established for admission or extension and will announce his/her decision. See §87.67 of this title for admission criteria.

(B) A hearing manager's decision to admit or extend the youth in the Corsicana Stabilization Unit must be supported by expert testimony of a psychiatrist that the youth meets the requisite criteria. The testimony should be given in-person when feasible.

(C) The youth shall be informed of his/her right to appeal to the executive commissioner. The pendency of an appeal shall not preclude implementation of the decision.

(9) Hearing Reporting.

(A) A report that includes the hearing manager's findings and the basis for them must be completed within seven working days after the date of the hearing.

(B) The facility administrator or designee will review the report to ensure accurate and consistent application of this rule and criteria for admission to the Corsicana Stabilization Unit, except that the person who conducted the hearing may not be the person who conducts this review. If necessary, the facility administrator or designee may return the report to the hearing manager for clarification or to re-open the hearing for the purpose of obtaining further information.

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

Filed with the Office of the Secretary of State on May 1, 2009.

TRD-200901656
Cheryln K. Townsend
Executive Commissioner
Texas Youth Commission
Earliest possible date of adoption: June 14, 2009
For further information, please call: (512) 424-6014

CHAPTER 97. SECURITY AND CONTROL

SUBCHAPTER A. SECURITY AND CONTROL

The Texas Youth Commission (TYC) simultaneously proposes the repeal of §97.23, concerning Use of Force, and new §97.23, concerning Use of Force. The new rule will make several key revisions to existing use of force policy.

Concerning the use of Oleoresin Capsicum (OC) or pepper spray, the new rule requires prior authorization on a case by case basis from the facility administrator or designee unless immediate use is believed necessary to prevent serious injury or loss of life. The rule also clarifies the previous rule by establishing that only one supervisory Juvenile Correctional Officer, the shift supervisor, may carry OC spray. OC spray will no longer be authorized for use in preventing "fleeing apprehension", which is defined as youth being in an unapproved area and resisting apprehension by staff.

The new rule also makes significant changes to other areas regarding the use of force. A medical assessment will be provided following every use of manual restraint, not just those resulting in suspected injuries. Force will no longer be authorized to remove youth from a "disruptive situation" unless the disruption causes danger to the youth or others. Use of riot shields during planned team restraints will be restricted to instances where the youth possesses a weapon or otherwise presents a significant risk of harm to staff. Additionally, requirements for use of restraints for medical or mental health purposes will be removed from this rule and published in a standalone rule, §91.98, which is also proposed in this issue of the *Texas Register*.

Robin McKeever, Director of Administrative Services, has determined that for the first five-year period the new section is in effect there are no anticipated significant fiscal implications for state or local government as a result of enforcing or administering the new section.

James Smith, Director of Residential and Community Services, has determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of enforcing the section will be increased safety for youth and staff through clearer direction on when force should be used, what type of force is authorized, as well as increased controls on uses of force. There will be no effect on small businesses or micro-businesses. There is no anticipated economic cost to persons who are required to comply with the amendment as proposed. No private real property rights are affected by adoption of this rule.

Comments on the proposal may be submitted within 30 days of the publication of this notice to Steve Roman, Policy Coordinator, Texas Youth Commission, P.O. Box 4260, Austin, Texas 78765, or email to steve.roman@tyc.state.tx.us.

37 TAC §97.23

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

The repeal is proposed under the Human Resources Code, §61.034, which provides the commission with the authority to make rules appropriate to the proper accomplishment of its functions.

The proposed repeal implements the Human Resources Code, §61.034.

§97.23. Use of Force.

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

Filed with the Office of the Secretary of State on May 4, 2009.

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Cheryln K. Townsend
Executive Commissioner
Texas Youth Commission
Earliest possible date of adoption: June 14, 2009
For further information, please call: (512) 424-6014

37 TAC §97.23

The new section is proposed under the Human Resources Code, §61.045, which provides the commission with the responsibility for providing for the welfare, custody, and rehabilitation of the children in a school, facility, or program operated or funded by the commission.

The proposed rule implements the Human Resources Code, §61.034.

§97.23. Use of Force.

(a) Purpose. This rule establishes the procedures for staff intervention when youth behavior threatens safety and order.

(b) General Provisions.

(1) Non-physical interventions are preferred, and must be used to the extent practical to manage youth behavior.

(2) Texas Youth Commission (TYC) authorizes its staff to use reasonable force as a last resort to maintain safety and order. Only staff who are trained in agency-approved techniques are authorized to use force.

(3) The use of force as punishment or for convenience of staff is strictly prohibited.

(4) Approved use of force techniques are those determined by TYC to minimize risk of harm to youth and staff.

(5) Staff shall release youth from manual or mechanical restraint as soon as the purpose for the restraint has been achieved.

(6) If a staff member observes a use of force in violation of policy, he/she shall take action, as practical, to protect the youth from harm.

(7) Staff shall report any violations of this policy as soon as possible, but no later than the end of the current shift.

(8) Violations of this policy may result in disciplinary action up to and including termination of employment.

(9) After any manual restraint or use of Oleoresin Capsicum (OC) spray, a youth shall be assessed by medical staff as soon as practical. Any injuries shall be documented in the medical record along with an explanation from the youth describing how the injuries occurred. Photographs shall be taken of all injuries.

(10) Only restraint equipment approved by the executive commissioner or his/her designee shall be used in TYC facilities. All restraint equipment shall be used in a manner consistent with its design and intended purpose.

(c) Applicability.

(1) This rule applies to all facilities, offices, and programs operated by or under contract with TYC, unless specifically stated otherwise in the rule.

(2) This rule does not apply to peace officers employed by the TYC Office of Inspector General.

(d) References.

(1) For riot control procedures, see §97.27 of this title.

(2) For procedures and programs designed to allow youth time to regain self-control, see §§95.20, 97.39, and 97.40 of this title.

(3) For criteria and procedures on administering a psychotropic drug in a psychiatric emergency when a youth will not give consent for the administration, see §91.92 of this title.

(4) For procedures relating to youth searches, see §97.9 of this title.

(5) For procedures and restrictions on the use of therapeutic restraints for medical or mental health purposes, see §91.98 of this title.

(e) Definitions.

(1) Handle With Care--an agency-trained physical intervention system.

(2) Imminent Harm--a reasonable belief that harm to persons or property is about to occur, unless immediate action is taken.

(3) Mental Health Professional--an individual who is a Psychiatrist, doctoral level Psychologist, masters level Associate Psychologist, Licensed Professional Counselor, or a Licensed Social Worker with an Advanced Clinical Practitioner (LMSW-ACP) designation.

(4) Positional Asphyxia--the reduction in oxygen in the bloodstream and tissues due to an impairment of a person's respiratory system caused by body positioning or the application of external weight/pressure.

(5) Practical--a reasonable belief that something is capable of being done.

(6) Reasonable Belief--a belief that would be held by a similarly trained staff considering the totality of the circumstances.

(7) Reasonable Force--the least amount of force which a trained staff, in like circumstances, would reasonably believe to be necessary to maintain order and safety as authorized under this rule.

(8) Totality of the Circumstances--facts and circumstances known by the actor at the time of the incident.

(9) Use of Force--physical measures used to direct, compel, or restrain bodily movement of a non-compliant youth.

(f) Non-Physical Interventions. Alternatives to force must be used whenever practical to assist a youth in maintaining or regaining self-control. Staff are prohibited from using profanity or slang based on race, gender, sexual orientation, or ethnicity to manage youth behavior. Staff will be trained in the use of the following non-physical intervention techniques:

(1) Staff presence--this includes mere presence of staff to include non-verbal gestures made with eyes, hands, head or body utilizing proximity, standing, eye contact and/or facial expressions; and/or involving additional staff to intervene.

(2) Verbal de-escalation--this includes verbal prompting, directive statements, and redirecting youth attention and/or behavior.

(3) Use of problem-solving groups.

(g) Physical Interventions. When reasonable force is necessary, staff are authorized to use the following methods:

(1) Physical Escort--touching of the arm, elbow, shoulder or back for the purpose of directing the youth from one location to another.

(2) Mechanical Restraint--use of a mechanical device applied to a youth as a means of restricting a youth's freedom of action.

(3) Manual Restraint--use of hands-on techniques as a means of restricting a youth's freedom of action.

(4) Planned Team Restraint--restraint of a youth who is in a locked or barricaded room by a pre-assembled team.

(5) OC Spray--oleoresin capsicum spray, also known as pepper spray. Oleoresin capsicum is a mixture of essential oil and resin found in nature and derived from any plant of the genus capsicum, such as jalapeño, cayenne, or habanero.

(h) Criteria for Use of Force. Except as otherwise indicated in this rule, reasonable force is authorized under the following circumstances:

(1) Protection of youth from imminent self-harm;

(2) Protection of self from imminent harm;

(3) Protection of other youth or third parties from imminent harm;

(4) Protection of property from imminent, substantial damage;

(5) Prevention of escape or fleeing apprehension;

(6) Movement of a youth referred to the security unit, other temporary isolation room, or alternative classroom;

(7) Movement of a resistant youth within the security unit when the youth's behavior is substantially disruptive and the youth refuses to stop the behavior;

(8) Movement of a resistant youth from a dangerous situation;

(9) To conduct a search of a resistant youth reasonably believed to be in possession of a weapon, an item that can be adapted for use as a weapon, a controlled substance, or other item(s) that breech the security of the facility;

(10) To conduct a search of a resistant youth entering the security unit; or

(11) Administration of medical treatment to a resistant youth when, under the circumstances, failure to administer the treatment could have serious health implications as determined by a physician or mid-level practitioner (such as a nurse practitioner or physician's assistant).

(i) Determining the Intervention or the Reasonable Force to be Used. In determining the type of intervention or the reasonable force to be used, staff must consider whether action needs to be taken immediately or can be delayed until additional staff can organize a team response.

(j) Approved Use of Force Techniques. Use of force techniques that may be used are limited to:

(1) agency-trained:

(A) physical escort;

(B) Handle With Care methods of manual restraint;

(C) mechanical restraints;

(D) OC spray, under certain limited circumstances; and

(2) other non-prohibited methods of manual restraint that under the totality of circumstances existing at the time:

(A) are more practical than the agency-trained Handle With Care methods of restraint, taking into account the youth's and staff's particular vulnerability to harm;

(B) involve a use of force that is measured and progressive to a degree no greater than that reasonably believed necessary to achieve the objective; and

(C) do not unduly risk serious harm or needless pain to the youth or staff.

(k) Prohibited Restraint Techniques.

(1) Prohibited restraint techniques include the following:

(A) restricting respiration in any way, such as applying a chokehold or pressure to a youth's back or chest or placing a youth in a position that is capable of causing positional asphyxia;

(B) using any method that is capable of causing loss of consciousness or harm to the neck;

(C) pinning down with knees to torso, head and/or neck;

(D) slapping, punching, kicking, or hitting;

(E) using pressure point, pain compliance and joint manipulation techniques, other than an approved Handle With Care method for release of a chokehold, bite or hair pull;

(F) modifying restraint equipment or applying any cuffing technique that connects handcuffs behind the back to ankle restraints;

(G) dragging or lifting of the youth by the hair or ear or by any type of mechanical restraints;

(H) lifting a youth's arms behind the back, while in mechanical restraints, in a manner that is capable of causing injury to the shoulder;

(I) using other youth or untrained staff to assist with the restraint;

(J) securing a youth to another youth or to a fixed object, other than to an agency-approved full-body restraint device; or

(K) administering a drug for controlling acute episodic behavior as a means of physical restraint, except when the youth's behavior is attributable to mental illness and the drug is authorized by a licensed physician and administered by a licensed medical professional.

(2) A physical contact that would otherwise be prohibited, under the above paragraph, does not include one that is only accidental and momentary.

(l) Requirements for Planned Team Restraint Situations.

(1) Criteria for Use. Planned team restraint is authorized only to:

(A) stop the youth from engaging in self-harm;

(B) prevent significant property damage; or

(C) recover a weapon or item that has been adapted for use as a weapon and is capable of causing death or serious bodily injury.

(2) Requirements for Use.

(A) Prior to approval of planned team restraint, the facility administrator or administrative duty officer must personally observe the situation. Only the facility administrator or administrative duty officer may authorize a planned team restraint.

(B) All planned team restraints must be videotaped when practical, including a recording of a verbal description of the youth's conduct and all warnings provided the youth according to the agency approved script.

(C) Only staff trained in planned team restraint may participate in the team that is assembled for the room entry.

(D) The youth must be warned to discontinue the misconduct at least two times after the team is assembled and before the room entry. The team must provide continuous opportunities for compliance during the room entry.

(E) Use of the riot shield during a planned team restraint is limited to cases in which a youth has a weapon or a youth's behavior indicates there is a significant risk of harm to the staff members involved in the restraint.

(m) Requirements for Use of Mechanical Restraints.

(1) Guidelines for Use.

(A) Mechanical restraint equipment must not be secured so tightly as to interfere with circulation or so loosely as to permit chafing of the skin.

(B) When mechanical restraints are employed on a youth in a prone position, the youth is placed on his/her side as soon as practical in order to help ensure adequate respiration and circulation. The youth must be allowed to sit up as soon as his/her behavior is under control.

(C) A mechanical restraint, for other than transportation or riot control, shall be terminated as soon as the purpose for which the youth was restrained under subsection (h) of this section has been

achieved, but in any event within 15 minutes, unless an extension is granted. Extensions may be granted by the facility administrator or designee for additional 30-minute intervals, until termination of restraint.

(D) When mechanical restraints are applied, staff shall ensure the youth's safety by checking the youth for adequate respiration and circulation every 15 minutes until termination of restraint. Staff will provide continuous visual supervision and appropriate assistance until the mechanical restraint is terminated.

(E) Mechanical ankle and wrist restraints attached to a waist belt by a lead chain may be used when transporting a youth to a security unit, within a security unit, and from a security unit in order to prevent harm to the youth or others. These restraints may not be attached in a manner that prevents the youth from being able to stand upright. Mechanical restraints may remain on the youth during the duration of the activity, if circumstances warrant such restraints.

(2) Mechanical Restraint Use by TYC Transportation Staff. Mechanical ankle and wrist restraints attached to a waist belt by a lead chain shall be used during secure transportation by designated TYC transportation staff. Exceptions may be made for youth being transported following release on parole from a residential program or when medically necessary.

(3) Mechanical Restraint Use by Other Transporters.

(A) Mechanical ankle and wrist restraints attached to a waist belt by a lead chain shall be used during transportation when a youth is being transported to a high restriction program.

(B) Mechanical ankle and wrist restraints attached to a waist belt by a lead chain may be used when transporting a youth off-campus.

(n) Requirements for Use of OC Spray.

(1) Persons Authorized to Use OC Spray.

(A) OC spray is permitted only in TYC-operated high restriction institutions.

(B) Unless reasonably believed necessary to prevent loss of life or serious bodily injury, authorization to use OC spray must be obtained from the facility administrator, assistant superintendent, or administrative duty officer prior to each use.

(C) The only staff authorized to routinely carry OC spray on-person are the facility administrator, assistant superintendent, administrative duty officer, juvenile correctional officer shift supervisor (one per shift), director of security, and security personnel whose primary responsibility is to patrol the campus and respond to security-related incidents. Any staff positions in addition to those listed must be authorized in writing by the executive commissioner or his/her designee.

(D) Only staff who have been trained by TYC in the use of OC spray are authorized to use it.

(2) Criteria for Use.

(A) Except as provided in subparagraph (B) of this paragraph, OC Spray is authorized for use only when non-physical interventions and other physical interventions have failed or are not practical, and it is reasonably believed necessary to:

(i) quell a riot or major campus disruption;

(ii) resolve a hostage situation;

(iii) remove youth from behind a barricade in a riot or self-harm situation;

(iv) secure an object that is being used as a weapon and that is capable of causing serious bodily injury;

(v) protect youth, staff, or others from imminent serious bodily injury; or

(vi) prevention of escape.

(B) Unless reasonably believed necessary to prevent loss of life or serious bodily injury, OC spray is not authorized for use on a youth when a medical provider has diagnosed the youth with a chronic, serious respiratory problem or other serious health condition identified by TYC. (e.g., significant eye problems, known history of severe allergic reaction to OC, or severe dermatological problems).

(3) Guidelines for Use.

(A) OC spray canisters must be carefully controlled at all times.

(B) Any youth affected by OC spray will be decontaminated with cool water as soon as the purpose of the restraint has been achieved.

(C) Immediately following de-contamination from OC spray, medical staff will be contacted to examine and, if necessary, treat and monitor all youth and staff affected by OC spray.

(D) Each individually assigned canister of OC must be weighed at the time it is assigned and after each use.

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

Filed with the Office of the Secretary of State on May 4, 2009.

TRD-200901683
Cheryln K. Townsend
Executive Commissioner
Texas Youth Commission
Earliest possible date of adoption: June 14, 2009
For further information, please call: (512) 424-6014

37 TAC §§97.35 - 97.37, 97.40, 97.41, 97.43

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

The Texas Youth Commission (TYC) proposes the repeal of §97.35 (concerning temporary segregation of youth out-of-control), §97.36 (concerning standard security unity program requirements), §97.37 (concerning security intake), §97.40 (concerning security program), §97.41 (concerning community detention), and §97.43 (concerning institution detention program).

The repeal of §97.35 will allow for the content of this rule to be republished under a new section number, §95.20. The new section is proposed in this issue of the *Texas Register.*

The repeal of §97.36 will allow for the content of this rule to republished under a new section number, §97.40. The new section is proposed in this issue of the *Texas Register.*

The repeal of §97.37 will reflect the proposal to discontinue the security intake program. This program currently operates as a temporary holding program for youth referred to a security unit.

Youth are kept in this program up to 24 hours while a determination is made whether or not to admit the youth to the security unit. Proposed changes in policy, as reflected in new §97.40, will require that this determination be made within one hour (or two if an extension is granted) after a youth is referred to the security unit.

The repeal of §97.40 will allow for a significantly revised rule to be published in its place. The revised rule is proposed as a new rule in this issue of the *Texas Register.*

The repeal of §97.41 and §97.43 will allow for the content of these rules to be republished under new section numbers, §95.59 and §95.61. The new sections are proposed in this issue of the *Texas Register.*

Robin McKeever, Director of Administrative Services, has determined that for the first five-year period the repeals are in effect there are no anticipated significant fiscal implications for state or local government as a result of enforcing or administering the repeals.

James Smith, Director of Residential and Community Services, has determined that for each year of the first five years the repeals are in effect the public benefit anticipated as a result of enforcing the repeals will be the availability of accurate and up-to-date information concerning TYC programming and operations.

There will be no effect on small businesses or micro-businesses. There is no anticipated economic cost to persons who are required to comply with the repeals as proposed. No private real property rights are affected by adoption of these repeals.

Comments on the proposal may be submitted within 30 days of the publication of this notice to Steve Roman, Policy Coordinator, Texas Youth Commission, P.O. Box 4260, Austin, Texas 78765, or email to steve.roman@tyc.state.tx.us.

The repeals are proposed under Human Resources Code §61.034, which provides the commission with the authority to adopt rules appropriate to the proper accomplishment of its functions.

The proposed repeals implement Human Resources Code §61.034.

§97.35. Temporary Segregation of Youth Out of Control.

§97.36. Standard Security Unit Program Requirements.

§97.37. Security Intake.

§97.40. Security Program.

§97.41. Community Detention.

§97.43. Institution Detention 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 May 1, 2009.

TRD-200901658
Cheryln K. Townsend
Executive Commissioner
Texas Youth Commission
Earliest possible date of adoption: June 14, 2009
For further information, please call: (512) 424-6014

37 TAC §97.40

The Texas Youth Commission (TYC) proposes new §97.40, concerning Security Program. The new rule will establish the criteria for admission to the Security Program, requirements for service delivery, maximum number of locally approved extensions, and release criteria.

This new policy, together with the repeal of §97.37 (concerning the security intake program), will require that the central office director of residential services approve any extension in resulting in confinement beyond five days. The current rule requires this level of approval only after 11 days in confinement. The new rule will also specify that required visits from the clinical, religious, medical, rehabilitation, and administrative departments must take place in the youth's room, or with the youth outside of the room, unless the youth's current behavior prohibits direct contact for safety reasons. The new rule also clarifies that large muscle exercise and physical education are not synonymous. The hour of large muscle exercise may not be counted toward the daily requirement to provide 5 and one-half hours of academic services in the security unit unless the youth is currently enrolled in physical education as part of his/her normal academic schedule.

Robin McKeever, Director of Administrative Services, has determined that for the first five-year period the section is in effect there are no anticipated significant fiscal implications for state or local government as a result of enforcing or administering the section.

James Smith, Director of Residential and Community Services, has determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of enforcing the section will be the establishment of enhanced protections against undue extensions in confinement, provision of more direct service delivery to youth in confinement, as well as compliance with nationally recognized best practices and accreditation standards.

There will be no effect on small businesses or micro-businesses. There is no anticipated economic cost to persons who are required to comply with the rule as proposed. No private real property rights are affected by adoption of this rule.

Comments on the proposal may be submitted within 30 days of the publication of this notice to Steve Roman, Policy Coordinator, Texas Youth Commission, P.O. Box 4260, Austin, Texas 78765, or email to steve.roman@tyc.state.tx.us.

The new rule is proposed under Human Resources Code §61.075, which provides the commission with the authority to order a committed child's confinement under conditions it believes best designed for the child's welfare and the interests of the public.

The proposed rule implements Human Resources Code §61.034.

§97.40. Security Program.

(a) Purpose. The Texas Youth Commission (TYC) operates security programs at its high restriction facilities in order to temporarily remove youth who engage in certain dangerous or disruptive behaviors from the general campus population. This rule establishes admission criteria, service delivery requirements, and security provisions, and requirements for due process and administrative review for youth admitted to the security program.

(b) Applicability. This rule applies to TYC-operated high restriction facilities that operate security units.

(c) Definitions. Security Unit--a secure building on the campus of a high restriction TYC facility which contains individual rooms and a central control station. Entry to and exit from the building are controlled exclusively by staff.

(d) General Provisions.

(1) Confinement in the security program shall not be used as punishment or as a convenience for staff.

(2) Youth shall be afforded all basic youth rights, as established in §93.1 of this title, while confined in the security program.

(3) Except as otherwise authorized by the division director over residential services or designee on a case-by-case basis, confinement in the security program shall not exceed five calendar days or a maximum of 120 hours.

(4) The security program shall be operated within the security unit.

(e) Admission Criteria. A youth may be admitted to the security program when there is a reasonable belief the youth has committed a major rule violation or a minor rule violation requiring referral to the security unit, and:

(1) the youth is a serious and continuing escape risk;

(2) the youth is a serious and immediate physical danger to others and staff cannot protect them except by admitting the youth to security program;

(3) confinement is necessary to prevent imminent and substantial damage to property;

(4) confinement is necessary to control behavior that disrupts programming to the extent that the current program cannot continue except by admitting the youth to the security program; or

(5) the youth is likely to interfere with a pending or ongoing investigation or a scheduled due process hearing.

(f) Admission Process.

(1) Within one hour after a youth's arrival at the security unit (or up two hours if an extension is approved by the facility administrator or designee), a staff member will hold a Level III hearing in accordance with §95.57 of this title to determine whether admission criteria have been met. The staff member appointed to conduct the review must not have been involved in the referral to the security program.

(2) If admission criteria are not met, the youth must be returned to the general population immediately.

(3) If admission criteria are met, the youth will be admitted to the security program for up to 24 hours.

(g) Extension Process.

(1) Extension Criteria.

(A) A 24-hour extension may be authorized if the following criteria are met, as established through a Level III hearing conducted in accordance with §95.57 of this title:

(i) one or more of the admission criteria listed in subsection (e)(1) - (5) of this section continue to be present; or

(ii) there is documented evidence that the youth is not complying with the security program rules of conduct.

(B) No more than four (4) extensions may be authorized by facility staff.

(2) Extensions Beyond Five Days.

(A) The division director over residential services or designee may approve extensions after the 5th day of confinement only when no less restrictive placement is suitable for managing the youth's behavior and:

(i) the youth continues to present an immediate physical danger to others; or

(ii) the youth continues to be likely to interfere with a pending or ongoing investigation or a scheduled hearing.

(B) Each extension is valid for up to 72 hours.

(h) Release to the General Population.

(1) A youth shall be released to the general population upon:

(A) the expiration of the most recently approved period in confinement; or

(B) prior to the expiration of the most recently period upon a determination that the youth's behavior no longer warrants confinement in the security unit.

(2) A youth may be released from the security program only by the director of security or a staff member authorized to conduct an admission hearing.

(i) Administrative Reviews and Appeals.

(1) The director of security or designee will review all admission and local extension decisions within one workday. The person reviewing the decision must not have been involved in the decision. If it is determined that admission or extension criteria were not met or appropriate due process was not provided:

(A) the youth will be returned to the general population immediately; and

(B) the youth's record will be corrected to reflect the overturned security admission or extension.

(2) The youth will be notified in writing of his/her right to appeal a security program admission or extension to the facility administrator or designee. Appeals of decisions made by the facility administrator will be decided by the division director over residential services or designee. The youth is notified in writing of the outcome of the appeal.

(j) Security Program Requirements.

(1) Staff shall visually check each youth at least once every 15 minutes and shall document youth activity and location during the check.

(2) Individual doors are locked.

(3) The security program will adhere to a standard schedule approximating that of the general population. The schedule must include at least four hours outside of the locked room for each youth if the youth's behavior permits.

(4) The standard schedule and security program rules of conduct will be posted and reviewed with youth.

(5) Staff from the administrative, clinical, and/or religious departments shall visit each youth at least once each day. A nurse and case manager shall visit each youth at least once each day. Actual entry into the room or removal of the youth from the room for the purpose of

discussion or counseling constitutes a visit, unless a youth's behavior prohibits direct contact for safety reasons.

(6) Youth shall be provided:

(A) appropriate psychological and medical services;

(B) an intervention plan that addresses the behavior that resulted in the referral or extension;

(C) adequate access to restroom facilities and drinking water;

(D) access to shower and hygiene routine at least once every 24 hours, as behavior permits;

(E) the same food, including snacks, prepared in the same manner as for other youth except for special diets that are prescribed on an individual basis by a physician, dentist, mental health professional, or approved by a chaplain;

(F) ability to earn privileges;

(G) access to at least five and one-half hours of academic services each scheduled instructional day; and

(H) one hour each day of large muscle exercise out of the room or in an enclosed outdoor recreation area, as the youth's behavior and weather permit.

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 May 1, 2009.

TRD-200901659

Cheryln K. Townsend

Executive Commissioner

Texas Youth Commission

Earliest possible date of adoption: June 14, 2009

For further information, please call: (512) 424-6014

TITLE 43. TRANSPORTATION

PART 1. TEXAS DEPARTMENT OF TRANSPORTATION

CHAPTER 9. CONTRACT MANAGEMENT

SUBCHAPTER G. HIGHWAY IMPROVEMENT CONTRACT SANCTIONS

43 TAC §9.114

The Texas Department of Transportation (department) proposes amendments to §9.114, concerning Opportunity for Formal Hearing.

EXPLANATION OF PROPOSED AMENDMENTS

The department's contractor sanction rules set forth the circumstances under which contractors may be sanctioned and the procedures that must be followed. The Texas Transportation Commission (commission) previously adopted §§9.100 - 9.115 to specify the process by which the department will administer and manage contractor sanctions associated with highway improvement contracts.

Amendments to §9.114, Opportunity for Formal Hearing, are necessary to clarify the appeals process available to those contractors sanctioned at a Level 1 as prescribed in existing §9.107(a)(1). Previous revisions to §9.114 and to 43 TAC §9.112, Opportunity for Informal Hearing, specified the appeals process for those contractors sanctioned at a Level 2 or greater, specifically providing for an opportunity for an informal hearing with the department and, if dissatisfied with the results of the informal hearing, subsequent opportunity for a formal hearing with the State Office of Administrative Hearings in accordance with 43 TAC §1.21 et seq. The appeals process for those contractors sanctioned at a Level 1 was inadvertently omitted from the formal appeal process. While contractors sanctioned at a Level 1 currently have the opportunity to request a formal hearing under 43 TAC §1.21 et seq., these amendments serve to further clarify within 43 TAC Chapter 9 the appeals process available to these contractors.

The opportunity for an informal hearing with the department prescribed under 43 TAC §9.112 is limited to those contractors sanctioned at a Level 2 or greater as imposition of these sanctions will prohibit a contractor from bidding on any department highway improvement contracts for the specified duration of the sanction. Any contractor who is suspended from bidding, regardless of the sanction level imposed, may request an informal hearing under §9.112. This additional department hearing process provides a more expeditious means of considering appeals associated with department suspensions and sanctions of a Level 2 or greater, while ensuring the maximum number of qualified bidders are eligible to bid on department highway improvement contracts. Since Level 1 sanctions involve only a reduction in bidding capacity, contractors sanctioned at this level who are not simultaneously suspended may continue to submit bids on department highway improvement contracts while awaiting the results of any formal appeals filed under 43 TAC §9.114.

The 43 TAC Chapter 9, Subchapter G title is changed from Contractor Sanctions to Highway Improvement Contract Sanctions to clarify the application of the subchapter specifically to highway improvement contracts.

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.

Thomas Bohuslav, Director, Construction Division, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the amendments.

PUBLIC BENEFIT AND COST

Mr. Bohuslav 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 to further the department's mission to provide an efficient and fair process of administering contractor sanctions, and provide clarification regarding the appeals process available to contractors sanctioned under 43 TAC Chapter 9, Subchapter G. 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.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments to §9.114 may be submitted to Thomas Bohuslav, Director, Construction 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 June 15, 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.

CROSS REFERENCE TO STATUTE

None.

§9.114. Opportunity for Formal Hearing.

(a) A contractor that is sanctioned at a Level 1, or that [~~If the contractor~~] is dissatisfied with the decision following an informal hearing under §9.112 of this subchapter (relating to Opportunity for Informal Hearing) or §9.113 of this subchapter (relating to Informal Hearing on Indirect Sanction), [~~the contractor~~] may request an administrative hearing under §1.21 et seq. of this title (relating to Procedures in Contested Cases).

(b) The request must be received by the executive director within 10 days after the date that the contractor receives notice of the Level 1 sanction under §9.109 of this subchapter (relating to Notice of Sanctions), or notice of the determination under §9.112(d) of this subchapter or §9.113(d) of 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 May 1, 2009.

TRD-200901627
Bob Jackson
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: June 14, 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 4. AGRICULTURE

PART 1. TEXAS DEPARTMENT OF AGRICULTURE

CHAPTER 19. QUARANTINES AND NOXIOUS AND INVASIVE PLANTS

SUBCHAPTER J. RED IMPORTED FIRE ANT QUARANTINE

4 TAC §19.101

The Texas Department of Agriculture withdraws the emergency amendment to §19.101 which appeared in the March 20, 2009, issue of the *Texas Register* (34 TexReg 1931).

Filed with the Office of the Secretary of State on May 1, 2009.

TRD-200901632

Dolores Alvarado Hibbs

General Counsel

Texas Department of Agriculture

Effective date: May 21, 2009

For further information, please call: (512) 463-4075

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 4. AGRICULTURE

PART 1. TEXAS DEPARTMENT OF AGRICULTURE

CHAPTER 19. QUARANTINES AND NOXIOUS AND INVASIVE PLANTS

SUBCHAPTER J. RED IMPORTED FIRE ANT QUARANTINE

4 TAC §19.101

The Texas Department of Agriculture (the department) adopts an amendment to §19.101(b), concerning the department's Red Imported Fire Ant Quarantine, with changes to the proposed text as published in the March 20, 2009, issue of *Texas Register* (34 TexReg 1933). The amendment is adopted in order to expand the quarantined area for the red imported fire ant, *Solenopsis invicta* Buren. The department adopted an amendment to §19.101 on an emergency basis on November 5, 2008, as published in the November 21, 2008, issue of the *Texas Register* (33 TexReg 9355), which expired on March 4, 2009. The department filed a revised emergency quarantine on March 6, 2009, as published in the March 20, 2009, issue of the *Texas Register* (34 TexReg 1931), which was the same as the November 5, 2008, submission, except that only the fire ant-infested portion of the City of Lubbock was quarantined instead of all of Lubbock County. The proposal has been changed to correct an error. In the proposal, at subsection (b), Highway 289 to the North was erroneously used to define the northern boundary of the quarantined area. The northern boundary has been changed to Ursuline Street, the correct boundary, in this adoption.

The amendment, as adopted, adds Archer, Baylor, Callahan, Clay, Coke, Coleman, Concho, Crane, Crockett, Fisher, Haskell, Howard, Irion, Martin, Mitchell, Nolan, Reagan, Runnels, Schleicher, Scurry, Shackelford, Starr, Terrell, Throckmorton, Ward, Wilbarger, Winkler and Upton counties to the list of quarantined areas, thereby restricting the movement of quarantined articles when transported from these counties to fire ant-free areas. In the City of Lubbock, Texas AgriLife Research and Extension Center and the county commissioners have been proactive in containing and controlling the limited fire ant infestation at the central portion of the City of Lubbock through pesticide treatment of and community outreach efforts. That portion of the City of Lubbock located within Highway 27 to the East, Ursuline Street to the North, Milwaukee Street to the West and 98 Street to the South are quarantined.

The amendment to §19.101 expands the quarantined area in correspondence with the detection of the red imported fire ant outside the current quarantined area.

Public hearings on the proposed rule were held on April 13, 2009 at Lubbock and on April 17, 2009 at San Angelo, Texas. No oral or written comments were received on the proposal.

The amendment is adopted under the Texas Agriculture Code, §71.001, which authorizes the department to establish a quarantine against the infested area within the state against diseases and pests; and §71.007, which authorizes the department to adopt rules as necessary to protect agricultural and horticultural interests, including rules to provide for specific treatment of a grove or orchard or of infested or infected plants, plant products, or substances.

§19.101. Quarantined Areas.

(a) The department hereby adopts by reference as quarantined areas those counties in Texas, or portions thereof, listed as regulated areas in the most current federal imported fire ant quarantine as adopted by the United States Department of Agriculture, and found at 7 Code of Federal Regulations 301.81-3. A copy of the regulation may be obtained at the Texas Department of Agriculture, P.O. Box 12847, Austin, Texas 78711.

(b) In addition to the areas described in subsection (a) of this section, Archer, Baylor, Brooks, Brown, Cameron, Callahan, Clay, Coke, Coleman, Concho, Crane, Crockett, Delta, Dimmit, Duval, Ector, Fisher, Haskell, Hidalgo, Howard, Irion, Jack, Jones, Kenedy, Kimble, Kinney, Lamar, La Salle, Mason, Martin, Maverick, McCulloch, Midland, Mills, Mitchell, Montague, Nolan, Palo Pinto, Reagan, Red River, Runnels, San Saba, Schleicher, Scurry, Shackelford, Starr, Stephens, Terrell, Throckmorton, Upton, Val Verde, Ward, Webb, Wilbarger, Willacy, Winkler, Young, and Zavala counties in Texas, and the area of the City of Lubbock located within Highway 27 to the East, Ursuline Street to the North, Milwaukee Street to the West and 98 Street to the South are quarantined.

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 May 1, 2009.

TRD-200901633
Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
Effective date: May 21, 2009
Proposal publication date: March 20, 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) is adopting new §11.13, concerning Formal Bid Protest Procedures, without changes to the proposed text as published in the March 6, 2009, issue of the *Texas Register* (34 TexReg 1512) and will not be republished.

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 being 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.

No comments were received regarding adoption of this new section.

This new section is adopted under the Texas Government Code §442.005, which provides the Commission with authority to promulgate rules that will reasonably effect the purposes of this chapter, and Texas Government Code §552.275, which provides that governmental bodies may adopt rules on this subject.

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

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 28, 2009.

TRD-200901590
F. Lawerence Oaks
Executive Director
Texas Historical Commission
Effective date: May 18, 2009
Proposal publication date: March 6, 2009
For further information, please call: (512) 936-4323

13 TAC §11.14

The Texas Historical Commission (Commission) is adopting new §11.14, concerning Negotiated Rulemaking and Alternative Dispute Resolution, without changes to the proposed text as published in the March 6, 2009, issue of the *Texas Register* (34 TexReg 1513) and will not be republished.

The section 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 section 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.

No comments were received regarding adoption of this new section.

This new section 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 the chapter, and Texas Government Code §442.023, which requires the Commission to adopt a policy regarding negotiated rulemaking and alternative dispute resolution.

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 April 28, 2009.

TRD-200901591
F. Lawerence Oaks
Executive Director
Texas Historical Commission
Effective date: May 18, 2009
Proposal publication date: March 6, 2009
For further information, please call: (512) 936-4323

CHAPTER 15. ADMINISTRATION OF FEDERAL PROGRAMS

13 TAC §15.3

The Texas Historical Commission (Commission) adopts amendments to §15.3 concerning State Board of Review/National Register without changes to the proposed text as published in the March 6, 2009, issue of the *Texas Register* (34 TexReg 1514) and will not be republished.

These adopted amendments 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.

No comments were received regarding adoption of the amendment to §15.3, State Board of Review/National Register.

The amendments are adopted 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.

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 April 28, 2009.

TRD-200901596

F. Lawerence Oaks
Executive Director
Texas Historical Commission
Effective date: May 18, 2009
Proposal publication date: March 6, 2009
For further information, please call: (512) 936-4323

CHAPTER 21. HISTORY PROGRAMS

SUBCHAPTER B. OFFICIAL TEXAS HISTORICAL MARKER PROGRAM

The Texas Historical Commission (Commission) adopts amendments to §21.7, relating to Application Requirements, and §21.9, relating to Application Evaluation Procedures, without changes to the proposed text as published in the March 6, 2009, issue of the *Texas Register* (34 TexReg 1515) and will not be republished.

These amendments will 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 uses. A limitation is placed on the number of markers to be authorized each year through the use of these criteria.

No comments were received regarding adoption of the amendments to §21.7, Application Requirements, and §21.9, Application Evaluation Procedures.

The amendments are adopted 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. 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.

13 TAC §21.7

The revised sections are adopted under the Texas Government Code, §442.005(q), 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.

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 April 28, 2009.

TRD-200901600
F. Lawerence Oaks
Executive Director
Texas Historical Commission
Effective date: May 18, 2009
Proposal publication date: March 6, 2009
For further information, please call: (512) 936-4323

13 TAC §21.9

The revised sections are adopted under the Texas Government Code, §442.005(q), 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.

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 April 28, 2009.

TRD-200901601
F. Lawerence Oaks
Executive Director
Texas Historical Commission
Effective date: May 18, 2009
Proposal publication date: March 6, 2009
For further information, please call: (512) 936-4323

TITLE 16. ECONOMIC REGULATION

PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

CHAPTER 25. SUBSTANTIVE RULES APPLICABLE TO ELECTRIC SERVICE PROVIDERS

SUBCHAPTER E. CERTIFICATION, LICENSING AND REGISTRATION

The Public Utility Commission of Texas (commission) adopts the repeal of §25.107, relating to Certification of Retail Electric Providers, without changes and adopts new §25.107, relating to Certification of Retail Electric Providers, with changes to the proposed text as published in the November 7, 2008, issue of the *Texas Register* (33 TexReg 9032). The new rule strengthens the certification requirements for retail electric providers (REPs) in order to better protect customers, transmission and distribution utilities (TDUs), and other REPs from the insolvency of REPs and other harmful conditions and activities of REPs. This rule is a competition rule subject to judicial review as specified in Public Utility Regulatory Act (PURA) §39.001(e). The rule is adopted under Project Number 35767.

A public hearing on the rule was held at commission offices on December 30, 2008. The commission received comments on the proposed rule from Alliance for Retail Markets (ARM); Bounce Energy, Inc. (Bounce); En-Touch Systems, Inc. (En-Touch); First Choice Power (First Choice); Integrys Energy Services, Constellation NewEnergy, Inc., and Direct Energy LP (Integrys, Constellation and Direct Energy); Joint TDUs; National Energy Marketers Association (NEM); NRG Texas, LLC (NRG); Office of Attorney General (OAG); Office of Public Counsel (OPC); REPower Energy (REPower); Shell Energy North America (Shell); Steering Committee of Cities served by Oncor (Cities); Tara Energy, Inc (Tara); Reliant Energy (Reliant); Texas Industrial Energy Consumers (TIEC); Texas Ratepayers Organization to Save Energy and Texas Legal Services Center (Texas ROSE/TLSC); TXU Energy Retail Company, LLC (TXU); and Whaley Consulting on behalf of REPs for Competitive Markets (RCM).

Summary of Comments

Question 1: How can the commission protect customer deposits from a REP bankruptcy while still allowing the REP access to the deposits to cover nonpayment? Please provide specific language for a letter of credit, escrow agreement, or other instrument that would accomplish this purpose.

Cities stated that an irrevocable stand-by letter of credit (LC) and escrow agreement would provide for the refund of customer deposits as soon as possible after the REP experiences a triggering event such as bankruptcy, default on TDU obligations, refusal to return customer deposits when due, or an announcement that it will cease operations. Cities stated that the refund of customers' funds should be a higher priority than protecting the REP from customer non-payments. Cities stated that the collection of customer deposits is a privilege of REP certification and the occurrence of a triggering event would indicate that the REP is not in compliance with the rules and certification requirements. Cities stated that the triggering event could be made dependant on a commission order specifying the amount of customer deposits, which are unencumbered by unpaid bills. However, Cities noted that this approach could result in excessive delays in refunding deposits because of potential obstacles, such as the time required for commission Staff to review records and possible contested hearings. Cities stated that a rapid refund of the defaulting REP's deposits is necessary to protect customers from the burden of duplicative deposits in the event that the REP ceases operations and the customer is dropped to a POLR with a corresponding new deposit requirement. Cities stated that if the commission believes it is necessary to provide some offset for unpaid bills, then 90% of the deposits should be returned, and 10% of the deposits should be held in reserve until the issue of uncollectible accounts has been resolved. Finally, Cities stated that the LC or escrow agreement could account for this type of provision, which would be based upon the commission finding that a triggering event had occurred. Cities did not provide any specific language for the development of a LC or escrow agreement but stated that the terms should be as specific as possible, with triggering events clearly defined in a manner that minimizes ambiguity or dispute.

TXU agreed, in part, with Cities that a trigger mechanism that helps establish the proper criteria to identify failing REPs is important relative to the bankruptcy parameters that allow the REP to return customer deposits prior to declaring bankruptcy. To the extent the commission relies on a LC, TXU supplied sample LC language.

TXU suggested a possible approach to protecting customer deposits from the bankruptcy estate is to seek a change to federal bankruptcy law to exclude customers' deposits. TXU stated that a resolution from the Texas Legislature asking the United States Congress to create such an exception would be appropriate.

ARM took no substantive position on the proposed standard language for use in a LC and recognized that TXU's sample LC may meet the necessary requirements for such a financial instrument.

Texas ROSE/TLSC and OPC agreed with the concept that customer deposits should be protected. Texas ROSE/TLSC stated that the deposit money and funds paid in advance for prepaid service should remain the property of the customer unless the deposit is used to pay off the final balance on the customer's account. The OAG supported this concept. Texas ROSE/TLSC agreed, in part, with Cities that customer funds should be held in an escrow account in the name of the REP, but did not comment on the LC. In addition, Texas ROSE/TLSC recommended that the accounts should be Federal Deposit Insurance Corporation (FDIC) insured accounts under the Transaction Account Guarantee Program (TAGP) with the pooled interest payments forwarded to the non-profit agencies that administer the REPs bill payment assistance program. Texas ROSE/TLSC stated that placing customer deposits in this type of account would provide the highest level of protection and would provide an additional social benefit at no cost to the REP or to the customer. Texas ROSE/TLSC suggested the program could be modeled after the Interest on Lawyers Trust Accounts program administered by the Texas Supreme Court. The OAG stated that the rule should clarify that customer deposits and advance payments remain the customers' property until the customer defaults on an obligation. The OAG recommended that this requirement would help exclude customer deposits and advance payments from a REP's bankruptcy estate. The OAG suggested that the commission review mechanisms used by other State agencies and, as a reference, cited Texas Tax Code §11.016. The OAG also cited Texas Finance Code §154.001 *et seq.*, which requires providers of pre-paid funeral services to deposit their customers funds in a separate trust fund. The OAG suggested the possibility of using a LC or a surety bond as a means of assuring customers' property is returned to customers.

Joint TDUs agreed with Texas ROSE/TLSC and, in part, with Cities that customer funds should be held in an escrow account, stating that this arrangement provides the most efficient way of ensuring that customer deposits are protected and are available to be refunded to customers in the event of a REP failure.

OPC, RCM and ARM did not have a suggestion as to a specific financial instrument that would protect the deposits. OPC stated that deposits are not to be considered the property of the REP and could not be accessed by the REP's creditors in the event of a bankruptcy. RCM stated that the primary goal for collecting deposits by the REP is to cover any unpaid balances on the customers' accounts, and urged the commission to institute protections that achieve the primary goal while imposing the least incremental cost and operational burden on REPs. RCM stated that to maintain a LC or an escrow account would result in additional cost to the REP, which may ultimately be borne by the customer, but did not state a preference for either proposal. RCM agreed that, even in bankruptcy, the deposits of customers who have paid their bills in full should be returned in a speedy manner, after determining account balances. RCM mentioned the problem REPs face when customers cease to pay upon hearing that their provider is having difficulties, leaving the REP to sort through unpaid obligations. ARM discussed Section 507 of the Bankruptcy Code and stated that REP assets become part of the property of the estate and are protected by the bankruptcy trustee for the benefit of creditors. ARM stated that the use of a third party to administer a segregated fund of customer monies would not impact the REP's ownership of the asset. RCM stated that it would support a reasonable proposal to keep deposits separate while maintaining operational access to the funds.

Reliant and TXU agreed with the commission's proposal to provide a menu of options from which REPs may choose. Reliant stated their preference for the use of segregated cash accounts along with record-keeping that would allow the tracing of specific deposits to specific customers as outlined in §25.478(h) and §25.478(j), which specify requirements for refunding deposits and the conditions under which a REP can retain the deposit. Reliant stated that its approach would be the least-cost option that allowed for day-to-day deposits and reimbursements. Re-

liant stated that this option meets the bankruptcy case law standards for keeping deposits from becoming part of the bankruptcy estate. Reliant did not oppose escrow accounts, but noted that escrow accounts are cumbersome for management of customer deposits on a daily basis, involve a third party to whom the REP would have to apply for disbursements, add costs with no concomitant benefit, and provide no additional security. Reliant did not oppose the option of a LC, but stated that such an approach is more complex than a segregated cash account. Reliant mentioned several issues are associated with the use of a LC, and stated that the most important feature of a LC is the draw statement, which specifies the conditions that allow for the draw on the LC.

TEAM agreed with Reliant and supported its recommendation. TEAM stated that the financial mechanism should be designed in a manner that allows the REP to access the funds to cover nonpayment, accommodates frequent transactions, does not add undue administrative costs, and protects customer deposits.

Shell agreed with ARM, RCM, and Reliant regarding the concept of segregated accounts and how these accounts could help protect customer deposits in a bankruptcy proceeding. Shell stated that a segregated account provides transparency as long as funds are not commingled with other funds. Shell stated that the rule should clearly spell out that these funds are third party funds and not the REP's property, and may be used by the REP only in the event that the customer has defaulted and the terms of service allow for the use of the deposit to satisfy unpaid bills.

Shell agreed with ARM that the segregated accounts should be administered by a third party but did not offer a recommendation as to a third party.

Shell disagreed with Cities regarding a LC or an escrow account. Shell stated that LCs are problematic alternatives and "absent external support, no financial institution will issue a LC unless it has possession of the issuer's funds or acceptable collateral in an equivalent amount," which means that under the rule every REP would need to maintain the funds in an escrow account. Shell mentioned three problems associated with escrow accounts: the tracking and the returning of each customer deposit if the REP defaults, the ability to terminate an escrow account and claim the funds before the REP defaults, and whether or not the funds in such an account would be returned to customers if the REP declared bankruptcy.

Cities expressed their skepticism of proposals that allow the use of restricted cash accounts, and disagreed with Reliant's proposal to extend the use of restricted cash accounts to all REPs. Cities stated that a creditor foreclosing on a REP's collateral might sweep all bank accounts, regardless of the identification of the account as restricted.

TXU disagreed with Cities regarding LCs and escrow accounts. TXU stated that financially reliable REPs are required to pay additional costs of providing credit support such as a LC, restricted cash account, or escrow account. TXU stated that financially reliable REPs should be able to maintain adequate liquid capital to cover customer deposits.

Reliant disagreed with Texas ROSE/TLSC's recommendation that all REPs use an escrow account, and stated that for those REPs that have significant daily deposit activity, an escrow account is not administratively feasible and would become cumbersome and costly.

ARM and TXU disagreed with Texas ROSE/TLSC and opposed their proposal to keep customer deposits in one or more FDIC insured accounts protected under the TAGP. ARM stated that this methodology will preclude REPs from earning any interest on those segregated monies, despite the requirement in §25.478(f) requiring REPs to pay interest on customer deposits. ARM also stated that REPs should not be restricted from at least partially funding this interest payment obligation during their retention of those deposit monies.

Commission Response

The commission disagrees with TXU that financially strong REPs should be allowed to maintain adequate liquid capital to cover customer deposits. One of the challenges for the commission in adopting this rule is to balance the interest of particular customers in adequate security for the amounts they deposit with a REP and the interest of all customers in a vibrant retail market. The problems that the market experienced in 2008, when several REPs failed, without returning all deposits and advance payments to customers, was one of the reasons that the commission reviewed the REP certification requirements, and the commission concludes that, in light of these circumstances, providing additional security for customers is appropriate. The commission finds that deposits and advance payments should be held in a segregated cash account or an escrow account, or secured by an irrevocable stand-by letter of credit, to increase the probability that the customer deposits and advance payments will be protected from the bankruptcy of the REP.

The commission disagrees with Cities and Texas ROSE/TLSC concerning the use of restricted (segregated) cash accounts. The commission finds that segregated cash accounts, coupled with the other financial strength or security requirements in the rule, will adequately protect customer deposits held by REPs. The rule will give REPs three options for managing customer deposits. A REP with a high level of financial strength, that is one that meet the requirements of subsection (f)(1)(A), may use a segregated cash account that meets the requirements of subsection (f)(2)(A), may use an escrow account, or may provide a LC to secure 100% of the customer deposits. REPs that meet the requirements of subsection (f)(1)(B) may use a segregated cash account that meets the financial requirements of subsection (f)(2)(B), may use an escrow account, or may provide a LC to secure 100% of the customer deposits. A segregated cash account under subsection (f)(2)(B) must be deposited with an FDIC insured institution and be subject to the control of a creditor of the REP. The third option relates to advance payments by a REP offering prepaid service, and a REP that takes advantage of this option may use an escrow account or letter of credit. It is reasonable to conclude that deposits held in segregated cash accounts by REPs that meet the commission's standard for creditworthiness under subsection (f)(1)(A) are protected because the probability of default for these REPs is very low. It is also reasonable to conclude that deposits held in segregated cash accounts by REPs that meet the requirements of subsection (f)(2)(B) are protected because a segregated cash account under subsection (f)(2)(B) is subject to the control or management of a provider of credit to the REP. The commission provides the option to use a segregated cash account pursuant to subsection (f)(2)(B) for the specific purpose of accommodating lockbox arrangements with providers of wholesale power supply to the extent the accounts are controlled and managed by that provider.

The commission disagrees with Texas ROSE/TLSC that REPs should hold deposits in TAGP accounts. The commission agrees

with ARM and TXU that such accounts are non-interest bearing accounts that would inhibit a REP's ability to pay interest on customer deposits as required by §25.478(f). The commission agrees with Texas ROSE/TLSC, in part, concerning the holding of deposits in FDIC insured accounts. The commission is applying this requirement to segregated cash accounts for REPs that do not meet the financial standards under subsection (f)(1)(A).

Question 2: How should such a program be administered? For example, should the REP use its bank to hold and disburse customer deposits or should some other third party be used?

Reliant and RCM did not support a third party administrator because it would be too cumbersome for day-to-day operations. Reliant stated their preference for the use of segregated cash accounts along with record-keeping that allows tracing of specific deposits to specific customers as outlined in §25.478(h) and §25.478(j), which specify requirements for refunding deposits and the conditions under which a REP can retain the deposit. RCM stated that a third party entity would be faced with developing both fee schedules and procedural guidelines to govern its operation, which would add costs to the REPs and consequently to the customers. RCM stated that if it is forced to choose between the two alternatives, RCM would opt for a standardized arrangement with a commercial bank acting as a custodian for all customer deposits in a manner that is similar to the LITE-UP administration.

OPC suggested that a third party administrator would be most effective for keeping the deposit money segregated from the REP's capital or operating funds. OPC mentioned ERCOT as one option for a third party administrator and stated that it is perfectly situated to assume the task of switching the deposit money from the old REP to the new REP when customers switch REPs. OPC stated that ERCOT could also handle the task of refunding money to the customer or to the prior REP if the customer left a balance due.

Cities stated that either approach would be acceptable as long as the third party is independent of the REP and has an acknowledged fiduciary responsibility to the beneficiaries of the LC or escrow agreement.

Texas ROSE/TLSC agreed with OPC that ERCOT should be used as a third party as this allows ease of transfer for security funds and billing credits from one REP to another during a mass transition or when a customer switches REPs.

Texas ROSE/TLSC also proposed a hybrid alternative that requires each REP to hold funds in an insured TAGP account. A designated ERCOT official (or the PUC's executive director) would be an account co-signer. The PUC would have a standard agreement with each REP that details the circumstances in which the co-signer would exercise the legal authority to transfer funds to the POLR or other acquiring REP. Texas ROSE/TLSC recommended assistance from the Office of Attorney General be sought in drafting the required legal instrument that would be uniform for all REPs.

Reliant opposed Texas ROSE/TLSC's proposal for a "co-signer" concept as inappropriately transferring access to funds rightfully held by the REP on behalf of its customers.

Commission Response

The commission disagrees with OPC and Texas ROSE/TLSC that a third party administrator would be the most effective method to segregate deposits from a REP's operating funds. The commission agrees with Reliant and RCM that the use of a third party administrator to manage customer deposits is too cumbersome for day-to-day operations and is not a cost-effective solution. The commission believes that such a system, whether it is administered by ERCOT or some other third party, would require substantial development and would add substantial new costs to the market. In addition, the use of a third-party administrator would increase the cost without providing a net benefit.

Question 3: What mechanism would provide the most cost-effective means of protecting customer deposits in the event of a REP failure, including bankruptcy?

Cities provided the following three mechanisms that would provide the most cost-effective means of protecting customer deposits: a LC, requiring some form of insurance (*i.e.*, bond), or an escrow agreement. Cities stated that a LC is intended to provide protection to the beneficiary in the event of bankruptcy or insolvency. Cities also stated that the LC be structured so that it is not considered the property of the REP and any draw will not be impaired by bankruptcy of the REP. Cities stated that the requirement of some form of insurance could prove to be more cumbersome and expensive, and bonds may not be readily available to the REP at a reasonable cost. Finally, Cities stated that some REPs with lesser financial resources may have difficulty obtaining a LC on their terms. Cities concluded that discussion in the workshop for this project indicated that the escrow approach was viewed as the most cost effective mechanism for such REPs.

Texas ROSE/TLSC stated that until a rule is adopted that fully describes the requirements for protecting customer deposits, it is impossible to determine the most cost effective means of protecting the deposits. Texas ROSE/TLSC stated that the mechanism should be measured for its cost effectiveness to the customer and not the REP.

Joint TDUs stated that customer funds should be held in an escrow account, which provides the most efficient way of ensuring that customer deposits are protected and are available to be refunded to customers in the event of a REP failure.

Reliant stated that allowing a REP to maintain the funds in a separate account in its own bank would be the most cost-effective method.

TEAM and TXU recommended that the commission retain an expert to study the wide array of banking products that may be available such as escrow agreements, disbursement accounts, trust accounts, reserve bank accounts, or other cash accounts to determine whether one or more meets the commission's goals.

Commission Response

The commission finds that providing REPs with the option of using segregated cash accounts, escrow accounts, and irrevocable stand-by letters of credit is the most cost-effective way to secure customer deposits. As discussed in the commission's response to Question 2, the commission finds that the use of a third party administrator is not cost-effective. The commission believes the approach it is adopting to protect customer deposits strikes the appropriate balance between cost concerns and protecting customer deposits.

Question 4: Given the current instability in the financial markets and the substantial differences in the collateral required for a subsection (f)(1)(A) REP versus a subsection (f)(1)(B) REP, does the rule adequately address what happens if a REP suddenly moves from one category to another as a result of a credit downgrade?

OPC, TXU, Texas ROSE/TLSC, RCM, ARM, and TEAM stated that the rule does not address a REP downgrade from the access to capital requirements under subsection (f)(1)(A) to the requirements under subsection (f)(1)(B). The parties recommended grace periods ranging from 10 days to six months to allow a REP that no longer meets the requirements of subsection (f)(1)(A) to meet the requirements of subsection (f)(1)(B).

TEAM argued that the issue should be addressed by creating a level playing field, rather than adding transition time for a REP that experiences a financial status change.

Reliant asserted that the rule adequately addresses the situation of a REP being downgraded, noting that subsection (i)(3) requires a REP to notify the commission within three days of a material change, and subsection (j) provides for the suspension of a certificate.

OPC stated that the rule does not address what would happen to a REP under subsection (f)(1)(B) if it incurs a sanction or default.

Cities recommended less differentiation between subsections (f)(1)(A) and (f)(1)(B), and suggested that a letter of credit or escrow arrangement for customer deposits for all REPs would lessen the impact of a downgrade.

Texas ROSE/TLSC recommended that if a REP experiences a downgrade or its liquid capital falls below $3 million, the REP should be required to report the change in financial status within five calendar days. ARM recommended modifications to subsection (i)(4) to better specify a process for re-achieving compliance with the financial requirements.

Commission Response

The commission agrees with OPC, TXU, Texas ROSE/TLSC, RCM, ARM, and TEAM that the proposed rule did not adequately address the impact of a credit downgrade or other event that result in a REP certified pursuant to subsection (f)(1)(A) needing to establish that it meets the requirements of subsection (f)(1)(B). The commission provides additional rule language in subsection (i)(4) to address this concern. Additionally, the commission is eliminating the collateral required of REPs certified pursuant to subsection (f)(1)(B) to secure TDU deposits, which dramatically reduces the impact of a credit downgrade.

The commission agrees with Cities that there should be less differentiation between the deposit protection requirements of subsections (f)(1)(A) and (f)(1)(B). As discussed in its response to Question 1, the commission believes that REPs certified under both subsections should have the option of using segregated cash accounts, escrow accounts, and irrevocable stand-by letters of credit.

The commission disagrees with TEAM that the issue of a downgrade from subsection (f)(1)(A) to subsection (f)(1)(B) should be addressed by creating a level playing field, rather than adding transition time for a REP that experiences a financial status change. The commission believes that it is appropriate to give applicants several options for qualifying to operate as a REP, with respect to financial qualifications and protections for customer deposits. Presumably, TEAM's idea of a level playing field implies that there would be a single standard for financial strength and protection of deposits. The commission believes that such an approach would require substantially higher levels of financial strength for applicants or more collateral and add costs to the market compared to the approach that the commission is taking in adopting the rule.

The commission agrees with OPC that the rule does not address what would happen to a REP under subsection (f)(1)(B) if it incurs a sanction or default. However, the commission finds that rule does not need to address this concern because the provisions in subsection (f)(1)(B) that used "sanction" or "default" have been deleted.

The commission agrees with Texas ROSE/TLSC that a REP should be required to promptly report a change in financial status. The commission is adopting a requirement that such a REP notify the commission within three working days pursuant to subsection (i)(4).

Question 5: Will our POLR and/or disclosure rules obviate the need for certain provisions of this rule? If so, please discuss the provisions and the impact that the other rules will have on the competitive market, REPs, and their customers.

ARM stated that addressing the issue of REP default on the "front end" in the certification rule should alleviate many of the concerns about POLR service that are being addressed in the POLR project. ARM emphasized that reducing the probability of REP defaults through new certification requirements will result in fewer instances in which POLR service is required. ARM added that it did not see a relationship between a new certification rule in this project and the REP disclosure rule.

OPC stated that the certification rule has a more significant impact on the market and consumers. OPC added that modifications to the certification rule would actually impact both the POLR and disclosure rules. OPC explained that the market begins with certification - and that the rule guides the standards for the caliber of entities that enter the market. Therefore, OPC opined that if a REP is sophisticated and has the tools necessary to succeed in this market, then it will, and the POLR rule will only be needed as "belt and suspenders" protection.

Texas ROSE/TLSC, OPC, and Joint TDUs stated that the proposed POLR rule would not obviate the need for a better REP certification rule. Texas ROSE/TLSC agreed with OPC on a "belt and suspenders" approach to further public protection. OPC also argued that the revisions to the certification rule are needed even if the proposed POLR rule is adopted. Joint TDUs stressed that even if the POLR rule mitigates the financial burden on customers transferred to the POLR, the process of transitioning customers is costly and disruptive to the market as a whole. Joint TDUs added that the market does not need to subsidize entrants who are not sufficiently equipped, financially and otherwise to support their own business risk.

Reliant commented that it is impossible to say whether certain provisions of this certification rule will or will not be necessary without knowing what provisions will or will not be adopted in the other pending rulemakings.

Conversely, Bounce stated that most issues addressed in this rulemaking can be resolved by the adoption of rules under the POLR rule. Bounce also stated that the revised POLR rule should include rapid transfer of customer accounts to and from their respective POLRs and ultimately to their desired REPs, clear and effective disclosures to customers affected by a REP insolvency so that customers can make timely and informed decisions, and reasonable price protections for the limited period necessary for customers to be transferred to the REP of their choice.

RCM agreed with Bounce and stated that it was the financial impact on customers being dropped to POLR, and the corre-

spondingly higher electric rates, that led to the public outcry for change. NEM added that the parties should focus on reforming the POLR rule to protect consumers in the event of a default, and that it supports practical POLR rule modifications that concomitantly protect consumers and that allow robust marketer participation in the market to continue.

TEAM stated that many of the issues in the certification rule are under consideration in the Disclosure and POLR rulemaking projects. TEAM added that the changes proposed in the other rulemakings will eliminate the need for the certification rule to include modified financial requirements and increased reporting for REPs. TEAM recommended that the commission allow some experience with the other efforts and enhanced enforcement of existing reporting requirements to take hold, before imposing new requirements that will increase the costs to provide service with no quantifiable benefit.

ARM stated that the adoption of financial, technical, and managerial requirements that aim to achieve a reduced probability of default is the best long-term solution for addressing the issues that triggered the contemporaneous initiation of the Certification and POLR rulemaking projects. ARM argued further that simply shifting an additional financial burden to those REPs obligated to provide emergency service is neither an effective nor equitable solution to the issues that the two rulemakings seek to remedy. ARM emphasized that it views emergency service as an integral component of the competitive electric market in Texas.

TEAM pointed out that the commission has recently taken other actions that will assist in avoiding the problems associated with market exits this past summer, such as the approval of advanced meter deployment. TEAM stated that these meters will allow REPs to better hedge against a volatile wholesale market through load control and possible participation as a demand resource.

TXU stated that there is a close relationship among the three rules, particularly between the POLR and the Certification rule. TXU believes the two rules most closely intersect with respect to the handling of customers' deposits. TXU argued that the fundamental policy tension between the Certification and POLR rules is the extent to which the commission provides customers additional protections by developing revised requirements for entry into the Retail market in the Certification rule, as contrasted with enhancing customers servicing when their REPs fail, through the POLR rulemaking.

TXU stated that it is possible to appropriately raise the standards in the certification rule without making the barriers to entry too high, while also improving customer servicing in the POLR rule without making the costs and risks to REPs unmanageable.

RCM disagreed with ARM's comments and argued that ARM's attempt to encourage the commission to "raise the bar" is really an effort to significantly reduce the number of competitors in the market. Furthermore, RCM argued, ARM's reluctance to acknowledge the need for any changes to the POLR rule confirms that a "purge of REPs" is the preferred solution for ARM.

Commission Response

The commission agrees that the disclosure rules have little impact on this rule and do not obviate any provisions in this rule. The commission recognizes the interrelationship between this rule and the POLR rule. The commission disagrees with TEAM that the changes proposed in the other rulemakings will eliminate the need for the certification rule to include modified financial requirements and increased reporting for REPs. It is the commission's intent to strengthen the quality of the REPs in the market so that fewer customers are transferred to POLRs as a result of REP defaults. The commission believes that by increasing the financial requirements and the technical and managerial requirements of REPs, fewer REPs will default. To the extent that some customers are transferred to POLRs, the deposits will be secured. The POLR rules have not yet been finalized, but the commission does not believe that provisions in the POLR rule will obviate any part of this rule because this rule is designed, in part, to reduce the probability that a customer will be transitioned to a POLR, which is a purpose that cannot be addressed in a rule that is designed to address issues that are born after a transition to a POLR has occurred. The transfer to POLR can be made less traumatic for customers through changes in the POLR rule, but a REP failure results in customers losing the benefit of the service arrangements they have with a REP that fails. One of the objectives of this rule is to reduce the number of instances in which customers lose this benefit, by reducing the number of REP failures.

The commission disagrees with TEAM that advanced metering will fundamentally affect the technical, managerial, or financial qualifications needed to be an effective REP. In addition, advanced metering will not be fully deployed, nor will the systems be in place for REPs to utilize the meters in the manner that TEAM suggests, for some time. Therefore the commission does not change any of the qualifications in this rule as a result of TEAM's comment.

The commission disagrees with RCM's comment that ARM's attempt to encourage the commission to "raise the bar" is really an effort to significantly reduce the number of competitors in the market. Whatever ARM's motivations may be, the commission's objectives are to maintain vibrant competition in the retail market and improve customers' experience in the market, and the commission does not believe that the rule will significantly reduce the number of competitors.

Question 6: General rate case principles require TDUs to prove that an expense is reasonable and necessary, in order to recover it. Is any additional language required in subsection (f)(3)(C) to make it clear what the TDU must prove in a rate case to obtain cost recovery of a regulatory asset related to REP bad debt?

OPC, Cities, Texas ROSE/TLSC, RCM, and SHELL stated that no additional language is necessary.

Joint TDUs recommended additional language to satisfy the auditors for creation of the regulatory asset and to make it clear that the regulatory review of reasonableness is required before rate recovery of the asset occurs.

Commission Response

As discussed in connection with subsection (f)(3) below, the commission revises the language regarding the creation of a regulatory asset as suggested by Joint TDUs so that the utility's auditors will allow the utility to create a regulatory asset.

Question 7: Does PURA give the commission the authority to pre-approve the transfer of a REP certificate?

Texas ROSE/TLSC stated that the commission has the authority to pre-approve a transfer pursuant to PURA §39.352(a). PURA does not allow a person to conduct business as a REP unless the person has been certificated as a REP by the commission. The commission is required to approve a transfer to assure that the REP receiving customers meets the requirements of PURA

and the commission's rules. TIEC expressed the same view and argument.

OPC stated that the commission may approve REP certificate transfers because such approval is reasonably necessary to carry out the express requirements of PURA §39.352(a). Without the ability to approve the transfer of REP certificates, the commission would not be able to fulfill its obligation to ensure that entities that provide retail electric service have been certificated by the commission. OPC also stated that a REP certificate transfer without customer consent or commission approval would be considered slamming under PURA §39.101(b)(2) and the commission's customer protection rules. Finally, OPC noted that the current rule requires prior approval by the commission of a REP certificate transfer, and that nothing in PURA has limited the commission's authority to require pre-approval since the last version of the rule was approved.

Cities stated that the authority to pre-approve the transfer of a REP certificate is implicit in the power of the commission to issue REP certificates pursuant to PURA §39.352. A REP certificate is issued based upon representations made by the applicant regarding its financial, technical, and managerial resources. A change in ownership is a material change in the representations upon which certification is based. Cities stated that the authority to amend or modify a certificate based upon a change in the circumstances underlying the initial approval is inherent in the commission's power to issue certificates. Cities also stated that PURA §39.356(a) allows the commission to suspend, revoke, or amend a REP certificate for violations of the commission's rules. The proposed rule can require a REP to obtain approval of a modification to the certificate to reflect a change in ownership. In reviewing the modification, the commission can consider whether the change in ownership would affect the REP's financial or technical capability to provide continuous and reliable service. Cities stated that the express terms of PURA §39.356(a) permit the commission to revoke or suspend the certificate.

TXU stated that PURA allows the commission to require pre-approval where the certificate is acquired by an entity that has not previously provided retail electric service under the certification being transferred but does not allow the commission to require pre-approval where the transaction only results in a change in the direct or indirect owners of a REP. TXU further stated that the commission concurred with this limitation when it declined to require prior approval of direct or indirect transfers in Project Number 34309.

Reliant stated that no specific authority allows the commission to control the ability of a REP to transfer a certificate. In addition, the purchase of stock in a REP or its parent would not require a transfer, nor would the commission have the authority to approve or deny such a purchase. Reliant noted that the commission could decide that the purchaser of a REP certificate is not qualified to be a REP.

ARM stated that the commission lacks authority under PURA to regulate transactions of this nature, and that nothing in the statute authorizes the commission to approve the transfer of a REP certificate. ARM stated that the as-filed version of Senate Bill 7 included a proposed PURA §39.158, which would have required a REP to obtain commission approval to merge, consolidate, or otherwise become affiliated with another REP. ARM noted that this provision was not included in the enacted version of the bill, and stated that the absence of the provision evinces a legislative intent to permit REPs to transfer certificates without commission approval. ARM also noted that the commission obtained authority in the last legislative session to approve sales, transfers, and mergers by electric utilities and TDUs and that the existence of this authority and the absence of similar authority applicable to REPs demonstrate legislative intent to allow the transfer of a REP certificate without commission approval. ARM mentioned that Chairman Smitherman filed two memoranda in Project No. 34039 contending that the commission lacked such authority under PURA. ARM stated that the commission's authority applies to whether a holder of a REP certificate meets the financial, technical, and managerial requirements in §25.107, and that the commission's authority over a sales/transfer/merger transaction involving the transfer of a REP certificate is limited in that respect. The transferee in such a transaction must meet the commission's certification requirements at the time of the certificate transfer or risk being in violation of §25.107. If a transferee is not already certificated to provide retail electric service in Texas, the transferee would need to obtain a REP certificate prior to or at the time of the transfer, and as a practical matter, the issuance of the certificate should take into account the pending certificate transfer as a way to ensure continued compliance with §25.107 once the certificate transfer takes place. According to ARM, if the transferee already holds a REP certificate, then proposed subsection (i)(3), as revised in ARM's comments, requires the REP to amend its existing certificate if the transfer involves a material change in the financial, technical, or managerial information upon which the REP and commission relied at the time the existing certificate was issued. ARM also stated that its proposed revisions to subsection (i)(3) would permit a REP under such circumstances to amend its certificate prior to the closing of the transaction.

Joint TDUs stated that an incongruity exists between not allowing an entity to start a REP until it demonstrates compliance with the commission's rules and allowing that same entity to operate a REP though a certificate transfer without having to demonstrate compliance with the commission's rules. Joint TDUs noted that the proposed rule appropriately gives the commission the authority to more closely monitor the financial condition of REPs, and that the transfer, merger, or sale of a REP certificate should not be used to impede the commission's oversight. Finally, Joint TDUs stated that it is important for TDUs to have accurate information regarding who is financially responsible for delivery charges. Joint TDUs recommended that TDUs should receive notice of any transfer, and that the transferee must execute a Delivery Service Agreement with the TDU before being eligible for delivery service.

Commission Response

The commission finds that issues regarding the transfer of a REP certificate and changes in the control of REPs merit further discussion in a separate project to fully develop the issues surrounding the transfer of REP certificates and changes in the control of REPs, and to provide certainty to the market regarding these transactions.

Subsection (a)(4)

TXU stated that the prohibition against REPs owning and operating generation assets is not necessary and should be deleted.

Texas ROSE/TLSC supported the proposed rule provisions in subsection (a) through (e) as written.

Commission Response

The commission agrees with TXU that this provision is unnecessary because this prohibition is already contained in PURA §31.002(17). The provision is therefore deleted.

Subsection (b)(4) - Definition of guarantor, now (b)(7)

ARM and TXU recommended that the definition of "guarantor" be expanded to include an affiliate, and to require that a guarantor satisfy the financial requirements. In addition, TEAM proposed that the rule should allow guarantees by non-affiliates.

Commission Response

The commission agrees that it is unnecessary to limit the types of entities that can provide a guaranty agreement. The commission therefore expands the definition of guarantor to include any person providing a guaranty agreement, business financial commitment, or credit support agreement providing financial support to a REP or applicant for REP certification pursuant to this section.

The commission disagrees with ARM and TXU that the definition of guarantor should require that the guarantor satisfy the financial requirements. The requirement that the guarantor satisfy the financial requirements is provided in subsection (f)(4)(G).

Subsection (b)(5) - Definition of investment-grade credit rating, now (b)(8)

Joint TDUs recommended adding language to the definition of "investment-grade credit rating" to allow ratings from A.M. Best and to remove the ambiguous reference to nationally recognized credit rating agencies.

Commission Response

The commission agrees with Joint TDUs. The commission expands the definition of investment-grade credit rating to include a "BBB" rating from A.M. Best, and removes the reference to nationally recognized agencies.

Subsection (b)(6) - Definition of liquid capital

Joint TDUs recommended adding clarifying language to the definition of "liquid capital" to exclude customer deposits, deposits with the TDU, and other restricted or encumbered cash.

ARM suggested additional language to acknowledge that a REP can rely on a guarantor to demonstrate or to help demonstrate liquid capital. Reliant expressed concern about ARM's suggestion and noted that guaranty agreements, corporate commitments, and credit support agreements are not liquid capital.

TEAM agreed with Shell that the commission should allow a REP that has a lock box credit arrangement with its wholesale supplier to count that credit toward its financial resources to allow small REPs that cannot meet the proposed financial standards to continue providing service to their retail customers in Texas. Joint TDUs argued that Shell's proposal is problematic because of the difficulty in valuing the arrangement, and because the funds are in a lock box controlled by Shell and are not liquid and unencumbered.

Commission Response

Because of changes to subsection (f), the commission finds that the definition of liquid capital is no longer relevant. The definition of liquid capital is deleted.

Subsection (b)(7) - Definition of permanent employee, now (b)(9)

ARM stated that proposed subsection (g)(1)(F) is critical to reducing the probability of a REP default, but that the definition of "permanent employee" failed to fully capture the objective of that section, which is to integrate commodity risk management and hedging expertise into a REP's business structure. ARM stated that to the extent that a REP's intention to employ someone for at least six months is subjective, it will be difficult to prove or disprove. ARM stated that an objective demonstration of the REP's commitment to integrate commodity risk management and hedging expertise on a permanent basis is the better option. ARM suggested that the definition distinguish a permanent employee from a consultant, third party contractor, temporary employee or other individual who is not fully and permanently integrated into the REP's business organization. ARM also suggested that the sixth month period should be deleted and that the proposed definition should be expanded to further define a permanent employee in the negative.

Commission Response

The commission agrees with ARM that intent to hire someone for six months is subjective and that a better option is to require an individual that is fully integrated into the business organization and is not a consultant. Therefore the commission makes changes to the definition of permanent employee to refer to an individual that is fully integrated into the business organization and is not a consultant.

Subsection (b)(8) - Definition of person, now (b)(10)

Commission Response

The commission finds that the definition of person should be broadened for purposes of this section to include all types of business entities, while maintaining the exclusion for an electric cooperative or municipal corporation as required by PURA, because the proposed rule did not provide for a limited liability company.

Subsection (b)(11) - Definition of sanction

ARM stated that the definition of the term "sanction" should be removed from the rule. ARM stated that the definition differs from the common meaning of the term, which is a penalty or coercive measure that results from failure to comply with a law, rule, or order. A sanction is the punishment that follows a finding of a legal violation; it is not the violation itself or a finding of a violation. ARM noted that the term sanction is only used in subsections (f)(1)(B)(ii) and (iii), which provide that a REP must have access to $2 million or $1 million in liquid capital if it has operated in the Texas market without default or sanction for two or three years, respectively. ARM stated that definition of sanction is important for REPs that must demonstrate access to liquid capital pursuant to subsection (f)(1)(B). ARM also stated that the definition of sanction includes all commission findings of violations of law in its final orders. Thus, a finding of a violation of a minor commission procedural rule would be on par with a finding of a violation of an ERCOT Protocol with multi-million dollar consequences. Finally, ARM stated that the sanction under the proposed rule does not have to relate to the REP's financial health or conduct.

TXU agreed with ARM's proposal to delete the definition of the term "sanction."

Commission Response

The commission has deleted the definition for "sanction" because the adopted rule does not use that term.

Subsection (b)(12) - Definition of tangible net worth, now (b)(14)

TXU, Reliant, and First Choice opposed a net worth calculation that subtracts goodwill and intangibles. TXU argued that the definition of tangible net worth improperly excludes consideration of goodwill and other intangible assets that have significant value in the marketplace. Joint TDUs and OPC stated that intangibles should not be included in a net worth calculation because of the difficulty in valuing the intangibles. OPC noted that goodwill cannot reimburse customers or offer any tangible assistance to customers in the event of default.

Commission Response

The commission agrees, in part, with TXU, Reliant, and First Choice. The commission modifies the definition of tangible net worth such that tangible net worth equals total shareholders' equity, determined in accordance with generally accepted accounting principles, less intangible assets other than goodwill. The commission allows goodwill because of changes to accounting standards that add transparency to the valuation of goodwill and that require that REPs use mark-to-market rules in valuing certain assets that may have a significant impact on the value of goodwill and, consequently, the REP.

Subsection (c)

ARM stated that the proposed rule lacks clarity as to how REPs currently holding certificates are to comply with the new certification standards adopted in this proceeding. ARM indicated that a statement regarding REP compliance with these new certification requirements is important because the commission is repealing the current certification rule with which those REPs have complied to date. ARM provided a modification to subsection (c)(1) to better capture the continuing application of the certification requirements to REPs, in particular, the financial requirements.

ARM stated that the subsection (c)(2) requirement that an application for certification be signed by a principal is both inappropriate and impractical. ARM argued that a principal, such as a controlling shareholder, is not always intimately involved in the applicant's day-to-day business and may not serve on its behalf in any representative capacity. Consistent with current certification practice, an officer of the applicant should bear the responsibility of vouching for the content of the submitted certification application.

ARM suggested that subsection (c)(3) be rewritten to allow for the filing of confidential information. TXU and Reliant agreed with and supported ARM's suggestion for subsection (c)(3).

Commission Response

The commission agrees with ARM that the proposed rule lacked clarity as to how REPs currently holding certificates are to comply with the new certification standards. The commission adds rule language in subsection (k) to establish a phase-in period for existing REPs to establish compliance with all of the new certification standards, and modifies language in subsection (f)(1)(B)(iii) to identify existing REPs that are required to meet the shareholders' equity requirement under subsection (f)(1)(B).

The commission agrees, in part, with ARM's recommendation to replace "principal" with "officer" in the affirmation of an application for certification. The principals of an applicant for certification may not necessarily have day-to-day involvement with the applicant's business operations, and it may be impractical to secure the required affirmation from a principal. The commission replaces "principal" with "executive officer" in subsection (c)(2), and provides a definition of executive officer in subsection (b).

The commission agrees, in part, with ARM, TXU, and Reliant that the rule should address the filing of confidential information. The commission did not intend the deletion of former section (c)(4) to alter the right of a REP to file information confidentially as allowed by law. Subsection (i)(8) of the proposal for publication required that all applications, reports, and notifications required by this section be filed in accordance with the commission's procedural rules, which address confidential filings in §22.71(d). The commission does not believe that additional language regarding the filing of confidential documents is needed because the commission's procedural rules and the standard protective order provide sufficient procedures for the handling of confidential documents. The commission does believe, however, that the reference to the procedural rules should be moved to subsection (a) to make it clear that the language applies generally to documents filed pursuant to this section.

Subsection (d)

TIEC stated that clarification needs to be made that an Option 2 REP that serves its parent company may continue the existing practice of submitting a consolidated financial report with that parent. TIEC concluded that producing a separate financial report for the REP would unnecessarily and excessively increase the administrative burden and costs of becoming an Option 2 REP, as it would require significant accounting and organizational changes.

NEM and RCM proposed that the commission relax and/or expand the Option 2 requirements to allow very small REPs to serve particular niche markets (limited by number of customers or aggregate load served) without otherwise satisfying all of the financial and technical requirements for subsection (f) and (g). NEM and RCM suggested that the new REP financial, technical and managerial requirements are onerous and will discourage new REP entrants. Further, NEM and RCM contended that the commission should consider relaxing these requirements to assist and encourage smaller REPs, who are bringing to market some of the most innovative products, but want to grow slowly.

NRG opined that PURA does not require Option 2 REPs to demonstrate specific financial or technical requirements to the commission in order to be certificated and that imposing specific financial requirements on Option 2 REPs would be inconsistent with PURA §39.352(d), and would undermine the commercial flexibility that is a primary motivation for becoming an Option 2 REP.

Commission Response

The commission agrees with NRG that PURA §39.352(d) does not require any specific financial or technical requirements and that imposing specific financial requirements on Option 2 REPs undermines the commercial flexibility of the option. The commission concludes that REPs certified pursuant to PURA §39.352(d) need not provide financial reports. Based on this change, the TIEC argument is moot.

The commission disagrees with the NEM and RCM proposal that the commission should relax or expand the Option 2 requirements. The commission finds that the NEM and RCM proposal is inconsistent with the requirements of PURA §39.352(d). The commission finds that the NEM and RCM proposal, if presented as a load-restricted option under Option 1, would differ from Option 2 in terms of the commission resources and the practicality

of policing the compliance of the REP, and would increase the burden on commission resources and the risk of harm to customers.

Subsection (e)

ARM proposed two changes for subsection (e)(2), regarding office requirements. ARM contended that the Texas office required by PURA §39.352(b)(4) did not need to be the exclusive location for the three required functions: customer service provision, acceptance of service of process, and maintenance of sufficient records to demonstrate compliance with PURA and commission rules. ARM argued that Texas law allows acceptance of service of process through a registered agent that may be at a separate address. In addition, ARM also argued that the REP must be given reasonable advance notice of any commission staff office visit to allow the REP time to ensure the availability of the records being sought for review and to provide any necessary personnel to assist in the review.

Commission Response

The commission agrees with ARM that, to the extent that the Texas office listed in the application will accept service of process as well as provide the other functions required, these functions can also occur at other offices as well. However, to the extent that ARM is suggesting that one or more of these functions do not occur at this office, the commission finds that circumstance unacceptable, because PURA §39.352 states that the REP must demonstrate "ownership or lease of an office located within this state *for the purpose of* providing customer service, accepting service of process, and making available in that office books and records sufficient to establish the retail electric provider's compliance with the requirements of this subchapter." (Emphasis added.) Given these requirements and the commission's authority to investigate whether these functions are occurring at the premises, the commission declines to require itself to notify the REP in advance of a visit to investigate, as the records the commission staff are seeking should be available at that office under the statute.

Subsection (f)(1), generally

Joint TDUs, ARM, OPC, Texas ROSE/TLSC, Cities, TXU, Reliant, OAG, and FCP supported the commission's effort to establish more stringent financial requirements for REPs. Texas ROSE/TLSC stated that the proposed rule will improve the financial stability of REPs and restore consumer confidence in the market, and supported the provisions requiring an investment-grade credit rating, $100 million in tangible net worth, or liquid capital in excess of $3 million for financial qualification. First Choice stated that the proposed rule strengthens the certification requirements for REPs in a manner that provides adequate protection for customers, TDUs, and REPs without creating unnecessary barriers to entry. ARM indicated that it is opposed to any significant revisions to the proposed subsection (f)(1).

NEM, En-Touch, Tara, and TEAM are opposed to increasing the financial requirements, arguing generally that the financial requirements are unreasonably burdensome to small REPs and present a substantial barrier to entry. RCM agreed that the financial standards are burdensome as proposed, but disagreed with parties that advocate maintaining the status quo.

Regarding the different criteria outlined in subsections (f)(1)(A) and (f)(1)(B), TXU agreed with the commission's effort to establish separate criteria for REPs based on creditworthiness. TXU argued that it is the most cost-effective way of protecting all stakeholders. Integrys, Constellation, and Direct noted that an investment-grade credit rating is applied appropriately in the rule because it represents a lower probability of default that allows an entity engage in commercial transactions with no security or less security compared to an entity that does not have an investment-grade credit rating.

RCM and Bounce opposed the establishment of separate criteria for financial qualification. Bounce proposed that all existing REPS that are serving retail customers should be subject to subsection (f)(1)(B)(iii), which requires liquid capital in excess of $1 million. Under the assumption that this argument has merit, Cities proposed that the argument does not necessarily support a uniform $1 million requirement, and that the argument may lead to the conclusion that $2 million or $3 million is the appropriate level. Alternatively, Bounce suggested that the impact of subsection (f)(1)(B) would be less discriminatory if the new liquid capital requirements were applied only to new REPs, since these REPs would have full disclosure of the requirements.

ARM suggested that the financial requirements should be modified to contemplate more than one guarantor, and noted that the proposed rule does not indicate whether the guaranty or commitment of a guarantor is open-ended or for a specific amount. ARM suggested that the amount guaranteed should correlate to one of the liquid capital requirements. TXU suggested that the REP demonstrate that it can access capital from the guarantor in an amount sufficient to satisfy subsection (f)(1)(B) and subsection (f)(2).

Commission Response

The commission disagrees with NEM, En-Touch, Tara, and TEAM that the financial requirements are unreasonably burdensome to small REPs and present a substantial barrier to entry. The commission agrees with First Choice that the proposed rule strengthens the certification requirements for REPs in a manner that provides adequate protection for customers, TDUs, and REPs without creating unnecessary barriers to entry.

The commission disagrees with Bounce that all existing REPS that are serving retail customers should be subject to proposed subsection (f)(1)(B)(iii), which requires liquid capital in excess of $1 million. The commission believes that the financial requirements should be bifurcated based on creditworthiness, and agrees with TXU that such an approach is the most cost-effective way to protect all stakeholders.

The commission agrees, in part, with Bounce that the new liquid capital requirements should be applied only to new REPs, since these REPs would have full disclosure of the requirements. The commission provides rule language in subsection (f)(1)(B)(iii) that exempts REPs that served load on or before January 1, 2009 from the requirement to demonstrate the shareholders' equity required by subsection (f)(1)(B).

Subsection (f)(1)(A)(i)

TXU agreed that an investment-grade credit rating is an appropriate standard because investment-grade companies are generally financially reliable and possess adequate liquidity to meet near-term obligations. Additionally, TXU invited the commission to consider a good payment history of 24 months as a means of qualification under subsection (f)(1)(A). Joint TDUs and RCM recommended that the commission reject TXU's proposal and argued that 24 months of good payment history with the TDU is not a substitute for an investment-grade credit rating.

Joint TDUs recommended that the credit ratings should be one notch above investment grade. Integrys, Constellation, Direct and TXU opposed Joint TDUs' recommendation because it increases the standard beyond what Moody's and S&P define as investment grade.

Commission Response

The commission agrees with TXU that an investment-grade credit rating is an appropriate standard for demonstrating the financial ability to obtain and maintain REP certification because companies with investment-grade credit ratings are financially reliable and possess adequate liquidity to meet near-term obligations.

The commission disagrees with TXU and agrees with Joint TDUs and RCM that a good payment history is not a substitute for an investment-grade credit rating. An investment-grade credit rating establishes a much higher standard for creditworthiness compared to a good payment history.

The commission disagrees with Joint TDUs that the credit rating should be one notch above investment grade. The commission agrees with Integrys, Constellation, Direct and TXU that Joint TDUs' recommendation increases the standard beyond what Moody's, S&P, Fitch, and A.M. Best define as investment grade.

Subsection (f)(1)(A)(ii)

TXU generally supported the use of net worth and financial ratios in subsection (f)(1)(A)(ii), but recommended that intangibles should be included in the net worth calculation. Additionally, TXU recommended removal of the current ratio because of the accounting mismatches between current assets and current liabilities. TXU agreed with Reliant that subsection (f)(1)(A)(ii) should include language to clarify that the effects of derivatives should be excluded from the calculation of the debt-to-total capitalization ratio.

Joint TDUs recommended that subsection (f)(1)(A)(ii) be deleted. Alternatively, Joint TDUs recommended additional language to subsection (f)(1)(A)(ii) that would require positive cash flow from operations for the most recent six months. TXU and Reliant opposed Joint TDUs' proposal to eliminate subsection (f)(A)(ii), and stated that the provision provides reasonable assurance of a REP's creditworthiness and limits risk to the TDU. Additionally, TXU and Reliant opposed the inclusion of a positive cash flow requirement because of the seasonal affects on cash flow.

Commission Response

The commission agrees with TXU and Reliant that the calculation of tangible net worth in subsection (f)(1)(A)(ii) should account for the effects of derivatives. The commission finds that a significant portion of the market value of the REP business is based on the mark-to-market value of contracts and financial instruments used to procure wholesale electricity or to hedge the cost of wholesale electricity. The commission modifies rule language in subsection (f)(1)(A)(ii) to account for unrealized gains and losses that result from marking to market such contracts and instruments, provided that the contracts and instruments are for the purpose of serving load.

The commission disagrees with TXU regarding the removal of the current ratio criteria. The commission understands TXU's concern regarding the potential for accounting mismatches between current assets and current liabilities. However, the commission finds that a current ratio of not less than 1.0 is a low hurdle, and that a REP qualifying under subsection (f)(1)(A)(ii) should at least be able to demonstrate that it has sufficient current assets to meet its current obligations.

The commission disagrees with Joint TDUs that subsection (f)(1)(A)(ii) should be deleted. The commission rejects Joint TDUs alternative recommendation modifying subsection (f)(1)(A)(ii) to require positive cash flow from operations. The commission agrees with TXU and Reliant that subsection (f)(1)(A)(ii) provides reasonable assurance of a REP's creditworthiness, and that the positive cash flow requirement should not be included because of the seasonal effects on cash flow.

Subsection (f)(1)(B)

Bounce, NEM, OPC, REPower, TXU, Texas ROSE/TLSC, RCM, TEAM, and Shell stated that the liquid capital requirements should not be based on the number of years that a REP has continuously served customers, and offered a variety of alternatives that scale the liquid capital requirement based on load or customers.

RCM argued that a REP has no material financial obligations when initially entering the market because it has no customers or forward supply purchases. RCM suggested that the need for capital increases as the business grows. RCM recommended that the initial liquid capital requirement bet set at $300,000 and that the ratio between TDU billings and liquid capital in the current rule be increased from 40% to 60%, with a maximum requirement of $1 million. TEAM generally agreed with RCM, but recommended an initial threshold of $250,000 and a scale up to $1 million.

REPower agreed with the commission that liquid capital requirements should be set to a reasonable level to ensure that a REP has ready access to funds necessary to meet unexpected requests for collateral. REPower recommended liquid capital of not less than two times the ERCOT collateral requirements not to exceed $1 million.

OPC argued that the liquid capital requirements should be scaled to the amount of load, such that REPs demonstrating liquid capital between $2 million and $4 million are load restricted on a sliding scale. Under OPC's plan, REPs that meet the requirements of subsection (f)(1)(A) may serve an unlimited amount of load. Reliant generally agreed with OPC's proposal of a stair-stepped approach based on load but noted that the approach did not include specific amounts of load. Reliant suggested that parties be given an opportunity to comment on the load thresholds should the commission choose to pursue the idea.

ARM and Joint TDUs disagreed with all commenters that proposed scaling the capital requirements based on load or customers. ARM argued that scaled requirements are unnecessary because REPs are already subject to ERCOT credit requirements and to counterparty credit requirements relating to bilateral wholesale power arrangements that are based on load. ARM noted that a scaling requirement will likely result in the frequent need to revise the financial instrument upon which the REP relies to meet the financial requirements. ARM pointed out that the objective of the rule is to reduce the probability of REP default, and that the rule should more simply reflect that the REP has access to a sufficient level of financial resources to enter and operate in the market, rather than attempt to match the financial requirements with the REPs exposure to the market. Joint TDUs argued that the purpose of the requirement is to establish that a new REP is financially stable *before* it acquires new customers, such that the PUC can advertise the REP on the Power

to Choose website with confidence that the REP will be able to stay in business and serve any customers it attracts.

Cities argued that most commenters missed the rationale for the liquid capital criteria. Cities stated that the threshold is intended to weed out fly-by-night REPs, and that a REP that can raise the amount of liquid capital required by the rule is less likely to be a transient. Cities stated that scaling the requirement to load or customers is not an unreasonable idea, but argued that the floor of such a scale should remain $1 million.

TXU suggested that the $3 million liquid capital requirement might be too low. TXU proposed that REPs that cannot meet the requirements of subsection (f)(1)(A) should be required to provide a cash deposit or a LC to the commission to ensure that the REP is committed to fulfilling its obligations. The deposit or LC would be returned to the REP upon exiting the market net of costs associated with customers being dropped to POLR. Should the REP fail, the deposit or LC would be used to offset the cost of providing POLR service and to defray the customers' loss of the benefit of the bargain with the failing REP. Shell and RCM argued that the liquid capital requirement as proposed is dead capital that the REP can't put to work in its business because the use of it would result in a violation of the rule. Similarly, Tara argued that the liquid capital requirement is a reservation of assets that may not be used or borrowed against, and that it provides an advantage to the largest REPs. RCM suggested that the rules should permit the use of the funds after a trigger event and provide a reasonable amount of time to rebuild the funds after a trigger event.

Commission Response

The commission agrees with Bounce, NEM, OPC, REPower, TXU, Texas ROSE/TLSC, RCM, TEAM, and Shell that financial qualification pursuant to subsection (f)(1)(B) should not be based on the number of years that a REP has continuously served customers. The commission disagrees that such a qualification should be based on load or customer count. The commission agrees with ARM that the objective of the rule is to reduce the probability of REP default, and that the rule should more simply reflect that the REP has access to a sufficient level of financial resources to enter and operate in the market, rather than attempt to match the financial requirements with the REP's exposure to the market. The commission agrees with Joint TDUs that the purpose of the requirement is to establish that a new REP is financially stable before it acquires new customers. The commission agrees with Cities that a REP that can raise the amount of capital required by the rule is less likely to be transient. The commission finds that the objective of subsection (f) is to establish the financial requirements to obtain and maintain REP certification, and that the credit risk associated with the scale of each REP's business should continue to be managed by agreements between the REP and ERCOT, or the REP and its counterparties that provide wholesale electricity.

The commission agrees with TXU that REPs that cannot meet the requirements of subsection (f)(1)(A) should be required to provide a cash deposit or a LC to the commission to ensure that the REP is committed to fulfilling its obligations. The commission finds that REPs that cannot meet the requirements of subsection (f)(1)(A) shall provide and maintain a LC payable to the commission. The commission modifies rule language in subsection (f)(1)(B) to require the LC, and provides rule language in subsection (f)(6) regarding the use of proceeds from a LC. The commission believes that the LC increases the probability that a REP will unwind its business in a manner that will avoid market defaults and lead to the return of proceeds from the LC to the REP. However, if the REP experiences a mass transition of its customers by ERCOT, then the LC provides a source of cash that is available for disbursal by the commission to pay POLR deposits for low income customers, mitigate losses incurred by other customers, ERCOT, or TDUs, or for the payment of administrative penalties.

The commission agrees, in part, with Shell and RCM that the liquid capital requirement as proposed is "dead capital" that the REP cannot put to work in its business because the use of it would result in a violation of the rule, and that the rule should permit the use of the funds after a trigger event. The commission finds that the liquid capital requirement under subsection (f)(1)(B) should be deleted and replaced with a requirement to demonstrate shareholders' equity of one million dollars that the REP can put to work in its business without a violation of the rule, provided that the REP does not make any distributions to shareholders or affiliates that will result in shareholders' equity of less than one million dollars for a period of not less than two years after REP certification. The commission finds that the requirement to demonstrate shareholders' equity strikes the appropriate balance regarding the appropriate amount of capital to obtain certification, and that the related restriction on distributions to shareholders provides certainty to the commission that the demonstrated shareholders' equity will be invested in the REP.

Subsection (f)(1)(C)

ARM noted that the compliance process in subsection (f)(1)(C) lacks specificity. ARM provided substantial language that it believes will eliminate confusion for REPs seeking to comply with the new certification standards. Joint TDUs agreed with ARM and added that a new application for certification should be submitted by a REP if it finds during the winding down process that it can comply with the new requirements.

Regarding the period of time provided under subsection (f)(1)(C) to comply with the new financial requirements, Bounce, REPower, Tara, and Shell argued that the period of time should be lengthened from six months to as much as 18 months. Texas ROSE/ TLSC, Joint TDUs, and ARM proposed that the period of time provided under subsection (f)(1)(C) to comply with the new financial requirements should be reduced from six months to as little as 60 days. Joint TDUs recommended that the period of time should be shortened so that REPs come into compliance prior to the 2009 summer months. TXU disagreed and argued that the 180 days proposed by the rule is reasonable.

TXU, ARM, and Reliant suggested that the commission make clear by rule that information submitted pursuant to this rule shall be treated confidentially if such treatment is requested by the REP. Each specifically suggested that the related provision in the existing rule be reinstated.

Commission Response

The commission finds that subsection (f)(1)(C) of the proposed rule, which applied to the financial requirements of subsection (f)(1) only, should be deleted. The commission is adopting subsection (k) to establish a phase-in provision that applies to all of the requirements of new §25.107.

The commission agrees, in part, with Bounce, REPower, Tara, and Shell that the period of time to comply with the financial requirements should be lengthened. The commission finds that six months may not be enough time to comply. Subsection (k) provides 12 months to comply with all requirements of new §25.107.

Subsection (f)(2)

ARM, TEAM, OPC and Reliant stated that all REPs should be treated equally regardless of whether the REPs were certified pursuant to proposed subsections (f)(1)(A) and (f)(1)(B). ARM, TEAM, OPC and Reliant advocated collapsing proposed subsections (f)(2)(A) and (f)(2)(B) into one provision, so that all financial instruments referenced in both provisions are included in a single provision applicable to all REPs serving residential customers. ARM also proposed adding the use of a guaranty or commitment from a guarantor with an investment-grade rating and a credit support agreement to the universe of financial instruments that can be used for this purpose.

OPC stated that Texas ROSE/TLSC, in their comments to Question 1, added an important element to subsection (f)(2) that "not only should customer deposits be protected, but there should be a like assurance regarding any advance payments that customers may have paid for pre-pay service." OPC agreed with Texas ROSE/TLSC and believes the requirement of REPs to protect customer deposits is perhaps "the most important element of this rule."

TXU proposed that the commission follow two steps regarding the protection of customer deposits. First, TXU stated that for a subsection (f)(1)(B) REP the commission immediately draw on the LC or account required of a subsection (f)(1)(B) REP in the event of a default by that REP. TXU stated that as customers are transitioned to a POLR, their proceeds could be allocated to the POLR. The POLR would then return the customer deposits to the customers, as appropriate, in a manner compliant with §25.478. TXU stated that the immediate draw on the LC or account provides an efficient way of returning customer deposits, obviates the need for customers to post additional deposits with POLRs, and provides POLRs with protection against non-payment from transitioned customers. TXU recommended that, for subsection (f)(1)(A) REPs who have not been required to post a LC or specific account, the commission prohibit the application by those REPs of deposits to customer bills except where the customer's payment is past due, the customer has switched or moved, or with the customer's express permission. TXU stated that in the event of a REP failure, the REP's ability to apply a deposit to the customer's bill under §25.478(j) should be revoked unless the REP has otherwise secured the return of the customers' deposits. Under §25.478, a REP is allowed to apply the customer deposits held by the REP (including interest) to the customer bills once the REP is no longer the REP of record for the customer. TXU stated that the failing REP should be required to provide the deposits to the customer's POLR, who will then return it to the customer in compliance with §25.478. Second, TXU stated that failing REPs should be required to provide a letter to the customer stating the time period during which the individual has been a customer of the REP, and that the customer is not delinquent in payment of any such electric service account and was not late in paying a bill more than once during the last 12 consecutive months of service. TXU stated that this letter could be used to satisfy the requirements of creditworthiness used by some REPs in assessing deposits to new customers. TXU stated that making compliance a prerequisite to seeking payment of outstanding bills seems more likely to adduce compliance from a failing REP than simply allowing failing REPs to pocket deposit money and disappear. Reliant agreed that the deposits held by a failed REP should be returned to the customer. Although Reliant was not opposed in concept to TXU's proposal to convey the deposit directly to the POLR, Reliant questioned how §25.478 should be applied in situations where the deposit is transferred from the failing REP to a POLR. Reliant noted that with multiple POLRs and various scenarios that could occur with a failing REP, the proposal would be difficult to implement, as there would be many administrative details that would have to be worked out to make sure the deposit follows the customer.

TXU noted that the interest rate for customer deposits for 2009 is set at 2.0%, and that the expense to secure a LC could cost as much as 3 or 4 percent. TXU recommended that all REPs use a restricted cash account and suggested the inclusion of specific language that describes the restrictions to be applicable to such an account.

TXU stated that the commission should allow subsection (f)(1)(A) REPs to use other commission approved instruments that provide an adequate level of protection of customer deposits and advanced payments.

The OAG stated that neither the existing rule nor the proposed rule distinguishes between "deposits" and "advance payments" in terms of how customer interests are protected. The OAG mentioned that the two classes of payments represent two different business models, each with different risks to customers when a REP fails. The OAG associated "deposits" with customers of REPs that pay for power after the use of it, wherein the REP collects a security deposit in order to reduce its risk in the event that the customer posting the deposit fails payment. The OAG associated "advance payments" to customers of REPs that pay for service in advance, creating a debt that the REP owes to its customer until such time as the customer uses the power that was purchased. The OAG stated that the commission could require that prepay REPs provide their customers with a "security deposit" to assure that this debt to their customers can and will be paid in the event of a REP's withdrawal from the marketplace, thus becoming a trustee for their customers. Finally, the OAG suggested the possibility of using LCs or surety bonds as a means of assuring customers property is returned to customers.

ARM and TXU recommended that subsection (f)(2) apply only to residential customers. OPC opposed ARM's proposal that subsection (f)(2) apply only to residential customers and not protect the deposits or prepayments of small commercial customers.

REPower agreed with the OAG that the terms "deposit" and "advance payment" be defined to better specify the protection this rule provision is attempting to deliver.

REPower stated that the requirements contained in subsection (f)(2)(A) and (B) do not address the conditions faced by REPs operating under §25.498 and that there is not one specific point in time where a REP providing prepay service could set aside 100% of the "advance payment." REPower stated that prepay customers make an average payment of less than $25 to purchase less than one week's worth of electricity, and that the average customer exposure would be far less than the amount of a deposit obtained from a REP providing traditional service. REPower suggested that a separate provision be included for REPs operating under §25.498.

REPower stated that by establishing a timeline for the refunds of any outstanding prepay amounts, the REP's failure to issue such refunds would be in violation of this rule and subject to commission enforcement.

Reliant disagreed with REPower that there should be a separate provision for prepayments pursuant to §25.498 and suggested that subsection (f)(2) be amended to make it applicable to prepayments as well.

Reliant suggested that REPs reconcile their restricted cash accounts on a monthly basis rather than be required to have sufficient funds to cover 100% of the REPs outstanding customer deposits and advance payments at all times. OPC opposed this idea because REPs would not be responsible to each of their customers at any point in time.

Commission Response

The commission disagrees with ARM, TEAM, OPC, and Reliant's suggestion that all REPs should be treated equally under subsection (f)(2) regardless of whether the REPs were certified under subsection (f)(1)(A) or (f)(1)(B). The commission finds that it is appropriate to require more stringent requirements for the protection of customer deposits for REPs that do not meet the high standard for credit quality under subsection (f)(1)(A).

The commission agrees with OPC and Texas ROSE/TLSC that, not only should customer deposits be protected, but there should be like assurance regarding any advance payments that customers may have paid for pre-pay service. The commission modifies rule language in subsection (f)(2) to provide protection for residential advance payments.

The commission disagrees with TXU that deposits held by a failed REP should be conveyed directly to the customer's new POLR provider, such that the POLR provider can return the deposit to the customer in accordance with §25.478. The commission finds that the transfer of deposits from one REP to another is problematic in terms of practical application. Instead, the commission has included subsections (f)(6)(A)(i) and (ii), which provide that the funds drawn from a REP's letter of credit will first be used to pay POLR deposits for low income customers. This approach can be implemented quickly and will provide a significant benefit to the customers who are likely to be most adversely affected by the REP's failure.

The commission agrees with OAG that the proposed rule does not distinguish between deposits and advance payments. The commission modifies rule language in subsection (f)(2) to make it clear that REPs are required to secure both deposits and advance payments. The commission believes that the requirements of subsection (f)(2), when paired with the requirements of subsection (f)(1) provide "belt and suspenders" protection for customer deposits and advance payments.

The commission disagrees with OAG that REPs offering prepaid services should provide a security deposit to customers. The commission finds that such a security deposit would defeat the purpose of an effective prepaid program.

The commission agrees, in part, with ARM and TXU that subsection (f)(2) should only apply to residential customers. The commission finds that commercial and industrial customers are sophisticated counterparties that are capable of managing their counterparty risk, and that commercial and industrial customers often provide an advanced payment to obtain a bargain from the REP. The commission modifies rule language in subsection (f)(2) to limit the application of subsection (f)(2) to customer deposits and residential advance payments.

The commission agrees with REPower that the requirements contained in subsections (f)(2)(A) and (B) do not address the conditions faced by REPs operating under §25.498, and that a separate provision be included for REPs operating under §25.498. The commission provides rule language under subsection (f)(2)(C) to accommodate REPs that provide electric service under §25.498.

The commission disagrees with OPC and agrees with Reliant that REPs should be allowed to reconcile accounts that hold customer deposits and advance payments on a monthly basis, rather than be required to have sufficient funds to cover deposits and advance payments at all times. The commission finds that a monthly reconciliation, rather than a daily reconciliation, is a more efficient and effective way to manage funds that are required to be deposited in an escrow account or segregated cash account.

Subsection (f)(3)

Bounce, TXU, Tara, RCM, ARM, TEAM, Shell, and First Choice supported the creation of a regulatory asset to recover bad debt arising from REP defaults. Tara indicated its support for the concept, but argued that it is not properly noticed and is beyond the scope of this project. Joint TDUs disagreed with Tara's position that the regulatory asset provision is not properly noticed and is beyond the scope of this project.

Joint TDUs recommended language to satisfy audit standards and make it clear that the regulatory asset is to be reviewed for reasonableness before it is included in rates. Reliant opposed the additional language, arguing that the language is unnecessary.

ARM and Reliant suggested language to make it clear that the regulatory asset must be adjusted for bad debt charges that are already being recovered through delivery charges. Joint TDUs opposed ARM and Reliant's language regarding the potential for double recovery and proposed that the rate case is the appropriate forum to deal with the issue.

TXU, Joint TDUs, Tara, RCM, TEAM, Shell, and First Choice opposed the requirement to pay deposits under subsection (f)(3)(B). If the commission chooses to adopt the provision, then the parties recommend that the deposit requirement be specifically and clearly set forth in the rule. Joint TDUs recommended adopting language regarding the size of the required deposit and other terms, noting that it would be more efficient to establish the language in the REP rule than to amend the standard tariff. Additionally, Joint TDUs recommended language in subsection (f)(3)(A) to make it clear that a TDU's ability to collect a deposit from a REP that has defaulted still applies.

Commission Response

The commission finds that the requirement to pay deposits to protect TDU financial integrity is economically burdensome for all REPs. The commission agrees with Joint TDUs that subsection (f)(3)(A) should make it clear that TDUs may continue to collect a deposit from a REP that has defaulted. The commission deletes subsection (f)(3)(B) of the proposed rule and modifies rule language in subsection (f)(3)(A) accordingly.

The commission agrees with Bounce, TXU, Tara, RCM, ARM, TEAM, Shell, and First Choice that the rule should allow the creation of a regulatory asset to recover bad debt arising from REP defaults, and finds that the regulatory asset provision is the most cost-effective method to protect TDU financial integrity.

The commission agrees with Joint TDUs' recommended language to satisfy audit standards and make it clear that the regulatory asset is to be reviewed for reasonableness before it is included in rates. The commission modifies rule language in subsection (f)(3)(B) consistent with Joint TDUs recommendation. The commission also agrees with ARM and Reliant that the rule should be clear that the regulatory asset must be adjusted for bad debt charges that are already being recovered

through the TDU's rate, and has modified subsection (f)(3)(B) accordingly. Finally, the commission notes that cost recovery of a regulatory asset related to bad debt will be subject to review in a rate case pursuant to PURA §36.051.

Subsection (f)(4) Financial Documentation

Tara argued that the requirements under subsection (f)(4) are unreasonable and overly burdensome and suggested that the commission could reduce the burden by requesting financial information on an as-needed basis.

The requirement to provide audited financial statements on an annual basis was supported by Texas ROSE/TLSC. TXU did not oppose the requirement, and asked the commission to clarify the language in the rule to allow for the required annual audited financial statements to be those of the entity on which the REP relies for meeting the financial requirements. Similarly, ARM argued that a REP should be permitted to use the annual audited financial statements of its parent company. RCM argued that the requirement to provide audited financial statements annually establishes a dramatically higher standard, and proposed that privately held REPs be required to submit sworn statements quarterly, attesting to any aspect of their financial health the commission deems necessary. TEAM argued that the requirements for financial statements will impose significant costs on small REPs, and that the timing and frequency is not feasible. TEAM suggested that REPs be required to file only their most recent audited financial statements.

TXU recommended that REPs be allowed 120 days after the end of the year to provide the required annual audited financial statements. TXU recommended that the quarterly unaudited financial statements be provided no later than 60 days after the end of the quarter.

ARM argued that quarterly unaudited financial statements are unnecessary, expensive, and administratively burdensome, and recommended that the commission eliminate the requirement or make it discretionary. TXU disagreed with ARM and argued that the information is the key to understanding the health of a business. TXU, Reliant, and TEAM recommended that the requirements for quarterly unaudited financial statements be expanded to allow an officer's certificate affirming that the quarterly unaudited financial statements have been prepared in accordance with generally accepted accounting principles.

Joint TDUs responded to the arguments from several REPs that the reporting requirements are costly and burdensome to small REPS, arguing that it is impossible for the commission to monitor compliance without financial reports. Joint TDUs noted that if the REP wants the imprimatur of commission approval and the benefit of being listed on the Power to Choose website, then the REP should do what is necessary to make information available to the commission.

ARM suggested that subsection (f)(4)(F) should be revised to clarify that a guaranty agreement or corporate commitment must be issued by a guarantor that meets *one* of the requirements in subsection (f)(1)(A), noting that the proposed rule states that the guarantor must satisfy *all* of the requirements of subsection (f)(1) and that an entity that can satisfy one of the standards under subsection (f)(1)(A) is in a better position to provide a guaranty. Reliant recommended deleting subsection (f)(4)(F) because subsection (f)(1), read in conjunction with subsection (b)(4), renders the language in subsection (f)(4)(F) unnecessary.

Commission Response

The commission finds that substantial confusion exists in the comments regarding the purpose of subsection (f)(4), and modifies rule language to clarify that subsection (f)(4) identifies and describes the financial documentation that is required to obtain REP certification. Additionally, some of the financial documentation required by subsection (f)(4) may be required semi-annually pursuant to subsection (i) to maintain REP certification. Comments regarding the timing and frequency of reports are relevant to subsection (i) and not relevant to subsection (f)(4).

The commission disagrees with Tara that the requirements under subsection (f)(4) are overly burdensome, and that the commission could reduce the burden by requesting financial information on an as-needed basis. The requirements under subsection (f)(4) identify the financial documentation that is required to obtain certification and cannot be provided on an as-needed basis. To the extent that the financial documentation must be provided on a going-forward basis in subsection (i), the commission finds that the information should be provided semi-annually. A semi-annual reporting requirement appropriately balances the need for timely information with the burden that reporting places on REPs.

The commission agrees, in part, with ARM that a REP should be permitted to use the annual audited financial statements of its parent company. The commission finds that a REP may satisfy the requirement to provide financial statements by providing the financial statements of the REP or its guarantor, because the REP or guarantor, not necessarily the parent company, is required to demonstrate financial qualification. Additionally, subsection (f)(5)(C) allows the REP to provide financial statements for the consolidated company if the REP is part of a structure that is consolidated for financial reporting purposes and files financial reports with a federal agency on a consolidated company basis.

The commission disagrees with RCM that the requirement to provide audited financial statements establishes a dramatically higher standard and agrees with TXU that the information is the key to understanding the health of a business. The commission finds that, for REPs that do not have an investment-grade credit rating, audited financial statements are necessary to provide the commission with independent verification of tangible net worth pursuant to subsection (f)(1)(A)(ii) or shareholders' equity pursuant to subsection (f)(1)(B), and to provide both the REP and the commission with a complete accounting of the REP's financial health.

The commission disagrees with ARM that quarterly unaudited financial statements are unnecessary, expensive, and administratively burdensome. The commission finds that unaudited financial statements are necessary to provide timely information to support audited financial statements, which require more time and effort to prepare.

The commission agrees with TXU, Reliant, and TEAM that the requirements for unaudited financial statements should be expanded to allow an executive officer's certificate affirming that the unaudited financial statements have been prepared in accordance with generally accepted accounting principles. The commission modifies rule language in subsections (f)(4)(B) and (f)(4)(C) to allow a sworn statement from an executive officer attesting to the accuracy of unaudited financial statements, because requiring a review report from an accountant could significantly increase the burden and cost of compliance.

The commission agrees, in part, with ARM that subsection (f)(4)(F) should be revised to clarify that a guaranty agreement

or corporate commitment must be issued by a guarantor that meets *one* of the requirements in subsection (f)(1)(A), noting that the proposed rule states that the guarantor must satisfy all of the requirements of subsection (f)(1). The commission notes that the provisions related to guarantors in the proposal for adoption are in subsection (f)(4)(G). The commission provides rule language in subsection (f)(4)(G) that allows a REP to meet the requirements of subsection (f)(1)(A) by relying upon a guarantor that meets one of the financial requirements of subsection (f)(1)(A). This subsection also lists the types of guarantors and agreements between the REP and the guarantor that are acceptable, so the commission disagrees with Reliant's suggestion that this subsection is superfluous.

Subsection (g)

ARM stated that the prefatory language of proposed subsection (g) should be amended to recognize that REPs may rely on their affiliates to meet the technical and managerial requirements for certification. TXU agreed. TEAM stated that it generally supported the enhanced requirements for management expertise contained in the proposed rule but suggested that the rule should state that the requisite experience can be provided through employees of parents, affiliates, or third-party contractors. RCM agreed.

REPower agreed that this section should allow the use of third-party vendors except where the use of such vendors is specifically precluded or otherwise addressed, such as in subsections (g)(1)(E) and (g)(1)(F). Shell also requested that a REP be able to rely on third party vendors to demonstrate its technical and managerial resources, and those REPs should be able to continue to provide retail electric service through vendors.

Commission Response

The commission agrees that the use of third party vendors is appropriate in some cases and allows REPs to use third party vendors to satisfy many requirements. However, the use of third party vendors for meeting technical and managerial requirements is not acceptable to the commission. The commission believes that the individuals relied on to meet these requirements should be fully integrated into the REP's business and has modified the definition of "permanent employee" accordingly.

Subsection (g)(1)(C)

ARM stated that proposed subsection (g)(1)(C) should be deleted because it is inconsistent with the structure and organization of the proposed rule, as it is a financial and not a technical or managerial requirement. ARM also suggested deletion of the proposed subsection because the capital access requirement of proposed subsections (f)(1)(A) and (B) should cover this and other normal, day-to-day REP payment obligations.

Commission Response

The commission agrees with ARM that the capital requirements of subsections (f)(1)(A) and (f)(1)(B) address a REP's financial ability to purchase ancillary services and deletes this requirement from subsection (g)(1)(C).

Subsection (g)(1)(E), now (g)(1)(D)

TXU agreed with the spirit and direction of the changes in the proposed rule but questioned whether the requirement of proposed subsection (g)(1)(E) would achieve the commission's goals. TXU stated that the requirement could be satisfied by eight employees with two years of experience each and that it is not clear that any number of employees with only two years of experience should be sufficient to satisfy the technical and managerial requirements. TXU suggested requiring that at least one principal or permanent employee have at least five years of relevant experience. NEM stated that its members participate in virtually every other jurisdiction open to competition and NEM is not aware of any other jurisdiction that imposes a 15 year technical requirement.

En-Touch commented that the proposed rule does not place any value on the experience of telecommunications experts who have experience in a broad range of skills to provide excellent service to customers such as call center operations, sales, marketing, customer service, contract negotiation, wholesale service agreements, plant engineering and operations, project management and other operational support systems, finance and business planning. En-Touch supports subsection (g)(1)(E) but requests that subsection (g)(1)(E) allow experience in the telecommunications industry.

TXU disagreed with En-Touch and stated that the risks inherent to the retail electric business are unique and the only relevant experience for satisfaction of the commission's rule should be experience in the electric industry.

Commission Response

Adopted subsection (g)(1)(D) requires a REP to have executive officers, principals, or permanent employees in managerial positions with combined experience in the competitive electric industry or competitive gas industry that equals or exceeds 15 years. However, even if a REP applicant meets the literal requirement of this provision, the commission still retains the discretion to determine whether the applicant would satisfy the overarching requirement of subsection (g): "A REP must have the technical and managerial resources and ability to provide continuous and reliable retail electric service to customers, in accordance with its customer contracts, PURA, commission rules, ERCOT protocols, and other applicable laws." Therefore, even though a REP may meet the literal requirement of adopted subsection (g)(1)(D), the commission will review the experience of the applicant's personnel on a case-by-case basis to determine whether the applicant would satisfy subsection (g)'s overarching requirement.

The commission agrees with TXU that the many of the risks in the retail electric industry result from a volatile commodity and are unique to retail electricity and, some extent, natural gas. The commission does not accept the changes proposed by En-Touch.

Subsection (g)(1)(F), now (g)(1)(E)

Joint TDUs stated that the requirement of proposed subsection (g)(1)(F) is appropriate given the commodity risk managed by a REP but suggested that the definition of substantial energy portfolio be increased to $1 million. Joint TDUs noted that an energy portfolio of $100,000 is not a substantial energy portfolio, and the commodity risk of a REP will likely far exceed that amount. TXU agreed with Joint TDUs suggestion.

ARM stated that proposed subsection (g)(1)(F) should be amended (1) to require that the contract be negotiated at arm's length to ensure its legitimacy, (2) to increase the minimum value of the substantial energy portfolio to $10,000,000 to ensure some level of expertise in the context of commercial customers or a large residential portfolio, and (3) to require that a third-party provider of commodity risk management services

must demonstrate that its technical and managerial expertise meets the requirements of the section.

OPC stated that the definition of substantial energy portfolio should be increased to $3 million.

NEM suggested that competence is not necessarily proven by years of experience and the commission should allow for a more subjective standard other than years of experience. RCM agreed and proposed that, in addition to one employee having five years of commodity risk management experience, REPs should be required to have at least one employee who has completed the currently available ERCOT sponsored training covering the areas of retail operations, wholesale market operations, and any other ERCOT-sponsored training that the PUC deemed necessary. RCM also proposed that if a test is made available by ERCOT for any of the trainings, then one employee must pass the test. RCM also felt that knowledge of customer protection rules and PUC rules should be demonstrated, and that applicants should be able to pass a written test if administered.

Commission Response

The commission agrees with ARM that the minimum value of the "substantial energy portfolio" should be increased to $10,000,000.

The commission determines that the most objective approach is to require a specified number of years of experience. While the commission recognizes that some people with years of experience may not have the knowledge to operate a REP, and some may be capable with less experience than the requirement, the commission requires a simple objective approach to evaluating the technical and managerial requirements and believes that it has chosen the best approach. For these reasons, the commission disagrees with the suggestions of NEM and RCM.

Subsection (g)(1)(G)

OPC stated that the proposed rule should clarify that technical and managerial requirements include equipment, software, staffing and employee training and other necessary resources. OPC also stated that subsection (g)(1)(G) should be amended to apply directly to the company's provision of a customer service center that is not covered in other sections of the rule. Specifically, OPC stated that the section be amended to refer to the provision of customer service at fully staffed levels at least five days a week from 8 a.m. to 9 p.m.

Commission Response

The commission determines that §25.485 of this title (relating to Customer Access and Complaint Handling) addresses customer access to customer service centers and, therefore, does not make the changes sought by OPC for this section.

Subsection (g)(1)(I), now (g)(1)(H)

OPC stated that subsection (g)(1)(I) should be amended to require a REP to describe the actions that the REP has undertaken and the steps that the REP will complete to ensure compliance with the commission's customer protection and anti-discrimination rules.

Commission Response

The commission concludes that OPC's concern is adequately addressed by subsection (g)(1)(H)'s requirement that a REP applicant have a customer service plan that describes how the applicant will comply with the commission's customer protection rules.

Subsection (g)(2)(B)

Commission Response

The commission revises subsection (g)(2)(B) to clarify the required information and to allow a REP to request a limitation on the information that must be provided when strict compliance with the provision would be unduly burdensome. For example, it may be unduly burdensome and unnecessary for a company that is controlled by a large, multinational holding company with dozens, if not hundreds, of subsidiaries world-wide to comply strictly with the provision.

Subsection (i)

TIEC commented that subsection (i) of the proposed rule contains ambiguities regarding Option 2 REPs. Under subsection (d)(2)(B), the only provisions of the proposed rule that would apply to Option 2 REPs are subsections (e), (f)(5), and (i). However, it appeared to TIEC that parts of the rule that do not apply to Option 2 REPs under subsection (d)(2)(B) may nonetheless be applied through subsection (i). Specifically, TIEC recommended that subsection (i) should be revised so that it does not inadvertently subject Option 2 REPs to certain financial requirements from which Option 2 REPs should be exempted. The subsections containing these financial requirements are not included in subsection (d)(B)(2), which specifically lists the provisions of the rule that apply to Option 2 REPs. However, subsection (i), which does apply to Option 2 REPs, appeared to incorporate some of these inapplicable provisions by reference.

NRG stated that Option 2 REPS are not required to file financial information as provided for in the proposed rule and PURA in order to be certified. NRG stated that PURA allows REPs serving customers with one MW or more to be certified by filing an affidavit and without demonstrating financial or technical capability. NRG emphasized that those customers are capable of ensuring that their REPs can handle their commercial and operational risks and added that the provision of additional financial information to the commission would be an unnecessary burden for Option 2 REPs and should be limited to Option 1 REPs. NRG opined that because Option 2 REPs serve a limited number of customers with tailored agreements, subsection (i)(7) is unduly restrictive to commercial options that may be negotiated between Option 2 REPs and their customers, and limits how such agreements may be structured.

NRG suggested that subsection (i)(10) should be limited to Option 1 REPs because large customers do not require unnecessary customer protection. NRG added that the provision is not specific as to the kind of information that might be requested of a REP; therefore, the commission might request extensive information of Option 2 REPs beyond what is required for certification. NRG further emphasized that Option 2 REPs are less likely to be prepared to provide extensive data on a short notice because Option 2 REPs have limited operations. If the provision is kept, then NRG suggested that it only be limited to information directly supporting or updating the information required in the application for certification.

TIEC agreed with NRG that PURA does not require Option 2 REPs to demonstrate specific financial or technical requirements to the commission in order to be certified. TIEC agreed with NRG that imposing specific financial requirements on Option 2 REPs would be inconsistent with PURA and would undermine the com-

mercial flexibility that is a primary motivation for becoming an Option 2 REP. TIEC stated that none of the other parties filing comments contended that it was appropriate to apply specific requirements to Option 2 REPs and therefore Option 2 REPs should be exempted from subsections (i)(4), (i)(5)(C), and (i)(6). TIEC requested that the rule be revised to make it clear that Option 2 REPs must only file an audited financial statement for the most recent completed calendar or fiscal year. TIEC maintained that conducting quarterly audits would be problematic, costly, and time consuming and insisted that Option 2 REPs should be able to guaranty the accuracy of the quarterly reports through an affidavit.

TIEC agreed with NRG that the reporting deadlines imposed in subsections (i)(7) and (10) are restrictive and unnecessary for the customers served by Option 2 REPs who are able to protect themselves through tailored contracts. TIEC maintained that these restrictive deadlines would impair the ability of Option 2 REPs to design contract terms to best meet the needs of its customers and, for that reason, Option 2 REPs should be excluded from subsections (i)(7) and (10) of the proposed rule.

TIEC sought clarification that an Option 2 REP that serves its parent company may continue to submit a consolidated financial report with that parent, which would more accurately reflect the REP's financial condition. TIEC cautioned that the April 1 deadline for the annual financial reports could be difficult to meet for some Option 2 REPs.

TXU stated that the current rule and proposed rule are confusing with regard to when a REP must apply to amend a certificate and when it is only required to provide notice to the commission. TXU pointed out that the proposed rule would require a REP to amend a certificate within 10 days of a "material change to the information provided to the commission as the basis for the commission's approval of the certification application." TXU stated that it is not always clear whether a change "is material" or whether the change is to information that provided the "basis for the commission approval" and quoted the commission's Amendment Application for REPs (Instructions) which states that "commission rules require notice of some changes that do not require 'approval'." TXU asked that the commission clarify changes that require an application to amend a certificate. TXU urged the commission to revise proposed subsections (i)(5)(C) and (i)(6) in line with TXU's suggestions regarding subsections (f)(4)(A) and (f)(4)(B) to clarify the language to allow for the required financial statements to be those of the entity on which the REP relies for meeting the financial requirements, and not necessarily of the REP itself. In the event that the commission leaves the requirement as proposed, TXU asked for the same grace period in this subsection as requested with regard to subsections (f)(4)(A) and (B).

NEM argued that the requirement to provide a 45-day notice to the commission and other interested parties before the REP ceases to operate is inadequate because events like the recent convergence in market conditions could result in a sudden default of a REP, making it impossible to provide consumers or the commission with long notice periods. NEM stated that the 45-day notice period may not effectively address the issues raised by the REP defaults, thus further supporting an argument in favor of a solution implemented through the POLR rules.

Cities suggested that the proposed rule should establish a requirement, by commission order, for a short deadline (*e.g.*, 30 days or less) for a REP which is no longer in compliance with subsection (f)(1)(A) to come into compliance with subsection (f)(1)(B) upon notification provided for in subsection (i)(4).

First Choice suggested that the proposed annual report filing date should be changed from April 1 to June 30 of each year because the April 1 date does not provide sufficient time to prepare audited financial statements and include the audited balance sheet in the annual report.

ARM agreed with a June 1 deadline in the current rule, provided that the filing of the audited financial statements may lag and will need to be filed separately on a later date. However, as an alternative, ARM recommended that the deadline move to July 1 to allow more time for preparing additional financial documentation.

Reliant requested deletion of subsection (i)(4), and argued that the provision is unnecessary because of subsection (i)(3)'s requirement that a REP apply to amend its certification within ten days of a material change. OPC disagreed and argued that the inability to meet the basic financial standards of subsection (f)(1) warrants immediate commission notification. Reliant, ARM, and OPC recommended that the reference to "violation" of subsection (f)(1)(A) or (B) be changed to "noncompliance." ARM stated that non-compliance with the financial requirements in the proposed rule can result in a critical situation (*e.g.*, the investment-grade credit rating upon which the REP has relied is downgraded below investment grade) that requires the REP to re-achieve compliance as quickly as possible. ARM also stated that the rule should require the REP to submit a remedial plan to achieve compliance with proposed subsection (f)(1)(A) or (f)(1)(B) within a specified period of time.

ARM agreed, in part, with OPC and advocated the use of the term "state of non-compliance" instead of "violation" stating that only the commission can determine whether a violation of its certification rule has taken place. ARM proposed five days, instead of three days, for the resolution of the non-compliance issue, stating that the proposed deadline may not always be realistic if the REP does not find its state of compliance immediately. ARM stated that the rule should require the REP to submit a remedial plan, within three days after the date the commission is notified, that will achieve compliance with subsections (f)(1)(A) or (f)(1)(B) within 15 days.

Joint TDUs stated that the current certification rule applicable to large REPs requires that information provided to the commission regarding the REP's financial condition also be made available to the TDU. Joint TDUs stated that disclosure to the TDU of the REP's financial condition is needed to monitor compliance with applicable TDU deposit requirements. Joint TDUs emphasized that it is particularly important for TDUs to be informed of conditions that would drop the REP from qualification under subsection (f)(1)(A) into subsection (f)(1)(B), at which point the deposit requirements would apply. Joint TDUs suggested that TDUs should also receive information on transfers of certificates, transfers of control, or other changes reported to the commission. Joint TDUs proposed that subsection (i)(9) retain the obligation to make this information available to the TDU and expand the obligation to all REPs. Reliant urged the commission to reject Joint TDUs proposal. Reliant maintained that such information is available at public filings for publicly traded companies and private companies should not be obligated to provide this information to the TDUs, as only the commission, can make the decision whether the REP has the financial ability to be a REP.

Joint TDUs disagreed with the argument from many REPs that the reporting requirements contained in the proposed rule are burdensome. Joint TDUs argued that the commission cannot monitor compliance with its rules without financial reports from the REPs, and that REPs should provide all necessary information to the commission in order to be approved and listed on the Power to Choose website as an alternative to be considered by consumers.

OPC proposed a requirement that subsection (i)(4) provide for penalties and/or sanctions or termination of certification in the event of failure to file notice with the commission.

OPC disagreed with Reliant and opposed the deletion of subsection (i)(4) as proposed by Reliant under the supposition that if a REP does not meet the requirements of either subsection (f)(1)(A) or (f)(1)(B), then the REP will notify the commission under the material change provision of subsection (i)(3). OPC emphasized that the inability to meet the basic financial standards of subsection (f)(1) is a serious condition that requires immediate commission notification.

Tara stated that subsections (i)(5)(C) and (i)(6) introduce high costs for REPs that will be required to submit not only annual audits, but also unaudited quarterly financials, imposing disproportionately high costs on smaller REPs that are not publicly traded and not required to conduct annual audits or produce quarterly reports. Tara opined that the commission already has the ability to obtain the information needed without imposing new time-consuming and costly requirements on a quarterly basis. Tara argued that the requirement in subsection (i)(10) for REPs to respond within three days to any commission request for additional information to prove continued compliance with this section is untenable, and argued that REPs should be allowed to respond to formal requests for such information in a three to four weeks time frame. Tara cautioned that the proposed rule would not provide enough time for the REP to verify accuracy of the information, and noted that provision of false information is punishable under the Texas Penal Code.

ARM stated that the proposed subsection be modified to make it clear that the material change the commission is authorized to review is a change in the information relied upon by the commission when it granted the REP's initial application for certification, or any subsequent certificate amendment. ARM stated that the appropriate base for determining whether a material change has occurred is the REP's current certificate, rather than the certification application originally filed. ARM pointed out that the transfer of a certificate or a change in the control or ownership of a REP may not always involve a material change in such information.

ARM stated that the expansion of filing requirements in subsection (i)(5)(C) should also include the filing of such documentation demonstrating initial compliance with the applicable requirements of subsections (f)(1) - (3). Alternatively, ARM thought that an earlier filing date to demonstrate initial compliance with the new certification rule may be appropriate, depending on the effective date of the new rule and the deadline by which REPs must achieve compliance with the new rule. ARM also recommended that subsection (i)(5) be clarified to allow a REP to file its parent company's audited annual financial statements to meet both the standard filing requirement for annual financial statements and the requirement to file all documentation demonstrating continuing compliance with the financial requirements in subsection (f)(1) - (3), as required by subsection (f)(4). ARM contended that this subsection must indicate that a REP may designate information filed in and as part of the annual report as confidential and proprietary, in line with the requirements for such information in subsection (c)(3).

ARM proposed that subsection (i)(5) be deleted, arguing that many REPs do not prepare a complete set of quarterly unaudited financial statements because the statements are expensive and administratively burdensome. ARM stated that, as an alternative, the proposed subsection could permit the filing of quarterly unaudited financial statements and accompanying documentation, if available, rather than make it mandatory. ARM proposed that subsection (i)(7) should be modified to account for a suspension or withdrawal of the certificate at the REP's discretion.

Commission Response

The commission finds that it must balance the need for information regarding the financial condition of REPs with the cost to provide such information, which is ultimately paid by consumers. The commission is concerned about the burden to provide financial information, as well as the impact on commission resources of collecting and reviewing financial information. To address these concerns, the commission establishes a semi-annual reporting requirement and eliminates the requirement to provide financial reports on a quarterly basis. The semi-annual report requires a demonstration that the REP continues to satisfy the financial requirements of subsections (f)(1) and (2). The commission maintains the requirement to provide audited financial statements annually, as an independent standard to periodically verify affirmations and unaudited information.

The commission agrees with TIEC that subsection (i) should be revised. The commission modifies rule language in subsection (i) so that REPs that obtained certification pursuant to subsection (d)(2) are not subjected to requirements that do not apply to Option 2 REPs. Pursuant to PURA §39.352(d), the commission finds that Option 2 REPs are not subject to the requirements of adopted subsection (i)(4) and (5).

The commission disagrees with TXU that the rule is confusing regarding when notice or an amendment is required. Subsection (i) clearly identifies each action that requires notice and each action that requires certification amendment.

The commission agrees with OPC that Reliant's proposed deletion of subsection (i)(4) should be rejected. Because of the importance of meeting the requirements of subsection (f)(1), the commission is requiring a REP in violation of subsection (f)(1) to notify it within three working days of violation of this provision. The commission also agrees with ARM that such a violation should be corrected as quickly as possible and that the REP should be required to submit a remedial plan to achieve compliance with subsection (f)(1)(A) or (f)(1)(B) within a specified period of time. The commission does not object to using the term "non-compliance" rather than "violation," in order to acknowledge that a REP may be in violation of subsection (f)(1) for reasons beyond its reasonable control. The commission has made changes to subsection (i)(4) accordingly.

The commission agrees with Cities that the rule should provide a deadline for REPs that are no longer in compliance with subsection (f)(1) to come into compliance with (f)(1), and the commission has changed the rule accordingly.

The commission disagrees with Joint TDUs that REPs should provide information regarding their financial condition to the TDUs. The commission finds that TDUs do not need this information to protect their financial integrity because TDUs are allowed create a regulatory asset to recover REP bad debts,

and the provision that allows a TDU to collect deposits from all REPs is deleted.

The commission disagrees with OPC's suggestion that subsection (i)(4) should provide for penalties or sanctions for failure to provide the required notice, because subsection (j)(17) and §22.246 of this title (relating to Administrative Penalties) adequately address this issue.

Subsection (j)

TXU stated that the 16 significant violation categories include felony convictions, a pattern of failing to comply with the law, and bankruptcy on one end of the spectrum, and a single inadvertent switch or billing error on the other end of the spectrum. TXU noted that the Legislature amended PURA in 2005 to direct the commission to develop a classification system for violations. TXU recommended that the commission revise subsection (j) to make it consistent with PURA §15.023 and P.U.C. Substantive Rule §25.8.

Commission Response

The commission disagrees with TXU's comment. This subsection does not set forth a classification system because the commission believes that the general classification system in §25.8 of this title appropriately classifies violations of this section.

Comments Regarding the Small Business Analysis Section of the Preamble

TEAM stated that the economic impact statement and regulatory flexibility analysis contained in the preamble provide only conclusions and are not factually grounded. Regarding the impact of the proposed rule on small businesses, TEAM stated that far more than 30 REPs have fewer than 100 employees. TEAM stated that it believes that the vast majority of Option 1 REPs are small businesses that could be adversely affected by the proposed rule. TEAM also stated that the preamble seems only to address the liquid capital requirements and does not address the increased cash requirement of the TDU deposit. TEAM stated that the deposit as proposed would be one-sixth of the annual billings by all TDUs and would have a significant detrimental impact on REPs that are small businesses. TEAM disagreed with the statement in the preamble that the proposed rule can be considered to have no economic costs to, and no adverse effect on, REPs because the proposal sets forth the minimum requirements to operate a REP prudently. TEAM noted that numerous REPs operate in a prudent manner, providing a wide array of competitive options under the current rule. TEAM also noted that the statement is inconsistent with statements made elsewhere in the proposal for publication that some REPs will go out of business as a result of the increased requirements of the rule. TEAM stated that there is nothing that justifies provisions of the proposed rule that add significant burdens to REPs that are small businesses. TEAM stated that the requirements could drive REPs out of business or keep new REPs from coming into the market and would increase the cost to provide service to customers. TEAM stated that the provisions of the proposed rule related to modification of the financial requirements and the requirement for TDU deposits do not meet the requirements of Senate Bill 700 and Texas Government Code Chapter 2006.

In its reply, TEAM stated that the commission should carefully review the disparate impacts that the proposed rule could have on small businesses. TEAM stated that increasing the cost of participation in the market for small businesses while decreasing the cost for publicly traded investment-grade companies is anticompetitive and does not appear to comply with the statutory regulatory flexibility analysis of Texas Government Code §2006.002. TEAM stated that a REP acting as a small business in Texas could be considered to include a REP who serves 1% of the residential and commercial market (excluding large commercial), which equates to 52,000 residential customers and 9,300 small and medium commercial customers. TEAM stated that under the proposed rule, such a REP would be required to post approximately $7.46 million in TDU deposits and that the proposed rule provides no analysis of this impact. TEAM stated that the proposed rule does not address the cost impact to the remainder of the market associated with REPs exiting the market as a result of the proposed rule. TEAM stated that the commission's draft scope of competition report indicates that 43 REPs serve 500 or more residential customers. TEAM also stated that those REPs are presumably of particular concern to the commission in adopting the proposed rule and that the rule should provide a regulatory impact and regulatory flexibility analysis for those REPs that are small businesses.

REPower agreed with TEAM's statement that the vast majority of Option 1 REPs in the retail electric market are small businesses that could be adversely affected by the proposed rule. REPower also agreed with TEAM that the provisions of the proposed rule related to modification of the financial requirements and the requirement for TDU deposits do not meet the requirements of Senate Bill 700 and Texas Government Code §2006.002. REPower supported TEAM's argument that the proposed rule does not allow sufficient time for an existing REP to make arrangements to meet the financial requirements. REPower also agreed that there is restricted access to capital in the current financial environment. REPower stated that the commission should allow a longer timeline for REPs to demonstrate compliance with any new financial requirements.

Commission Response

The commission disagrees with TEAM and REPower that the provisions of the proposed rule do not meet the requirements of Senate Bill 700 and Texas Government Code §2006. The commission finds that the economic impact statement and regulatory flexibility analysis were prepared in a manner consistent with Texas Government Code §2006.002 and the Final Guidelines adopted by the Office of the Attorney General ("Guidelines") pursuant to §2006.002(g). The commission's economic impact statement and regulatory flexibility analysis represent a reasonable, good-faith effort that provides the public and affected small businesses with information about the potential adverse effects of the proposed rule and about potentially less-burdensome alternatives, and such interested persons were provided with an opportunity to comment on the economic impact statement and the regulatory flexibility analysis.

The commission disagrees with TEAM that the economic impact statement and regulatory flexibility analysis contained in the preamble provide only conclusions that are not factually grounded. The commission finds that each of the conclusions contained in the economic impact statement and the regulatory flexibility analysis are based on facts and data available to the commission at the time the proposed rule was published.

The commission agrees with TEAM that more than 30 REPs have fewer than 100 employees, and disagrees with TEAM and REPower that the vast majority of Option 1 REPs are small businesses. The commission finds that there are over 100 REPs that have fewer than 100 employees. The commission believes that many of the business functions of a REP are outsourced,

which reduces the number of employees to below 100 for REPs that might be considered large by other measures. Texas Government Code §2006.002 defines a small business as "an entity that is for profit, independently owned and operated, and has fewer than 100 employees or less than $6 million in annual gross receipts." The Guidelines provide that independently owned and operated businesses are self-controlling entities that are not subsidiaries of other entities or otherwise subject to control by other entities and entities that are publicly traded. Each of the three standards must be met in order for an entity to qualify as a small business. To qualify as a small business, a REP must (1) be a for profit business, be independently owned and operated, and have fewer than 100 employees, or (2) be a for profit business, be independently owned and operated, and have less than $6 million in annual gross receipts. The commission has sufficient data to conclude that approximately 30 REPs are small businesses.

The commission agrees with TEAM and REPower that the deposit requirement to protect TDU financial integrity in subsection (f)(3) of the proposed rule would have a significant impact on REPs that are small businesses. The provision is deleted.

The commission disagrees with TEAM's statement that increasing the cost of participation in the market for small businesses while decreasing the cost for publicly traded investment-grade companies is anticompetitive and does not appear to comply with the statutory regulatory flexibility analysis of Texas Government Code §2006.002. The commission finds that the rule does not set the cost of participation in the market. The cost of participation in the market is a function of market conditions and creditworthiness. The financial requirements in the rule require a demonstration that the REP has access to the capital that the commission believes successful market participation will require.

The commission modifies the proposed rule language to mitigate the impact on small businesses, consistent with the regulatory flexibility analysis required by Texas Government Code §2006.002. The commission reduces the amount of capital required to demonstrate and maintain financial qualification for REP certification, exempts REPs that began serving load on or before January 1, 2009 from the requirement to demonstrate shareholders' equity in subsection (f)(1)(B), expands the types of accounts that can be used to secure customer deposits and advance payments under subsection (f)(2)(B), allows a monthly reconciliation of customer deposit accounts, eliminates the requirement to provide deposits to protect TDU financial integrity, broadens the ability of REPs that are small businesses to qualify under subsection (f)(1)(A) and avoid the requirements of subsection (f)(1)(B) and (f)(2)(B) by expanding the types of guarantors and agreements under subsection (f)(4)(G), eliminates the requirement to provide unaudited financial statements on a quarterly basis and establishes a semi-annual reporting requirement, allows affirmation of unaudited financial statements by an executive officer instead of requiring a review by a certified public accountant, expands the amount of time that a REP has to come into compliance from six months to 12 months, and expands the scope of the 12-month phase-in to include all of §25.107.

16 TAC §25.107

The repeal is adopted under PURA, Texas Utilities Code Annotated §14.002 (Vernon 2007 and Supp. 2008), which requires the commission to adopt rules reasonably required in the exercise of its powers and jurisdiction; and specifically, PURA §39.352, which requires the commission to certify a person as a REP if the person demonstrates, among other things, the financial and technical resources to provide continuous and reliable electric service, the managerial and technical ability to supply electricity at retail in accordance with customer contracts, and the resources needed to meet customer protection requirements and which requires a person applying for certification as a REP to comply with all customer protection provisions, disclosure requirements, and marketing guidelines established by the commission and PURA; PURA §17.004, which authorizes the commission to adopt and enforce rules concerning REPs that protect customers against fraudulent, unfair, misleading, deceptive, or anticompetitive practices and that impose minimum service standards relating to customer deposits and termination of service; PURA §§17.051 - 17.053, which authorize the commission to adopt rules for REPs concerning certification, changes in ownership and control, customer service and protection, and reports; and PURA §39.101, which authorizes the commission to adopt and enforce rules that ensure retail customer protections that entitle a customer: to safe, reliable, and reasonably priced electricity, to other information or protections necessary to ensure high-quality service to customers including protections relating to customer deposits and quality of service, and to be protected from unfair, misleading, or deceptive practices, and which requires the commission to ensure that its customer protection rules provide at least the same level of customer protection against potential abuses and the same quality of service that existed on December 31, 1999.

Cross Reference to Statutes: PURA §§14.002, 17.004, 17.051 - 17.053, 39.101, and 39.352.

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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Rules Coordinator
Public Utility Commission of Texas
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For further information, please call: (512) 936-7223

16 TAC §25.107

The new rule is adopted under PURA, Texas Utilities Code Annotated §14.002 (Vernon 2007 and Supp. 2008), which requires the commission to adopt rules reasonably required in the exercise of its powers and jurisdiction; and specifically, PURA §39.352, which requires the commission to certify a person as a REP if the person demonstrates, among other things, the financial and technical resources to provide continuous and reliable electric service, the managerial and technical ability to supply electricity at retail in accordance with customer contracts, and the resources needed to meet customer protection requirements and which requires a person applying for certification as a REP to comply with all customer protection provisions, disclosure requirements, and marketing guidelines established by the commission and PURA; PURA §17.004, which authorizes the commission to adopt and enforce rules concerning REPs that protect customers against fraudulent, unfair, misleading, deceptive, or anticompetitive practices and that impose minimum service standards relating to customer deposits and termination

of service; PURA §§17.051 - 17.053, which authorize the commission to adopt rules for REPs concerning certification, changes in ownership and control, customer service and protection, and reports; and PURA §39.101, which authorizes the commission to adopt and enforce rules that ensure retail customer protections that entitle a customer: to safe, reliable, and reasonably priced electricity, to other information or protections necessary to ensure high-quality service to customers including protections relating to customer deposits and quality of service, and to be protected from unfair, misleading, or deceptive practices, and which requires the commission to ensure that its customer protection rules provide at least the same level of customer protection against potential abuses and the same quality of service that existed on December 31, 1999.

Cross Reference to Statutes: PURA §§14.002, 17.004, 17.051 - 17.053, 39.101, and 39.352.

§25.107. Certification of Retail Electric Providers (REPs).

(a) Applicability. This section applies to all persons who provide or seek to provide electric service to retail customers in an area in which customer choice is in effect and to retail customers participating in a customer choice pilot project authorized by the commission. This section does not apply to the state, political subdivisions of the state, electric cooperatives or municipal corporations, or to electric utilities providing service in an area where customer choice is not in effect. An electric cooperative or municipally owned utility participating in customer choice may offer electric energy and related services at unregulated prices directly to retail customers who have customer choice without obtaining certification as a REP.

(1) A person must obtain a certificate pursuant to this subsection before purchasing, taking title to, or reselling electricity in order to provide retail electric service.

(2) A person who does not purchase, take title to, or resell electricity in order to provide electric service to a retail customer is not a REP and may perform a service for a REP without obtaining a certificate pursuant to this section.

(3) A REP that outsources retail electric functions remains responsible under commission rules for those functions and remains accountable to applicable laws and commission rules for all activities conducted on its behalf by any subcontractor, agent, or any other entity.

(4) All filings made with the commission pursuant to this section, including a filing subject to a claim of confidentiality, shall be filed with the commission's Filing Clerk in accordance with the commission's Procedural Rules, Chapter 22, Subchapter E, of this title (relating to Pleadings and other Documents).

(b) Definitions. The following words and terms when used in this section shall have the following meaning unless the context indicates otherwise:

(1) Affiliate--An affiliate of, or a person affiliated with, a specified person, is a person that directly, or indirectly through one or more intermediaries, controls or is controlled by, or is under the common control with, the person specified.

(2) Continuous and reliable electric service--Retail electric service provided by a REP that is consistent with the customer's terms and conditions of service and uninterrupted by unlawful or unjustified action or inaction of the REP.

(3) Control--The term control (including the terms controlling, controlled by and under common control with) means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through ownership of voting securities, by contract, or otherwise.

(4) Customer--Any entity who has applied for, has been accepted for, or is receiving retail electric service from a REP on an end-use basis.

(5) Default--As defined in a transmission and distribution utility (TDU) tariff for retail delivery service, Electric Reliability Council of Texas (ERCOT) qualified scheduling entity (QSE) agreement, or ERCOT load serving entity (LSE) agreement.

(6) Executive officer--When used with reference to a person means its president or chief executive officer, a vice president serving as its chief financial officer, or a vice president serving as its chief accounting officer, or any other officer of the person who performs any of the foregoing functions for the person.

(7) Guarantor--A person providing a guaranty agreement, business financial commitment, or a credit support agreement providing financial support to a REP or applicant for REP certification pursuant to this section.

(8) Investment-grade credit rating--A long-term unsecured credit rating of at least "Baa3" from Moody's Investors' Service, or "BBB-" from Standard & Poor's or Fitch, or "BBB" from A.M. Best.

(9) Permanent employee--An individual that is fully integrated into a REP's business organization. A consultant is not a permanent employee.

(10) Person--Includes an individual and any business entity, including and without limitation, a limited liability company, a partnership of two or more persons having a joint or common interest, a mutual or cooperative association, and a corporation, but does not include an electric cooperative or a municipal corporation.

(11) Principal--A person or a member of a group of persons that controls the person in question.

(12) Retail electric provider--A person that sells electric energy to retail customers in this state. As provided in Public Utility Regulatory Act (PURA) §39.353(b), a REP is not an aggregator.

(13) Shareholder--The term shareholder means the legal or beneficial owner of any of the equity of any business entity, including without limitation and as the context and applicable business entity requires, stockholders of corporations, members of limited liability companies and partners of partnerships.

(14) Tangible net worth--Total shareholders' equity, determined in accordance with generally accepted accounting principles, less intangible assets other than goodwill.

(15) Working day--A day on which the commission is open for the conduct of business.

(c) Application for REP certification.

(1) A person applying for certification as a REP must demonstrate its capability of complying with this section. A person who operates as a REP or who receives a certificate under this section shall maintain compliance with this section.

(2) An application for certification shall be made on a form approved by the commission, verified by oath or affirmation, and signed by an executive officer of the applicant.

(3) Except where good cause exists to extend the time for review, the presiding officer shall issue an order finding whether an application is deficient or complete within 20 working days of filing. Deficient applications, including those without necessary supporting

documentation, will be rejected without prejudice to the applicant's right to reapply.

(4) While an application for a certificate is pending, an applicant shall inform the commission of any material change in the information provided in the application within ten working days of any such change.

(5) Except where good cause exists to extend the time for review, the commission shall enter an order approving, rejecting, or approving with modifications, an application within 90 days of the filing of the application.

(d) REP certification requirements. A person seeking certification under this section may apply to provide services under paragraph (1) or (2) of this subsection, and shall designate its election in the application.

(1) Option 1. This option is for a REP whose service offerings will be defined by geographic service area.

(A) An applicant must designate one of the following categories as its geographic service area:

(i) The geographic area of the entire state of Texas;

(ii) A specific geographic area (indicating the zip codes applicable to that area);

(iii) The service area of specific TDUs or specific municipal utilities or electric cooperatives in which competition is offered; or

(iv) The geographic area of ERCOT or other independent organization to the extent it is within Texas.

(B) A REP with a geographic service area is subject to all subsections of this section, including those pertaining to basic, financial, technical and managerial, customer protection, and reporting and changing certification requirements.

(C) The commission shall grant a certificate to an applicant proposing to provide retail electric service to a geographic service area in Texas if it demonstrates that it meets the requirements of this section.

(D) The commission shall deny an application if the configuration of the proposed geographic area would discriminate in the provision of electric service to any customer because of race, creed, color, national origin, ancestry, sex, marital status, lawful source of income, disability, or familial status; because the customer is located in an economically distressed geographic area or qualifies for low income affordability or energy efficiency services; or because of any other reason prohibited by law.

(2) Option 2. This option is for a REP whose service offerings will be limited to specifically identified customers, each of whom contracts for one megawatt or more of capacity. The applicant shall be certified as a REP only for purposes of serving the specified customers. The commission shall grant a certificate under this paragraph if the applicant demonstrates that it meets the requirements of this paragraph.

(A) A person seeking certification under this paragraph must file with the commission a signed, notarized affidavit from each customer, with whom it has contracted to provide one megawatt or more of capacity. The affidavit must state that the customer is satisfied that the REP meets the standards prescribed by PURA §39.352 (b)(1) - (3) and (c).

(B) The following subsections apply to REPs certified pursuant to this paragraph:

(i) Subsection (e) of this section (relating to Basic Requirements);

(ii) Subsection (f)(5) of this section (relating to Billing and Collection of Transition Charges); and

(iii) Subsection (i) of this section (relating to Requirements for Reporting and Changing Certification).

(e) Basic requirements.

(1) Names on certificates. All retail electric service shall be provided under names set forth in the granted certificate. If the applicant is a corporation, the commission shall issue the certificate in the corporate name of the applicant.

(A) No more than five assumed names may be authorized for use by any one REP at one time.

(B) Business names shall not be deceptive, misleading, vague, otherwise contrary to §25.272 of this title (relating to Code of Conduct for Electric Utilities and Their Affiliates), or duplicative of a name previously approved for use by a REP certificate holder.

(C) If the commission determines that any requested name does not meet the requirements of subparagraph (B) of this paragraph, it shall notify the applicant that the requested name shall not be used by the REP. An application shall be dismissed if an applicant does not provide at least one suitable name.

(2) Office requirements. A REP shall continuously maintain an office located within Texas for the purpose of providing customer service, accepting service of process and making available in that office books and records sufficient to establish the REP's compliance with PURA and the commission's rules. The office satisfying this requirement for a REP shall have a physical address that is not a post office box and shall be a location where the above three functions can occur. To evaluate compliance with requirements in this paragraph, the commission staff may visit the office of a REP at any time during normal business hours. An applicant shall demonstrate that it has made arrangements for an office located in Texas.

(f) Financial requirements.

(1) Access to capital. A REP must meet the requirements of subparagraphs (A) or (B) of this paragraph.

(A) A REP or its guarantor electing to meet the requirements of this subparagraph must demonstrate and maintain:

(i) an investment-grade credit rating; or

(ii) tangible net worth greater than or equal to $100 million, a minimum current ratio (current assets divided by current liabilities) of 1.0, and a debt to total capitalization ratio not greater than 0.60, where all calculations exclude unrealized gains and losses resulting from valuing to market the power contracts and financial instruments used as supply hedges to serve load, and such calculations are supported by an affidavit from an executive officer of the REP attesting to the accuracy of the calculation.

(B) A REP electing to meet the requirements of this subparagraph must demonstrate shareholders' equity, determined in accordance with generally accepted accounting principles, of not less than one million dollars for the purpose of obtaining certification, and the REP or its guarantor must provide and maintain an irrevocable stand-by letter of credit payable to the commission with a face value of $500,000 for the purpose of maintaining certification.

(i) The required shareholders' equity of one million dollars shall be determined net of assets used for collateral pledged to secure the irrevocable stand-by letter of credit of $500,000.

(ii) For the period beginning on the date of certification and ending two years after the REP begins serving load, a REP shall not make any distribution or other payment to any shareholders or affiliates if, after giving effect to the distribution or other payment, the REP's shareholders' equity is less than one million dollars, net of assets used for collateral pledged to secure the irrevocable stand-by letter of credit of $500,000. The restriction on distributions or other payments contained in this subparagraph includes, but is not limited to, dividend distributions, redemptions and repurchases of equity securities, or loans to shareholders or affiliates.

(iii) A REP that began serving load on or before January 1, 2009 is not required to demonstrate the shareholders' equity required pursuant to subparagraph (B) of this paragraph, and is not subject to the restrictions on distributions or payments to shareholders or affiliates contained in subparagraph (B) of this paragraph.

(2) Protection of customer deposits and advance payments.

(A) A REP certified pursuant to paragraph (1)(A) of this subsection shall keep customer deposits and residential advance payments in an escrow account or segregated cash account, or provide an irrevocable stand-by letter of credit payable to the commission in an amount sufficient to cover 100% of the REPs outstanding customer deposits and residential advance payments held at the close of each month.

(B) A REP certified pursuant to paragraph (1)(B) of this subsection shall keep customer deposits and residential advance payments in an escrow account or segregated cash account, or provide an irrevocable stand-by letter of credit payable to the commission in an amount sufficient to cover 100% of the REP's outstanding customer deposits and residential advance payments held at the close of each month. For purposes of this subparagraph only, to qualify as a segregated cash account, the account must be with a financial institution whose deposits, including the deposits in the segregated cash account, are insured by the Federal Deposit Insurance Corporation, the account is designated as containing only customer deposits, the account is subject to the control or management of a provider of pervasive and comprehensive credit to the REP that is not affiliated with the REP, and the terms for managing the account protect customer deposits.

(C) In lieu of the requirements of subparagraph (B) of this paragraph, a REP certified pursuant to paragraph (1)(B) of this subsection that is providing electric service under the provisions of §25.498 of this title (relating to Retail Electric Service Using a Customer Prepayment Device or System) shall be required to keep all deposits and an amount sufficient to cover the credit balance that exceeds $50 for all customer accounts that have a credit balance exceeding $50 at the close of each month in an escrow account, or to provide an irrevocable stand-by letter of credit payable to the commission in an amount equal to or greater than the amount required to be deposited in the escrow account.

(D) Each escrow account and segregated cash account shall be reconciled no less frequently than at the close of each month to ensure that it equals or exceeds deposits and residential advance payments held as of the end of the month, and shall maintain at least that amount in the account until the next monthly reconciliation.

(E) Any irrevocable stand-by letter of credit provided pursuant to this paragraph shall be in addition to the irrevocable stand-by letter of credit required by paragraph (1)(B) of this subsection, if applicable.

(3) Protection of TDU financial integrity.

(A) A TDU shall not require a deposit from a REP except to secure the payment of transition charges as provided in §25.108 of this title (relating to Financial Standards for Retail Electric Providers Regarding Billing and Collection of Transition Charges), or if the REP has defaulted on one or more payments to the TDU. A TDU may impose credit conditions on a REP that has defaulted to the extent specified in its statewide standardized tariff for retail delivery service and as allowed by commission rules.

(B) A TDU shall create a regulatory asset for bad debt expenses, net of collateral posted pursuant to subparagraph (A) of this paragraph and bad debt already included in its rates, resulting from a REP's default on its obligation to pay delivery charges to the TDU. Upon a review of reasonableness and necessity, a reasonable level of amortization of such regulatory asset shall be included as a recoverable cost in the TDU's rates in its next rate case or such other rate recovery proceeding as deemed necessary.

(4) Financial documentation required to obtain a REP certificate. The following shall be required to demonstrate compliance with the financial requirements to obtain a REP certificate.

(A) Investment-grade credit ratings shall be documented by reports of a credit reporting agency.

(B) Tangible net worth shall be documented by the audited financial statements of the REP or its guarantor for the most recently completed calendar or fiscal year, and unaudited financial statements for the most recently completed quarter. Audited financial statements shall include the accompanying notes and the independent auditor's report. Unaudited financial statements shall include a sworn statement from an executive officer of the REP attesting to the accuracy, in all material respects, of the information provided in the unaudited financial statements. Three consecutive months of monthly statements may be submitted in lieu of quarterly statements if quarterly statements are not available. The requirement for financial statements may be satisfied by filing a copy of or by providing an electronic link to its most recent statement that contains unaudited financials filed with any agency of the federal government, including without limitation, the Securities and Exchange Commission.

(C) Shareholders' equity shall be documented by the audited and unaudited financial statements of the REP for the most recent quarter. Audited financial statements shall include the accompanying notes and the independent auditor's report. Unaudited financial statements shall include a sworn statement from an executive officer of the REP attesting to the accuracy, in all material respects, of the information provided in the unaudited financial statements. Three consecutive months of monthly statements may be submitted in lieu of quarterly statements if quarterly statements are not available. The requirement for financial statements may be satisfied by filing a copy of or by providing an electronic link to its most recent statement that contains unaudited financials filed with any agency of the federal government, including without limitation, the Securities and Exchange Commission.

(D) Segregated cash accounts shall be documented by an account statement that clearly identifies the financial institution where the account holder maintains the account, and that clearly identifies the account as an account that is designated as containing only customer deposits and residential advanced payments. Segregated cash accounts shall be maintained at a financial institution that is supervised or examined by the Board of Governors of the Federal Reserve System, the Office of the Controller of the Currency, or a state banking department, and where accounts are insured by the Federal Deposit Insurance Corporation.

(E) Escrow accounts shall be documented by the current account statement and the escrow account agreement. The escrow account agreement shall provide that the account holds customer deposits and residential advance payments only, and that the deposits are

held in trust by the escrow agent and are not the property of the REP or in the REP's control unless the customer deposits are applied to a final bill or applied to satisfy unpaid amounts if allowed by the REP's terms of service. The escrow agent shall deposit the customer deposits and residential advance payments in an account at a financial institution that is supervised or examined by the Board of Governors of the Federal Reserve System, the Office of the Controller of the Currency, or a state banking department, and where accounts are insured by the Federal Deposit Insurance Corporation.

(F) Irrevocable stand-by letters of credit provided pursuant to paragraph (1) or (2) of this subsection must be issued by a financial institution that is supervised or examined by the Board of Governors of the Federal Reserve System, the Office of the Controller of the Currency, or a state banking department, and where accounts are insured by the Federal Deposit Insurance Corporation. The REP must use the standard form irrevocable stand-by letter of credit approved by the commission. The irrevocable stand-by letter of credit must be irrevocable for a period not less than twelve months, payable to the commission, and must permit the commission's executive director to draw on the irrevocable stand-by letter of credit at such time that a mass transition of the REP's customers is carried out by ERCOT or any time thereafter, and permit a draw to be made in part or in full.

(G) A REP may satisfy the requirements of paragraph (1)(A) of this subsection by relying upon a guarantor that meets one of the capital requirements of paragraph (1)(A) of this subsection, provided that:

(i) The guarantor is an affiliate of the REP and has executed and maintains the standard form guaranty agreement approved by the commission, or

(ii) The guarantor is one or more persons that are affiliates of the REP and such affiliates have executed and maintain guaranty agreements, business financial commitments, or credit support agreements that demonstrate financial support for credit or collateral requirements associated with power purchase agreements and for security associated with participation at ERCOT, or

(iii) The guarantor is a financial institution that maintains an investment-grade credit rating and has executed and maintains guaranty agreements, business financial commitments, or credit support agreements that demonstrate financial support for credit or collateral requirements associated with power purchase agreements and for security associated with participation at ERCOT, or

(iv) The guarantor is a provider of wholesale power supply to the REP, or one of such power provider's affiliates, and such person has executed and maintains guaranty agreements, business financial commitments, or credit support agreements that demonstrate financial support for credit or collateral requirements associated with a power purchase agreement and for security associated with participation at ERCOT.

(5) Billing and collection of transition charges. If a REP serves customers in the service area of a TDU that is subject to a financing order pursuant to PURA §39.310, the REP shall comply with §25.108 of this title.

(6) Proceeds from an irrevocable stand-by letter of credit.

(A) Proceeds from an irrevocable stand-by letter of credit provided under this subsection may be used to satisfy the following obligations of the REP, in the following order of priority:

(i) first, to pay the deposits to retail electric providers that volunteer to provide service in a mass transition event under §25.43 of this title (relating to Provider of Last Resort) of low income customers enrolled in the system benefit fund rate reduction program pursuant to §25.454(f) of this title (relating to Rate Reduction Program);

(ii) second, to pay the deposits to retail electric providers that do not volunteer to provide service in a mass transition event under §25.43 of this title of low income customers enrolled in the system benefit fund rate reduction program pursuant to §25.454(f) of this title;

(iii) third, for customer deposits and residential advance payments of customers that did not benefit from clause (i) or (ii) of this subparagraph;

(iv) fourth, for services provided by the independent organization related to serving customer load;

(v) fifth, for services provided by a TDU; and

(vi) sixth, for administrative penalties assessed under Chapter 15 of PURA.

(B) Proceeds from an irrevocable stand-by letter of credit provided under this subsection shall, to the extent that the proceeds are not needed to satisfy an obligation set out in subparagraph (A) of this paragraph, be paid to the REP.

(g) Technical and managerial requirements. A REP must have the technical and managerial resources and ability to provide continuous and reliable retail electric service to customers, in accordance with its customer contracts, PURA, commission rules, ERCOT protocols, and other applicable laws.

(1) Technical and managerial resource requirements include:

(A) Capability to comply with all applicable scheduling, operating, planning, reliability, customer registration, and settlement policies, protocols, guidelines, procedures, and other rules established by ERCOT or other applicable independent organization including any independent organization requirements for 24-hour coordination with control centers for scheduling changes, reserve implementation, curtailment orders, interruption plan implementation, and telephone number, fax number, e-mail address, and postal address where the REP's staff can be directly reached at all times.

(B) Capability to comply with the registration and certification requirements of ERCOT or other applicable independent organization and its system rules, or contracts for services with entities registered with or certified by ERCOT or other applicable independent organization.

(C) Compliance with all renewable energy portfolio standards in accordance with §25.173 of this title (relating to Goal for Renewable Energy).

(D) Principals or permanent employees in managerial positions whose combined experience in the competitive electric industry or competitive gas industry equals or exceeds 15 years. An individual that was a principal of a REP that experienced a mass transition of the REP's customers to POLR shall not be considered for purposes of satisfying this requirement, and shall not own more than 10% of a REP or directly or indirectly control a REP.

(E) At least one principal or permanent employee who has five years of experience in energy commodity risk management of a substantial energy portfolio. Alternatively, the REP may provide documentation demonstrating that the REP has entered into a contract for a term not less than two years with a provider of commodity risk management services that has been providing such services for a substantial energy portfolio for at least five years. A substantial energy portfolio

means managing electricity or gas market risks with a minimum value of at least $10,000,000.

(F) Adequate staffing and employee training to meet all service level commitments.

(G) The capability and effective procedures to be the primary point of contact for retail electric customers for distribution system service in accordance with applicable commission rules, including procedures for relaying outage reports to the TDU on a 24-hour basis.

(H) A customer service plan that describes how the REP complies with the commission's customer protection and anti-discrimination rules.

(2) An applicant shall include the following in its initial application for REP certification:

(A) Prior experience of one or more of the applicant's principals or permanent employees in the competitive retail electric industry or competitive gas industry;

(B) Any complaint history, disciplinary record and compliance record during the 60 months immediately preceding the filing of the application regarding: the applicant; the applicant's affiliates that provide utility-like services such as telecommunications, electric, gas, water, or cable service; the applicant's principals; and any person that merged with any of the preceding persons;

(i) The complaint history, disciplinary record, and compliance record shall include information from any federal agency including the U.S. Securities and Exchange Commission; any self-regulatory organization relating to the sales of securities, financial instruments, or other financial transactions; state public utility commissions, state attorney general offices, or other regulatory agencies in states where the applicant is doing business or has conducted business in the past including state securities boards or commissions, the Texas Secretary of State, Texas Comptroller's Office, and Office of the Texas Attorney General. Relevant information shall include the type of complaint, status of complaint, resolution of complaint, and the number of customers in each state where complaints occurred.

(ii) The applicant may request to limit the inclusion of this information if it would be unduly burdensome to provide, so long as the information provided is adequate for the commission to assess the applicant's and the applicant's principals' and affiliates' complaint history, disciplinary record, and compliance record.

(iii) The commission may also consider any complaint information on file at the commission.

(C) A summary of any history of insolvency, bankruptcy, dissolution, merger, or acquisition of the applicant or any predecessors in interest during the 60 months immediately preceding the application;

(D) A statement indicating whether the applicant or the applicant's principals are currently under investigation or have been penalized by an attorney general or any state or federal regulatory agency for violation of any deceptive trade or consumer protection laws or regulations;

(E) Disclosure of whether the applicant or applicant's principals have been convicted or found liable for fraud, theft, larceny, deceit, or violations of any securities laws, customer protection laws, or deceptive trade laws in any state;

(F) An affidavit stating that the applicant will register with or be certified by ERCOT or other applicable independent organization and will comply with the technical and managerial requirements of this subsection; or that entities with whom the applicant has a contractual relationship are registered with or certified by the independent organization and will comply with all system rules established by the independent organization; and

(G) Other evidence, at the discretion of the applicant, supporting the applicant's plans for meeting requirements of this subsection.

(h) Customer protection requirements. A REP shall comply with all applicable customer protection requirements, including disclosure requirements, marketing guidelines and anti- discrimination requirements, and the requirements of this section.

(i) Requirements for reporting and changing certification. To maintain a REP certificate, a REP must keep its certification information up to date, pursuant to the following requirements:

(1) A REP shall notify the commission within five working days of any change in its business address, telephone numbers, authorized contacts, or other contact information.

(2) A REP that demonstrates compliance with certification requirements of this section by submitting an affidavit shall supply information to the commission to show actual compliance with this section.

(3) A REP shall apply to amend its certification within ten working days of a material change to the information provided as the basis for the commission's approval of the certification application. A REP may seek prior approval of a material change, including a change in control, by filing the amendment application before the occurrence of the material change. The transfer of a REP certificate is a material change.

(4) For an Option 1 REP, the REP shall notify the commission within three working days of its non-compliance with subsection (f)(1)(A) or (f)(1)(B) of this section. The notification shall set out a plan of recourse to correct the non-compliance with subsection (f)(1)(A) or (f)(1)(B) of this section within 10 working days after the non-compliance has been brought to the attention of the commission. The commission staff may initiate a proceeding to address the non-compliance.

(5) For an Option 1 REP, the REP shall file a report due on March 5, or 65 days after the end of the REP or guarantor's fiscal year (annual report), and August 15, or 225 days after the end of the REP or guarantor's fiscal year (semi-annual report), of each year.

(A) The annual report shall include:

(i) Any changes in addresses, telephone numbers, authorized contacts, and other information necessary for contacting the certificate holder.

(ii) Identification of areas where the REP is providing retail electric service to customers in Texas compiled by zip code.

(iii) A list of aggregators with whom the REP has conducted business in the reporting period, and the commission registration number for each aggregator.

(iv) A sworn affidavit that the certificate holder is not in material violation of any of the requirements of its certificate.

(v) Any changes in ownership.

(vi) Any changes in management, experience, and personnel relied on for certification in each semi-annual report before the REP begins serving customers and in the first semi-annual report after the REP serves customers.

(vii) Documentation to demonstrate ongoing compliance with the financial requirements of subsection (f) of this section, including, but not limited to, calculations showing tangible net worth, financial ratios or shareholders' equity, as applicable, and the amount of customer deposits and the balance of an account in which customer deposits are held, supported by a sworn statement from an executive officer of the REP attesting to the accuracy, in all material respects, of the information provided. Any certified calculations provided as part of the annual report to demonstrate such compliance shall be as of the end of the most recent fiscal quarter. A REP may submit any relevant documentation of the type required by subsection (f)(4) of this section to demonstrate its ongoing compliance with the financial requirements of subsection (f) of this section.

(B) The semi-annual report shall include:

(i) Documentation to demonstrate ongoing compliance with the financial requirements of subsection (f) of this section, including, but not limited to, calculations showing tangible net worth, financial ratios or shareholders' equity, as applicable, and the amount of customer deposits and the balance of an account in which customer deposits are held, and shall be supported by a sworn statement from an executive officer of the REP attesting to the accuracy of the information provided. Any certified calculations provided as part of the semi-annual report to demonstrate such compliance shall be as of the end of the most recent fiscal year and most recent fiscal quarter. A REP may submit any relevant documentation of the type required by subsection (f)(4) of this section to demonstrate its ongoing compliance with the financial requirements of subsection (f) of this section.

(ii) The audited financial statements of the REP or its guarantor for the most recent completed calendar or fiscal year with accompanying footnotes and the independent auditor's report, if not previously filed.

(iii) The unaudited financial statements for the most recent six-month financial period that immediately follows the end of its most recent fiscal year. Unaudited financial statements shall include a sworn statement from an executive officer of the REP attesting to the accuracy, in all material respects, of the information provided in the unaudited financial statements. In lieu of six-month unaudited financial statements, six consecutive months of monthly financial statements may be submitted.

(C) The requirement for financial statements may be satisfied by filing a copy of or by providing an electronic link to its most recent statement that contains unaudited financials filed with any agency of the federal government, including without limitation, the Securities and Exchange Commission. A REP that is part of a structure that is consolidated for financial reporting purposes and files financial reports with a federal agency on a consolidated company basis may provide financial statements for the consolidated company to meet this requirement.

(D) REPs or guarantors with an investment-grade credit rating are not required to provide financial statements pursuant to this section.

(6) A REP shall not cease operations as a REP without prior notice of at least 45 days to the commission, to each of the REP's customers to whom the REP is providing service on the planned date of cessation of operations, and to other affected persons, including the applicable independent organization, TDUs, electric cooperatives, municipally owned utilities, generation suppliers, and providers of last resort. The REP shall file with the commission proof of refund of any monies owed to customers. Upon the effective cessation date, a REP's certificate will be suspended. A REP must demonstrate full compliance with the requirements of this section, including but not limited to, the requirement to demonstrate shareholders' equity of not less than one million dollars and its associated restrictions pursuant to subsection (f)(1)(B) of this section, in order for the commission to reinstate the certificate. The commission may revoke a suspended certificate if it determines that the REP does not meet certification requirements.

(7) If a REP files a petition in bankruptcy, is the subject of an involuntary bankruptcy proceeding, or in any other manner becomes insolvent, it shall notify the commission within three working days of this event and shall provide the commission a summary of the nature of the matter. The commission shall have the right to proceed against any financial resources that the REP relied on in obtaining its certificate, to satisfy unpaid obligations to customers or administrative penalties.

(8) A REP shall respond within three working days to any commission staff request for additional information to confirm continued compliance with this section.

(j) Suspension and revocation. A certificate granted pursuant to this section is subject to amendment, suspension, or revocation by the commission for a significant violation of PURA, commission rules, or rules adopted by an independent organization. A suspension of a REP certificate requires the cessation of all REP activities associated with obtaining new customers in the state of Texas. A revocation of a REP certificate requires the cessation of all REP activities in the state of Texas, pursuant to commission order. The commission may also impose an administrative penalty on a person for a significant violation of PURA, commission rules, or rules adopted by an independent organization. The commission staff or any affected person may bring a complaint seeking to amend, suspend, or revoke a REP's certificate. Significant violations include the following:

(1) Providing false or misleading information to the commission;

(2) Engaging in fraudulent, unfair, misleading, deceptive, or anticompetitive practices, or unlawful discrimination;

(3) Switching, or causing to be switched, the retail electric provider for a customer without first obtaining the customer's permission;

(4) Billing an unauthorized charge, or causing an unauthorized charge to be billed, to a customer's retail electric service bill;

(5) Failure to maintain continuous and reliable electric service to customers pursuant to this section;

(6) Failure to maintain financial resources in accordance with subsection (f) of this section;

(7) Bankruptcy, insolvency, or the inability to meet financial obligations on a reasonable and timely basis;

(8) Failure to timely remit payment for invoiced charges to an independent organization;

(9) Failure to observe any applicable scheduling, operating, planning, reliability, and settlement policies, protocols, guidelines, procedures, and other rules established by the independent organization;

(10) A pattern of not responding to commission inquiries or customer complaints in a timely fashion;

(11) Suspension or revocation of a registration, certification, or license by any state or federal authority;

(12) Conviction of a felony by the certificate holder, a person controlling the certificate holder, or principal employed by the certificate holder, or any crime involving fraud, theft, or deceit related to the certificate holder's service;

(13) Not providing retail electric service to customers within 24 months of the certificate being granted by the commission;

(14) Failure to serve as a provider of last resort if required to do so by the commission;

(15) Providing retail electric service in an area in which customer choice is in effect without obtaining a certificate under this section;

(16) Failure to timely remit payment for invoiced charges to a transmission and distribution utility pursuant to the terms of the statewide standardized tariff adopted by the commission; and

(17) Other significant violations, including the failure or a pattern of failures to meet the requirements of this section or other commission rules or orders.

(k) Phase-in provisions.

(1) A REP that obtained certification pursuant to this section before the effective date of this section and does not meet all of the requirements of this section may continue to operate as a REP for not more than 12 months after the effective date of this section.

(2) A REP that cannot meet the requirements of this section shall meet the requirements of the this section as it was in effect on April 22, 2009 until it notifies the commission that it meets the requirements of this section and provides documentation to substantiate the notification.

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 May 1, 2009.

TRD-200901636
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Effective date: May 21, 2009
Proposal publication date: November 7, 2008
For further information, please call: (512) 936-7223

PART 3. TEXAS ALCOHOLIC BEVERAGE COMMISSION

CHAPTER 43. ACCOUNTING

The Texas Alcoholic Beverage Commission (commission) adopts the repeal of Chapter 43, Accounting, which includes §43.1, relating to fees collected by county tax assessor, and §43.11, relating to liquor prescription tax stamps, without changes to the proposed text as published in the February 27, 2009, issue of the *Texas Register* (34 TexReg 1335) and, therefore, the sections will not be republished.

Government Code, §2001.39 requires that each state agency review and consider for readoption every four years each rule adopted by the agency under Government Code, Chapter 2001. Section 43.1 and §43.11 have been reviewed and the commission has determined that they are obsolete and are no longer necessary.

Specifically, §43.1 relates to sending statements to county tax assessors and their payment of those statements. It is a statement regarding only the internal management and does not affect private rights or procedures so it is inappropriate as an agency rule as that term is defined at §2001.003(6) of the Government Code.

Section 43.11 relates to tax stamps for liquor used for medicinal purposes. This rule is also obsolete. Chapter 39 of the Alcoholic Beverage Code (Code) relating to Medicinal Permits and Chapter 40 of the Code relating to Physician's Permit were repealed in 2001. Additionally, §38.02 of the Code exempts pharmacists filling a prescription issued by a physician in the legitimate practice of medicine from obtaining a permit. Section 38.06 of the Code makes the use of alcohol and denatured alcohol in medicinal and pharmaceutical applications tax exempt.

No comments were received as a result of the publication of the proposed repeal.

SUBCHAPTER A. FEES

16 TAC §43.1

Repeal of the existing Chapter 43 is authorized by §5.31 of the Alcoholic Beverage Code, which gives the commission the authority to prescribe and publish rules necessary to carry out the provisions of the Code. Review of the sections implements Government Code, §2001.039.

Cross Reference: §5.31 of the Alcoholic Beverage Code will be affected by this repeal.

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 May 1, 2009.

TRD-200901641
Alan Steen
Administrator
Texas Alcoholic Beverage Commission
Effective date: May 21, 2009
Proposal publication date: February 27, 2009
For further information, please call: (512) 206-3204

SUBCHAPTER B. LIQUOR PRESCRIPTION TAXES

16 TAC §43.11

Repeal of the existing Chapter 43 is authorized by §5.31 of the Alcoholic Beverage Code, which gives the commission the authority to prescribe and publish rules necessary to carry out the provisions of the Code. Review of the sections implements Government Code, §2001.039.

Cross Reference: §5.31 of the Alcoholic Beverage Code will be affected by this repeal.

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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Alan Steen
Administrator
Texas Alcoholic Beverage Commission
Effective date: May 21, 2009
Proposal publication date: February 27, 2009
For further information, please call: (512) 206-3204

TITLE 19. EDUCATION

PART 1. TEXAS HIGHER EDUCATION COORDINATING BOARD

CHAPTER 17. RESOURCE PLANNING

SUBCHAPTER D. RULES APPLYING TO NEW CONSTRUCTION AND ADDITION PROJECTS

19 TAC §17.30

The Texas Higher Education Coordinating Board adopts amendments to §17.30, concerning rules applying to new construction and addition projects, with changes to the proposed text as published in the February 13, 2009, issue of the *Texas Register* (34 TexReg 924). Specifically, the purpose of the amendments will revise the project standard for construction costs and add the utilization standard. The change in the construction cost standard would replace the criteria from a range of projects approved in the past five years, to the standard of construction costs not to exceed the mean plus one standard deviation above the mean of construction costs for the projects approved in the past seven years. The new standard for utilization is replacing the guideline of classroom and class laboratories. The utilization standard will be the combination of three factors: room demand, hours per week of use, and percent of student stations filled.

The following comments were received regarding the amendments:

Comment: A comment was received from the Utilization Working Group regarding the actions required of an institution not in compliance with the standard regarding the Space Usage Efficiency (SUE). It was requested that §17.30(2)(D)(iv)(II) be deleted or be changed to read "a demonstration that significant improvement will be made to the SUE as a result of this project".

Response: Staff agrees with the comments and the deletion of this paragraph was made accordingly.

The amendments are adopted under the Texas Education Code, §§51.927, 61.027, 61.0572, and 61.058.

§17.30. Standards for New Construction and/or Addition Projects.

To obtain Board approval for a new construction and/or addition project, an institution shall demonstrate that the project complies with the following standards:

(1) Institutional Standards.

(A) Deferred Maintenance.

(i) The Board standard for deferred maintenance shall be the ratio of campus deferred maintenance costs to replacement value of 5 percent or less.

(ii) If the ratio of campus deferred maintenance costs to replacement value is more than 5 percent, a project may be approved if the institution demonstrates that:

(I) the project is intended to reduce the deferred maintenance on the campus, or

(II) the institution has demonstrated a reduction in its deferred maintenance to replacement value ratio 10 percent or more for the immediate prior three years.

(iii) Alternatively, if the deferred maintenance to replacement value ratio is greater than 5 percent, a project may be approved if the institution:

(I) submits a written plan on a form specified by the Board for substantial progress toward meeting the standard; and

(II) provides the Board with a statement signed by the president of the institution, regarding its ability to support and maintain the proposed facility while continuing to address current institutional facility maintenance needs. The president of the institution may not delegate this authority.

(B) Critical Deferred Maintenance.

(i) The Board standard for critical deferred maintenance is zero.

(ii) If the critical deferred maintenance is greater than zero, a project may be approved if the institution:

(I) Develops an acceptable plan in place to address any critical deferred maintenance reported on the master plan; and

(II) the institution shall demonstrate progress towards meeting the plan goals; and

(III) the institution shall provide the Board with a statement signed by the president of the institution regarding its ability to support and maintain the proposed facility while continuing to address current institutional facility maintenance needs. The president of the institution may not delegate this authority.

(2) Project Standards. The institution shall demonstrate that a new construction or addition project complies with the following project standards:

(A) Space Need--The project shall not create a campus space surplus, or add to an existing surplus, as determined by the Board's space projection model report, required by §17.100 of this title (relating to Board Reports).

(i) If the institution has a predicted surplus of space in the current Space Projection Model report and the project is required to accommodate future predicted enrollment growth, the Board may consider a written plan from the institution, on a form specified by the Board, for substantial progress toward meeting the standard. The plan must include:

(I) an explanation of the expected growth and how the predicted growth will impact the institution;

(II) a demonstration of progress towards eliminating the surplus;

(III) a statement regarding the ability of the institution to support and maintain the proposed facility while continuing to address current institutional facility needs; and

(IV) a demonstration that, upon completion of the project, the institution will comply with the Board standard and eliminate the space surplus.

(V) The plan shall be signed by the president of the institution. The president of the institution may not delegate this authority within the requesting institution.

(ii) If more than one project is submitted for an agenda, all projects submitted for the current agenda will be considered in the determination of a campus surplus or deficit.

(B) Cost--The construction building cost per gross square foot shall not exceed one standard deviation above the mean of similar projects approved by the Board within the last seven years, adjusted for inflation as described in the Board's Construction Cost report, §17.100 of this title (relating to Board Reports). The estimated construction cost of the project will be adjusted by the future inflation factor based on the projected timeline of the construction midpoint. If the construction cost per gross square foot exceeds one standard deviation above the mean of similarly approved projects, as published periodically by the Coordinating Board the institution shall demonstrate that the higher cost is due to market conditions or other circumstances that warrant the higher cost.

(C) Efficiency--The ratio of NASF to GSF for the space in projects for classrooms and general purpose facilities shall be 0.60 or greater. Where the following specialized space is predominant in the project, the ratios of NASF to GSF shall be as follows:

(i) Office space: 0.65 or greater;

(ii) Clinical facility; 0.50 or greater;

(iii) Diagnostic support laboratories: 0.50 or greater; and

(iv) Technical research buildings: 0.50 or greater; and

(v) Parking structure:

(I) 400 Square Feet per parking space for automobile facilities;

(II) 500 Square Feet per parking space for boathouses; and

(III) 3,000 Square Feet per parking space for airplanes.

(IV) If the parking structure does not meet this standard, the project may be approved if the institution demonstrates that the lower efficiency is due to the shape of the available land or site or other conditions that warrant the lower efficiency.

(vi) For mixed-use facilities, the ratio of NASF to GSF shall be calculated for each space type and considered separately.

(D) Usage Efficiency--The use of existing classroom and class laboratory facilities will be considered when the project includes Education & General (E&G) square footage.

(i) Classroom usage efficiency--

(I) A score of 75 points or higher is considered as meeting the standard.

(II) The classroom score will determine compliance for projects involving the following facility types: classroom, general; auditorium/theater; other facility types that appear, as determined by the Texas Higher Education Coordinating Board (THECB) staff, to contain classrooms or similar space.

(III) The approval authority as specified in THECB Board rules has the discretion to consider classroom score in considering approval for projects related to any facility type.

(ii) Class laboratory usage efficiency--

(I) A score of 75 points or higher is considered as meeting the standard.

(II) The class laboratory score will determine compliance for projects involving facility type laboratory, general and other facility types that appear, as determined by the THECB staff, to contain class laboratories or similar space

(III) The approval authority as specified in THECB Board rules has the discretion to consider class laboratory score in considering approval for projects related to any facility type.

(iii) Overall usage efficiency--

(I) Overall score is a function of the classroom and class laboratory scores. A combined score of 150 or higher, as determined by summing the classroom and class laboratory scores, is considered as meeting the overall standard.

(II) The overall score will determine compliance for projects involving the following facility types: athletic; library/study facilities; office, general; office, high rise; office, technology; physical plant; student center; other; and projects that, at the discretion of the THECB staff, cannot clearly be classified in a single category of facility type.

(III) The approval authority as specified in THECB Board rules has the discretion to consider the overall score in considering approval for projects related to all facility types.

(iv) Non-compliance--If an institution is not in compliance with any standard outlined in clauses (i) - (iii) of this subparagraph, the Board may approve the project if the institution has submitted a written plan of action, on a form specified by the Board, for substantial progress toward meeting the standard. The plan must include:

(I) An explanation of the factors influencing the current utilization score and the expected growth and how the plan of action will improve institutional performance.

(II) The plan shall be signed by the president of the institution. The president of the institution may not delegate this authority within the requesting institution.

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 May 4, 2009.

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Bill Franz
General Counsel
Texas Higher Education Coordinating Board
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For further information, please call: (512) 427-6114

19 TAC §17.31

The Texas Higher Education Coordinating Board adopts the repeal of §17.31, concerning rules applying to new construction and addition projects, without changes to the proposed text as published in the February 13, 2009, issue of the *Texas Register* (34 TexReg 925). Specifically, the purpose of the repeal will delete the additional guideline section. The change in the con-

struction cost standard would replace the criteria from a range of projects approved in the past five years, to the standard of construction costs not to exceed the mean plus one standard deviation above the mean of construction costs for the projects approved in the past seven years. The new standard for utilization is replacing the guideline of classroom and class laboratories. The utilization standard will be the combination of three factors: room demand, hours per week of use, and percent of student stations filled.

There were no comments received regarding the repeal of this section.

The repeal is adopted under the Texas Education Code, §§51.927, 61.027, 61.0572, and 61.058.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Bill Franz
General Counsel
Texas Higher Education Coordinating Board
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For further information, please call: (512) 427-6114

SUBCHAPTER K. REPORTS

19 TAC §17.100

The Texas Higher Education Coordinating Board adopts amendments to §17.100, concerning rules applying to Campus Planning Board Reports, without changes to the proposed text as published in the February 13, 2009, issue of the *Texas Register* (34 TexReg 926). Specifically, the purpose of the amendments is to address the definition of construction costs for the Board report. The change in the construction cost report replaces the average cost with the mean and mean plus one standard deviation above the mean on the report for the projects approved in the past seven, instead of five years. The rule change also adds adjustments for the region of the state where the project is located and the future inflation factor. The rule change modifies the report to include only costs of new construction/additions and repair and renovation only. The separate calculation of parking construction and housing costs is eliminated and continues to be included in the report as a facility type.

No comments were received regarding the amendments.

The amendments are adopted under the Texas Education Code, §§51.927, 61.027, 61.0572, and 61.058.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Bill Franz
General Counsel
Texas Higher Education Coordinating Board
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For further information, please call: (512) 427-6114

CHAPTER 21. STUDENT SERVICES
SUBCHAPTER A. GENERAL PROVISIONS

19 TAC §21.8

The Texas Higher Education Coordinating Board (Coordinating Board) adopts new §21.8, concerning General Provisions, without changes to the proposed text as published in the February 20, 2009, issue of the *Texas Register* (34 TexReg 1167). Specifically, new §21.8 provides a general definition of student financial need. Certain sections of the Texas Education Code, such as §56.011(b) regarding set-asides from designated tuition, indicate institutions are to award funds to students who "must establish financial need in accordance with rules and procedures established by the Texas Higher Education Coordinating Board." Currently, the term "financial need" is defined in Coordinating Board rules for individual financial aid programs, but there is no generic definition in our rules of "student financial need." New §21.8 provides this definition.

No comments were received regarding the new section.

The new section is adopted under the Texas Education Code, §56.011(b) and §56.012(b), which gives the Coordinating Board the authority to adopt rules that will provide for the efficient and uniform application of this section.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Bill Franz
General Counsel
Texas Higher Education Coordinating Board
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For further information, please call: (512) 427-6114

SUBCHAPTER OO. CHILDREN'S MEDICAID LOAN REPAYMENT PROGRAM

19 TAC §§21.2200 - 21.2207

The Texas Higher Education Coordinating Board adopts new §§21.2200 - 21.2207, concerning the Children's Medicaid Loan Repayment Program. Sections 21.2200, 21.2201 and 21.2203 - 21.2206 are adopted with changes to the proposed text as published in the February 20, 2009, issue of the *Texas Register* (34 TexReg 1168). Sections 21.2202 and 21.2207 are being adopted without changes and will not be republished.

Specifically, House Bill 15, 80th Texas Legislature, Regular Session, instructs the Texas Health and Human Services Commis-

sion (HHSC) to develop a plan (contingent on applicable approval by the federal judiciary and pursuant to the Joint Motion in Frew v. Hawkins), that details the proposed expenditure of funds in a manner that addresses the requirements of the Consent Decree, the Joint Motion, and the judicially-approved Correction Action Plans in Frew v. Hawkins, to the extent those judicially-approved Corrective Action Plans supersede the Joint Motion. The Frew expenditure plan was approved by the Governor's Office of Budget, Planning, and Policy and the Legislative Budget Board (LBB) in October 2007. The Frew expenditure plan included Appendix D, Strategic Initiatives Received from Public Stakeholders, which indicates to achieve the objective of increasing participation of medical and dental providers who serve children in the Texas Medicaid program, HHSC should fund or establish well-structured loan repayment programs with a particular emphasis on primary care. The Texas Health and Human Services Commission is currently drafting a Memorandum of Understanding, under which the Texas Higher Education Coordinating Board (THECB) will serve as a fiscal disbursing agent for the program. To qualify, participants must meet specified targets for Medicaid services to children. The program anticipates enrolling up to 300 physicians and dentists per year. Once the program is fully implemented, HHSC anticipates that it will provide loan repayments for up to 1,200 physicians and dentists per year. Each doctor will be eligible for up to $140,000 in loan repayments over four years if he or she meets targets for services provided to Medicaid eligible children. The loan repayment program is expected to cost about $300,000 in state funding in fiscal year 2010, with the cost growing to $42.6 million a year once the program achieves the maximum number of participants after four years. The new sections establish definitions and identify the eligibility requirements for provider, education loan, and lender or holder of loan.

The following comments were received regarding the new sections:

Comment: The Texas Health and Human Services Commission made several comments, including (1) that the name of the program has been changed; (2) that certain revisions would enhance clarity; and (3) that dentists as well as doctors need to be specifically included.

Response: The Board agreed with and adopted all recommendations made by HHSC.

The new sections are adopted under the Texas Education Code, §61.027, which provides the Coordinating Board with general rulemaking authority, Article III of the General Appropriations Act of the 80th Texas Legislature, and House Bill 15, §19 and §20, 80th Texas Legislature.

§21.2200. Authority and Purpose.

(a) Authority. Authority for this subchapter is provided in House Bill 15, §19 and §20, 80th Legislature, Regular Session, 2007.

(b) Purpose. The purpose of the Children's Medicaid Loan Repayment Program is to increase access to health care for Medicaid-enrolled beneficiaries under the age of 21 by encouraging qualified primary care, specialty, and subspecialty physicians and dentists to participate in the Medicaid program.

§21.2201. Administration.

The Texas Higher Education Coordinating Board, or its successor or successors, shall enter into an agreement with the Texas Health and Human Services Commission (HHSC) and/or the Texas Department of State Health Services (DSHS) to administer the disbursement processes of the Children's Medicaid Loan Repayment Program. The agreement shall describe the respective roles and responsibilities of the Coordinating Board, the Texas Health and Human Services Commission and the Texas Department of State Health Services, including application review and selection, compliance monitoring, dissemination of information, and funds disbursement.

§21.2203. Definitions.

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

(1) Board--The Texas Higher Education Coordinating Board.

(2) Commissioner--The Commissioner of Higher Education, the Chief Executive Officer of the Board.

(3) DSHS--The Texas Department of State Health Services.

(4) HHSC--The Texas Health and Human Services Commission.

(5) Medicaid--The State and Federal cooperative venture that provides medical coverage to eligible needy persons.

(6) Program--The Children's Medicaid Loan Repayment Program.

(7) Service period--A twelve-month period during which a physician or dentist qualifies for repayment of education loans.

§21.2204. Provider Eligibility Requirements.

Applicants must:

(1) have an outstanding eligible education loan;

(2) ensure that an application has been received by DSHS by the established deadline;

(3) hold an unrestricted license from the Texas Medical Board or the Texas State Board of Dental Examiners;

(4) if practicing in a specialty or subspecialty, be certified by or be eligible to sit for the applicable specialty or subspecialty board;

(5) have a Medicaid provider number;

(6) not, at the time of application or at any time during which the recipient is fulfilling his or her obligation under the Program, be fulfilling another service obligation to provide medical or dental services in the same eligible area or facility;

(7) fulfill the four-year service obligation in the Children's Medicaid Loan Repayment Program before qualifying for loan repayment through any other state loan repayment program; and

(8) provide eligible services for four consecutive years and meet the target number of Medicaid visits by children under the age of 21 for each 12-month period as indicated on the following table:
Figure: 19 TAC §21.2204(8)

§21.2205. Eligible Education Loan.

To be eligible for repayment, an education loan must:

(1) have been made for undergraduate, graduate, medical or dental education at an accredited institution in the United States;

(2) not have been made during residency;

(3) not be from a loan made to oneself from one's own insurance policy or pension plan or from the insurance policy or pension plan of a spouse or other relative;

(4) not have an existing service obligation;

(5) not be subject to repayment through another student loan repayment or loan forgiveness program; and

(6) not be consolidated with non-education loans or with loans obtained by someone other than the provider applying for loan repayment.

§21.2206. Eligible Lender or Holder.

The Board shall retain the right of determining eligibility of lenders and holders of education loans to which payments may be made. An eligible lender or holder shall, in general, make or hold education loans made to individuals for purposes of undergraduate, graduate, medical or dental education.

(1) An eligible lender or holder may be, but is not limited to, a bank, savings and loan association, credit union, institution of higher education, secondary market, governmental agency, pension fund, private foundation, or insurance company.

(2) An eligible lender or holder shall not be any private individual.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Bill Franz
General Counsel
Texas Higher Education Coordinating Board
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For further information, please call: (512) 427-6114

TITLE 22. EXAMINING BOARDS

PART 21. TEXAS STATE BOARD OF EXAMINERS OF PSYCHOLOGISTS

CHAPTER 469. COMPLAINTS AND ENFORCEMENT

22 TAC §469.1

The Texas State Board of Examiners of Psychologists adopts amendments to §469.1, Timeliness of Complaints, with changes to the proposed text published in the February 27, 2009, issue of the *Texas Register* (34 TexReg 1373) and will be republished.

The amendments are being adopted to clarify the rule.

The adopted amendments will help to ensure protection of the public.

No comments were received regarding the adoption of the amendments.

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

§469.1. Timeliness of Complaints.

(a) A complaint is timely filed if it is received by the Board, in proper form, within five years of the date of the termination of professional services.

(b) A complaint alleging sexual misconduct by a licensee is timely filed if received within ten years of the termination of services or the patient's reaching the age of majority.

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

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

This agency hereby certifies that the 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 May 1, 2009.

TRD-200901647
Sherry L. Lee
Executive Director
Texas State Board of Examiners of Psychologists
Effective date: May 21, 2009
Proposal publication date: February 27, 2009
For further information, please call: (512) 305-7706

22 TAC §469.11

The Texas State Board of Examiners of Psychologists adopts the repeal of §469.11, Legal Actions Reported, without changes to the proposed text published in the February 27, 2009, issue of the *Texas Register* (34 TexReg 1373) and will not be republished.

The repeal is being adopted to be replaced with an extended, clarified rule.

The adopted repeal will help to ensure protection of the public.

No comments were received regarding the adoption of the repeal.

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

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-200901648
Sherry L. Lee
Executive Director
Texas State Board of Examiners of Psychologists
Effective date: May 21, 2009
Proposal publication date: February 27, 2009
For further information, please call: (512) 305-7706

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22 TAC §469.11

The Texas State Board of Examiners of Psychologists adopts new §469.11, Legal Actions Reported and Reciprocal Discipline, without changes to the proposed text published in the February 27, 2009, issue of the *Texas Register* (34 TexReg 1374) and will not be republished.

The new rule is adopted to replace the repealed §469.11 with an extended, clarified rule.

The adopted new rule is to clarify the former rule and to add a new provision regarding disciplinary actions.

No comments were received regarding the adoption of the new rule.

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

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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Sherry L. Lee
Executive Director
Texas State Board of Examiners of Psychologists
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Proposal publication date: February 27, 2009
For further information, please call: (512) 305-7706

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TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 3. TAX ADMINISTRATION

SUBCHAPTER V. FRANCHISE TAX

34 TAC §3.588

The Comptroller of Public Accounts adopts an amendment to §3.588, concerning margin: cost of goods sold, without changes to the proposed text as published in the November 7, 2008, issue of the *Texas Register* (33 TexReg 9061).

Subsection (c)(2) is amended to add language to clarify that an election must be made to capitalize or expense allowable costs for the cost of goods sold. This paragraph is also amended to allow a beginning inventory only to taxable entities that elect to capitalize costs. A new paragraph (3) is added to clarify how a taxable entity elects to deduct the cost of goods sold to determine margin and what restrictions apply when amending that election. Subsequent paragraphs have been renumbered. Paragraph (4), regarding exclusions from total revenue, is amended to more narrowly interpret Tax Code, §171.1011(j). Only expenses excluded from total revenue may not be included in the determination of the cost of goods sold. Language that did not allow costs related to excluded revenue to be included in the determination of the cost of goods sold is deleted. Paragraph (11), is amended to include bars (drinking places) and beverages in this paragraph regarding the cost of goods sold allowed for restaurants.

Subsection (d)(5) regarding storage costs is amended to include language from the statute that disallows as storage costs those costs specifically disallowed in subsection (g).

We received a comment from Texas Taxpayers and Research Association (TTARA). Following is a summary of the comment and the response.

TTARA recommends the proposed language added to §3.588(c)(2) be withdrawn, as the additional language, which restricts taxpayers from amending a report to change the election regarding the capitalization or expensing of certain costs, has no statutory basis. The comptroller declined to delete the language. The statute does provide that the taxpayer must make an election to either capitalize or expense certain costs. Comptroller policy allows amendments for the correction of mathematical or other errors; however, the revision of an election does not constitute an error and, therefore, is not allowed.

This amendment is adopted under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

The amendment implements Tax Code, §§171.101, 171.1011(j) and 171.1012.

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-200901638
Martin Cherry
General Counsel
Comptroller of Public Accounts
Effective date: May 21, 2009
Proposal publication date: November 7, 2008
For further information, please call: (512) 475-0387

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 19. DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES

CHAPTER 746. MINIMUM STANDARDS FOR CHILD-CARE CENTERS

The Health and Human Services Commission adopts, on behalf of the Department of Family and Protective Services (DFPS), amendments to §§746.1017, 746.1601, and 746.1609, without changes to the proposed text published in the February 6, 2009, issue of the *Texas Register* (34 TexReg 804).

The justification for the amendments is to clarify rule language and ensure consistency with regulations. The amendment to §746.1017 replaces the current graphic with an amended version, which is needed as a result of a technical oversight. The amendments to §746.1601 and §746.1609 clarify that children

up through age 13 years may be cared for in licensed child-care centers, as outlined in the Human Resources Code, §42.001.

The amendments will function by ensuring that child-care facilities have a clearer understanding that children through the age of 13 years may be in care and of the rules related to director qualifications.

No comments were received regarding adoption of the amendments.

SUBCHAPTER D. PERSONNEL

DIVISION 1. CHILD-CARE CENTER DIRECTOR

40 TAC §746.1017

The amendment is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC §42.042.

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 April 27, 2009.

TRD-200901575
Gerry Williams
General Counsel
Department of Family and Protective Services
Effective date: June 1, 2009
Proposal publication date: February 6, 2009
For further information, please call: (512) 438-3437

SUBCHAPTER E. CHILD/CAREGIVER RATIOS AND GROUP SIZES

DIVISION 2. CLASSROOM RATIOS AND GROUP SIZES FOR CENTERS LICENSED TO CARE FOR 13 OR MORE CHILDREN

40 TAC §746.1601, §746.1609

The amendments are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments implement HRC §42.042.

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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Gerry Williams
General Counsel
Department of Family and Protective Services
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For further information, please call: (512) 438-3437

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) adopts 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 adopted in conjunction with the adopted repeal of 43 TAC §11.56 and new 43 TAC §11.56, relating to connection with a regionally significant highway. The amendments to §2.1 are adopted without changes to the proposed text as published in the March 6, 2009, issue of the *Texas Register* (34 TexReg 1547) and will not be republished.

EXPLANATION OF ADOPTED 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).

COMMENTS

No comments on the proposed amendments were received.

STATUTORY AUTHORITY

The amendments are adopted 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.

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 May 1, 2009.

TRD-200901628
Bob Jackson
General Counsel
Texas Department of Transportation
Effective date: May 21, 2009
Proposal publication date: March 6, 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) adopts 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 adopted 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. The repeal of §11.56 and new §11.56 are adopted without changes to the proposed text as published in the March 6, 2009, issue of the *Texas Register* (34 TexReg 1549) and will not be republished.

EXPLANATION OF ADOPTED 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.

COMMENTS

No comments on the proposed repeal of §11.56 and new §11.56 were received.

43 TAC §11.56

STATUTORY AUTHORITY

The repeal is adopted 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.

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 May 1, 2009.

TRD-200901629
Bob Jackson
General Counsel
Texas Department of Transportation
Effective date: May 21, 2009
Proposal publication date: March 6, 2009
For further information, please call: (512) 463-8683

43 TAC §11.56

STATUTORY AUTHORITY

The new section is adopted 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.

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 May 1, 2009.

TRD-200901630
Bob Jackson
General Counsel
Texas Department of Transportation
Effective date: May 21, 2009
Proposal publication date: March 6, 2009
For further information, please call: (512) 463-8683

Review Of Agency Rules

This section contains notices of state agency rules review as directed by the Texas Government Code, §2001.039. Included here are (1) notices of *plan to review;* (2) notices of *intention to review,* which invite public comment to specified rules; and (3) notices of *readoption,* which summarize public comment to specified rules. The complete text of an agency's *plan to review* is available after it is filed with the Secretary of State on the Secretary of State's web site (http://www.sos.state.tx.us/texreg). The complete text of an agency's rule being reviewed and considered for *readoption* is available in the *Texas Administrative* Code on the web site (http://www.sos.state.tx.us/tac).

For questions about the content and subject matter of rules, please contact the state agency that is reviewing the rules. Questions about the web site and printed copies of these notices may be directed to the *Texas Register* office.

Proposed Rule Reviews

Texas Department of Insurance, Division of Workers' Compensation

Title 28, Part 2

The Texas Department of Insurance, Division of Workers' Compensation files this notice of intention to review the rules contained in Chapter 148 concerning Hearings Conducted by the State Office of Administrative Hearings. This review is pursuant to the General Appropriations Act, Article IX, §167, 75th Legislature, the General Appropriations Act, Section 9-10, 76th Legislature, and Texas Government Code §2001.039 as added by SB 178, 76th Legislature.

The Division's reason for adopting the following rules contained in this chapter continues to exist and it proposes to readopt these rules. At a later date, some or all of these rules may be repealed or amended.

§148.1. Definitions.

§148.2. Scope and Applicability.

§148.3. Requesting a Hearing.

§148.4. Correction of Clerical Error in Medical Review Division Decisions or Orders Absent a Request for Hearing.

§148.5. Notice of Hearing.

§148.6. Venue.

§148.7. Representation.

§148.8. Withdrawal of Hearing Request.

§148.9. Informal Disposition.

§148.10. Hearings Subpoenas to Compel Attendance and Subpoenas Duces Tecum.

§148.11. Commissions to Compel Attendance for Deposition.

§148.12. Ex Parte Communications.

§148.13. Recording the Hearing.

§148.14. Burden of Proof.

§148.15. Final Decision by the ALJ.

§148.16. Proposal for Decision by the ALJ.

§148.17. Special Provisions for Administrative Penalties.

§148.18. Record of the Hearing.

§148.19. Transcript or Duplicate of the Hearing Audiotape or Videotape.

§148.20. Reimbursement, Travel Expenses, and Fees for Witnesses and Deponents.

§148.21. Expenses to be Paid by Party Seeking Judicial Review.

§148.22. Failure to Appear or Comply with Order or Decision, Administrative Violation.

§148.23. Commission Enforcement of Orders.

Comments regarding whether the reason for adopting these rules continues to exist must be received by 5:00 p.m. on June 5, 2009 and submitted to Victoria Ortega, Legal Services, Texas Department of Insurance, Division of Workers' Compensation, 7551 Metro Center Drive, Suite 100, MS-4D, Austin, Texas 78744-1609.

TRD-200901709
Dirk Johnson
General Counsel
Texas Department of Insurance, Division of Workers' Compensation
Filed: May 6, 2009

The Texas Department of Insurance, Division of Workers' Compensation files this notice of intention to review the rules contained in Chapter 149 concerning Memorandum of Understanding with the State Office of Administrative Hearings. This review is pursuant to the General Appropriations Act, Article IX, §167, 75th Legislature, the General Appropriations Act, Section 9-10, 76th Legislature, and Texas Government Code §2001.039 as added by SB 178, 76th Legislature.

The Division's reason for adopting the following rules contained in this chapter continues to exist and it proposes to readopt these rules. At a later date, some or all of these rules may be repealed or amended.

§149.1. Definitions.

§149.2. General Statement.

§149.3. Referral of Contested Case to SOAH.

§149.4. Notice of Hearing.

§149.5. Hearings.

§149.6. Confidentiality of Records.

§149.7. Action Upon Withdrawal of Decision.

§149.8. Final Orders in Accordance with the Act, §§411.049, 413.031, 413.055 and 415.034.

§149.9. Proposals for Decision in Accordance with the Act, §§402.072, 407.046, and 408.0231.

§149.10. Custody of the Hearing Record.

Comments regarding whether the reason for adopting these rules continues to exist must be received by 5:00 p.m. on June 5, 2009 and submitted to Victoria Ortega, Legal Services, Texas Department of Insurance, Division of Workers' Compensation, 7551 Metro Center Drive, Suite 100, MS-4D, Austin, Texas 78744-1609.

TRD-200901710
Dirk Johnson
General Counsel
Texas Department of Insurance, Division of Workers' Compensation
Filed: May 6, 2009

♦ ♦ ♦

Adopted Rule Reviews

Texas Alcoholic Beverage Commission

Title 16, Part 3

The Texas Alcoholic Beverage Commission (Commission) has completed the review of Title 16, Chapter 43, concerning Accounting, in accordance with the requirements of Government Code, §2001.039. Notice of the review was published in the November 7, 2008, issue of the *Texas Register* (33 TexReg 9087).

The Commission found that the reasons for the adoption of the rules in Title 16, Chapter 43, no longer exist. The rules are repealed pursuant to the Alcoholic Beverage Code, §5.31, which gives the Commission rulemaking authority. The adoption notices for the repeal of §43.1 and §43.11 are published in the Adopted Rules section of this issue.

The Commission repeals Chapter 43 in accordance with the Government Code, §2001.039. No comments were received regarding the review of the chapter.

TRD-200901626
Alan Steen
Administrator
Texas Alcoholic Beverage Commission
Filed: April 30, 2009

♦ ♦ ♦

Texas Certified Self-lnsurer Guaranty Association

Title 28, Part 3

In accordance with the requirement of Texas Government Code, §2001.039, which requires state agencies to review and consider for readoption each of their rules every four years, and pursuant to the notice of intention to review published in the October 24, 2008, issue of the *Texas Register* (33 TexReg 8813), the Texas Certified Self-lnsurer Guaranty Association (Association) has assessed whether the reason for adopting or readopting this rule continues to exist.

No comments were received regarding the review of this rule.

As a result of the review, the Texas Certified Self-lnsurer Guaranty Association has determined that the reason for adoption of this rule continues to exist. Therefore, the Association readopts Chapter 181.

Chapter 181. Bylaws.

§181.1. Bylaws of the Texas Certified Self-lnsurer Guaranty Association.

TRD-200901691
Clay Pope
Executive Director
Texas Certified Self-Insurer Guaranty Association
Filed: May 5, 2009

♦ ♦ ♦

Texas Department of Insurance, Division of Workers' Compensation

Title 28, Part 2

Pursuant to the notice of proposed rule review published in the November 28, 2008, issue of the *Texas Register* (33 TexReg 9719), the Texas Department of Insurance, Division of Workers' Compensation has reviewed and considered for readoption, revision or repeal all sections as they existed on November 28, 2008, of the following chapter of Title 28, Part 2 of the Texas Administrative Code, in accordance with Texas Government Code §2001.039: Chapter 104, General Provisions--Rule-Making.

The Department considered, among other things, whether the reasons for adoption of this rule continue to exist. The Department received no written comments regarding the review of its rule.

The Department has determined that the reasons for adopting the remaining section continues to exist and this section is retained in its present form. However, any such revisions in the future will be accomplished in accordance with the Texas Administrative Procedure Act.

This concludes the Department's review of Chapter 104. The completion of the review of this chapter concludes the rule review process.

TRD-200901711
Dirk Johnson
General Counsel
Texas Department of Insurance, Division of Workers' Compensation
Filed: May 6, 2009

♦ ♦ ♦

Pursuant to the notice of proposed rule review published in the March 13, 2009, issue of the *Texas Register* (34 TexReg 1883), the Texas Department of Insurance, Division of Workers' Compensation has reviewed and considered for readoption, revision or repeal all sections as they existed on March 13, 2009, of the following chapter of Title 28, Part 2 of the Texas Administrative Code, in accordance with Texas Government Code §2001.039: Chapter 108, Fees.

The Department considered, among other things, whether the reasons for adoption of this rule continue to exist. The Department received no written comments regarding the review of its rule.

The Department has determined that the reasons for adopting the remaining section continues to exist and this section is retained in its present form. However, any such revisions in the future will be accomplished in accordance with the Texas Administrative Procedure Act.

This concludes the Department's review of Chapter 108. The completion of the review of this chapter concludes the rule review process.

TRD-200901713
Dirk Johnson
General Counsel
Texas Department of Insurance, Division of Workers' Compensation
Filed: May 6, 2009

♦ ♦ ♦

Pursuant to the notice of proposed rule review published in the November 28, 2008, issue of the *Texas Register* (33 TexReg 9719), the Texas Department of Insurance, Division of Workers' Compensation has reviewed and considered for readoption, revision or repeal all sections as they existed on November 28, 2008, of the following chapter of Title 28, Part 2 of the Texas Administrative Code, in accordance with Texas

Government Code §2001.039: Chapter 180, Monitoring and Enforcement.

The Department considered, among other things, whether the reasons for adoption of these rules continue to exist. The Department received no written comments regarding the review of its rules.

The Department has determined that the reasons for adopting the remaining sections continue to exist and those sections are retained in their present form. However, other sections that were reviewed may be subsequently revised in accordance with the Department's internal procedures. Any such revisions will be accomplished in accordance with the Texas Administrative Procedure Act.

This concludes the Department's review of Chapter 180. The completion of the review of this chapter concludes the rule review process.

TRD-200901712
Dirk Johnson
General Counsel
Texas Department of Insurance, Division of Workers' Compensation
Filed: May 6, 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: 19 TAC §21.2204(8)

	Year							
	Year 1		Year 2		Year 3		Year 4	
Loan Payout Amount, by Year	$20,000	$40,000	$15,000	$30,000	$20,000	$40,000	$15,000	$30,000
Specialty/Subspecialty	**Target number of Medicaid visits for children under the age of 21 per month. (Monthly average will be calculated over a 12-month period.)**							
Family Physician, Internal Medicine & Ob/GYNs	25	50	40	80	75	150	75	150
Pediatrician	N/A	50	N/A	80	N/A	150	N/A	150
Pediatric Subspecialists	N/A	15	N/A	24	N/A	45	N/A	45
General Dentists	25	50	37	75	50	100	50	100
Pediatric Dentists	N/A	50	N/A	75	N/A	100	N/A	100

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.

Texas Department of Agriculture

Request for Information: Specialty Crop Research and Product Development Grant Program

Statement of Purpose. Pursuant to the Texas Agriculture Code, 12.002, and 12.007, the Texas Department of Agriculture (TDA) hereby requests proposals for projects designed to solely enhance the competitiveness of specialty crops.

Specialty Crop Block Grant Program (SCBGP) funds will be made available to Texas from the Federal 2009 fiscal year budget. Although the United States Department of Agriculture - Agricultural Marketing Service (USDA-AMS) has not officially released SCBGP funds to the states, TDA anticipates that $1.2 to $1.7 million will be available for Texas projects. Additional funds are anticipated for each of the fiscal years 2010 through 2012. Notice of funds and solicitation of proposals will be published each year in the Texas Register. Funding from the United States Department of Agriculture - Agricultural Marketing Service under the Specialty Crop Block Grant Program is authorized by the Food, Conservation, and Energy Act of 2008 (Farm Bill), which amended the Specialty Crops Competitiveness Act of 2004 (7 U.S.C. 1621 note) and authorized the USDA to provide grants to States for each of the fiscal years 2008 through 2012 to enhance the competitiveness of specialty crops.

Eligibility. Responses will be accepted from other agencies, universities, institutions, and producer, industry or community-based organizations involved with specialty crops.

Please note: Grant funds will not be awarded for projects that directly benefit or provide a profit to a single organization, institution or individual.

Funding Areas/Preferences. Specialty crops are defined as fruits and vegetables, dried fruit, tree nuts and nursery crops (including floriculture). Refer to Attachment 1 of this document for a list of common specialty crops. TDA encourages organizations to develop projects to solely enhance the competitiveness of specialty crops pertaining to the following issues affecting the specialty crop industry:

Food Safety - Possible projects include but are not limited to assisting entities in the specialty crop distribution chain in developing "Good Agricultural Practices", "Good Handling Practices", "Good Manufacturing Practices" or researching new methods to improve food safety.

Nutrition - Projects may focus on increasing child and adult nutrition knowledge and consumption of specialty crops.

Industry Development - Acceptable projects may include participation of industry representatives at meetings of international standard setting bodies in which the U.S. government participates or proposals aimed at improving efficiency and reducing costs of distribution systems.

Marketing- These projects may be geared at increasing the sales or consumption of specialty crops through advertising campaigns, in-store demonstrations, or promotional, educational and international literature.

Plant Health - Projects investing in specialty crop research, including organic research to focus on conservation and environmental outcomes; developing new and improved seed varieties and specialty crops; pest and disease control; and sustainability.

Funding Parameters.

Projects will be funded at varying levels depending on the nature of the project. All projects must demonstrate strong justification for the requested budget as well as the potential for providing significant demonstrable benefits to Texas specialty crops. Selected projects will be awarded funds for one funding cycle. Projects may re-submit in subsequent years for continued/additional funding.

TDA reserves the right to fund proposals partially or fully. Where more than one proposal on an eligible research topic is acceptable for funding, TDA may request cooperation between grantees or revision/adjustment to a proposal in order to avoid duplication and to realize the maximum benefit to the state.

TDA may choose to use a portion of the funds for projects conducted internal to the department such as some specialty crop marketing campaigns, promotions, surveys, or cost-share arrangements including but not limited to funding audits of Good Agricultural Practices or Fruit and Vegetable Month promotional activities.

Proposal Requirements. Each response must include the following information:

1. Personnel/Contact Information.

2. Proposal Title and Summary - Do Not Exceed 200 Words. Include the title and a brief summary of the project for which you are requesting funding.

3. Project Proposal - Do Not Exceed Four Pages. Include the following:

a. Project purpose. Clearly state the purpose of the project. Describe the specific issue, problem, interest, or need to be addressed. Explain why the project is important and timely. If applicable, indicate clearly how the new project complements previous work. Indicate if the project will be or has been submitted to or funded by another Federal or State grant program.

b. Potential impact. Discuss the number of people or operations affected, the intended beneficiaries of each project, and/or potential economic impact if such data are available and relevant to the project.

c. Expected measurable outcomes. Describe at least one distinct, quantifiable, and measurable outcome-oriented objective that directly and meaningfully supports the project's purpose. The measurable outcome oriented objective must define an event or condition that is external to the project and that is of direct importance to the intended beneficiaries and/or the public. Outcome measures may be long term that exceed the grant period. *(Examples: Increase sales by X%. Prepared X organizations for GAP certification. Reached X students through the Fruit and Vegetable Month promotional activities.)*

d. Work plan. Explain briefly the activities that will be performed to accomplish the objectives of the project. Include appropriate time lines. For all projects, be clear about who will do the work, TDA or the applying organization.

e. Budget narrative. Provide in sufficient detail, information about the budget to demonstrate that grant funds are being expended on eligible grant activities that meet the purpose of the program. Indirect costs should not to exceed 10 percent.

Evaluation of Information. Information submitted to TDA will be evaluated on the following elements:

1. Importance to the intended beneficiaries;

2. Potential economic impact;

3. Clear and achievable goals, objectives and outcomes;

4. Overall value; and

5. Demonstrated support.

Award Information and Notification. TDA will select projects to be included in the State plan submitted to Agricultural Marketing Service, USDA for funding. Selected projects may be asked to provide more detailed information regarding the scope of work, measurable outcomes, implementation, or anticipated expenditures.

TDA reserves the right to accept or reject any or all proposals submitted. TDA is under no legal or other obligation to execute a grant on the basis of a response submitted to this RFP. TDA shall not pay for any costs incurred by any entity in responding to this RFP.

The public announcements and written notifications will be made to all applicants and their affiliated agencies, organizations, or institutions. Favorable decisions will indicate the amount of award, duration of the grant, and any special conditions associated with the project.

Budget Information. Specialty Crop projects are paid on a cost reimbursement basis.

1. Eligible Expenses. Generally, expenses that are necessary and reasonable for proper and efficient performance and administration of a project are eligible. Expenses must be properly documented with sufficient backup detail, including copies of invoices. Examples of eligible expenditures are:

a. Personnel costs - both salary and benefits;

b. Travel - domestic;

c. Travel - foreign. Foreign travel may be paid on a case-by-case basis. To be eligible for reimbursement, foreign travel shall be approved in advance by TDA;

d. Materials and direct operating expenses - equipment that costs less than $5,000 per unit, research and office supplies, postage, telecommunications, printing, etc.;

e. Equipment - nonexpendable, tangible personal property having a useful life of more than one year and an acquisition cost of $5,000 or more;

f. Other expenses - any expenses that do not fall into the above categories;

g. Contracts - agreements made with other universities or private parties to perform a portion of the award; and

h. Indirect expenses - TDA limits reimbursable indirect expenses to 10% of the grant award.

2. Ineligible Expenses. Expenses that are prohibited by state or federal law are ineligible. Examples of these expenditures are:

a. Alcoholic beverages;

b. Entertainment;

c. Contributions, charitable or political;

d. Expenses falling outside of the contract period;

e. Expenses for expenditures not listed in the project budget; and

f. Expenses that are not adequately documented.

General Compliance Information.

1. Prior to accepting the research grant and signing the grant agreement, researchers will be provided a copy of the TDA reporting requirements for their review. This document will explain billing procedures, quarterly and annual reporting requirements, procedures for requesting a change in the project scope or budget, and other miscellaneous items.

2. Any delegation by the Grantee to a subcontractor regarding any duties and responsibilities imposed by the grant award shall be approved in advance by TDA and shall not relieve the Grantee of its responsibilities to TDA for their performance.

3. All grant awards are subject to the availability of appropriations and authorizations by the Agricultural Marketing Service, USDA and TDA.

4. Any information or documentation submitted to TDA as part of the project grant proposal is subject to disclosure under the Texas Public Information Act.

5. While TDA attempts to observe the strictest confidence in handling the research proposals, it cannot guarantee complete confidentiality on any matters that lie beyond its control. The confidentiality of recipient's "proprietary data" so designated shall be strictly observed to the extent permitted by appropriate Texas laws, including the Texas Public Information Act. There shall be no restriction on the publication of research results except when taking into consideration effects of prior publication on possible subsequent patent and license to use copyrighted material.

6. Control of the ownership and disposition of all patentable products and inventories shall be agreed to by Grantee and TDA. A copy of the intellectual property policy should be made available to TDA upon request.

7. Awarded grant projects must remain in full compliance with state and federal laws and regulations. Noncompliance with such law may result in termination by TDA.

8. Grant recipients must keep a separate bookkeeping account with a complete record of all expenditures relating to the research project. Records shall be maintained for three years after the completion of the research project or as otherwise agreed upon with TDA. TDA and the Texas State Auditor's Office reserve the right to examine all books, documents, records, and accounts relating to the research project at any time throughout the duration of the agreement and for three years immediately following completion of the project. If there has been any litigation, claim, negotiation, audit or other action started prior to the expiration of the three-year period involving the records, then the records must be retained until the completion of the action and resolution of all issues which arise from it, or until the end of the regular three-year period, whichever is later. TDA and the Texas State Auditor's Office reserve the right to inspect the research locations and to obtain from the research team full information regarding all project activities.

9. If the Grantee has a financial audit performed in any year during which Grantee receives funds from TDA, and if TDA requests information about the audit, the Grantee shall provide such information to TDA or provide information as to where the audit report can be publicly viewed, including the audit transmittal letter, management letter, and any schedules in which the Grantee's funds are included.

10. Grant awards to Texas institutions shall comply in all respects with the Uniform Grant Management Standards (UGMS). A copy may be downloaded from the following website: www.governor.state.tx.us/divisions/stategrants/guidelines/files/UGMS012001.doc

Deadline for Submission of Responses. Responses to this request should be submitted to Ms. Mindy Weth Fryer, Grants Specialist, Texas Department of Agriculture, P.O. Box 12847, Austin, Texas 78711. The street address is 1700 North Congress, 11th Floor, Austin, Texas 78701. Fax: (888) 223-9048, e-mail: grants@TexasAgriculture.gov.

Submissions must be received no later than 5:00 p.m. on June 22, 2009.

TDA will send an acknowledgement receipt by email indicating the response was received.

Assistance and Questions.

For questions regarding project topics or cooperative projects with TDA, please contact Mr. Richard De Los Santos, Coordinator for Horticultural, Produce and Forestry, at (512) 463-7472 or by email at: Richard.DeLosSantos@TexasAgriculture.gov.

For questions regarding submission of the proposal and TDA documentation requirements, please contact Ms. Mindy Weth Fryer, Grants Specialist, at (512) 463-6908 or by email at grants@TexasAgriculture.gov.

ATTACHMENT 1

Definition of Specialty Crops. Specialty crops are defined by law as "fruits and vegetables, tree nuts, dried fruits and horticulture and nursery crops, including floriculture." The tables below list plants commonly considered fruits and tree nuts, vegetables, culinary herbs and spices, medicinal plants, and nursery, floriculture, and horticulture crops. Ineligible commodities are also listed.

This list is not intended to be all inclusive, but rather intended to give examples of the most common specialty crops. It will be updated as USDA gets new questions. Please refer to the USDA-AMS Web site to get the most current list (www.ams.usda.gov).

List of Plants Commonly Considered Fruits and Tree Nuts.

Almond, Apple, Apricot, Avocado, Banana, Blackberry, Blueberry, Breadfruit, Cacao, Cashew, Citrus, Cherimoya, Cherry, Chestnut (for nuts), Coconut, Coffee, Cranberry, Currant, Date, Feijou, Fig, Filbert (hazelnut), Gooseberry, Grape (including raisin), Guava, Kiwi, Litchi, Macadamia, Mango, Nectarine, Olive, Papaya, Passion fruit, Peach, Pear, Pecan, Persimmon, Pineapple, Pistachio, Plum (including prune), Pomegranate, Quince, Raspberry, Strawberry, Suriname cherry, Walnut

List of Plants Commonly Considered Vegetables.

Artichoke, Asparagus, Bean (Snap or green), Lima (Dry, edible), Beet table, Broccoli (including broccoli raab), Brussels sprouts, Cabbage (including Chinese), Carrot, Cauliflower, Celeriac, Celery, Chive, Collards (including kale), Cucumber, Eggplant, Endive, Garlic, Horseradish, Kohlrabi, Leek, Lettuce, Melon (all types), Mushroom (cultivated), Mustard and other greens, Okra, Pea, (Garden, English or edible pod), Onion, Opuntia, Parsley, Parsnip, Pepper, Potato, Pumpkin, Radish (all types), Rhubarb, Rutabaga, Salsify, Spinach, Squash (summer and winter), Sweet corn, Sweet potato, Swiss chard, Taro, Tomato (including tomatillo), Turnip, Watermelon

List of Commonly Considered Nursery, Floriculture, and Horticulture Crops.

Christmas Trees, Cut Flowers, Honey, Maple Syrup, Hops, Turfgrass Sod, Tea Leaves

List of Plants Commonly Considered Culinary Herbs and Spices.

Ajwain, Allspice, Angelica, Anise, Annatto, Artemisia (all types), Asafetida, Basil (all types), Bay (cultivated), Bladder wrack, Bolivian coriander, Borage, Calendula, Chamomile, Candle nut, Caper, Caraway, Cardamom, Cassia, Catnip, Chervil, Chicory, Cicely, Cilantro, Cinnamon, Clary, Cloves, Comfrey, Common rue, Coriander, Cress, Cumin, Curry, Dill, Fennel, Fenugreek, Filé (gumbo, cultivated), Fingerroot, French sorrel, Galangal, Ginger, Hops, Horehound, Hyssop, Lavender, Lemon balm, Lemon thyme, Lovage, Mace, Mahlab, Malabathrum, Marjoram, Mint (all types), Nutmeg, Oregano, Orris root, Paprika, Parsley, Pepper, Rocket (arugula), Rosemary, Rue, Saffron, Sage (all types), Savory (all types), Tarragon, Thyme, Turmeric, Vanilla, Wasabi, Water cress

List of Plants Commonly Considered Medicinal Herbs.

Artemisia, Arum, Astragalus, Boldo, Cananga, Comfrey, Coneflower, Ephedra, Fenugreek, Feverfew, Foxglove, Ginkgo biloba, Ginseng, Goat's rue, Goldenseal, Gypsywort, Horehound, Horsetail, Lavender, Yerba buena Liquorice, Marshmallow, Mullein, Passion flower, Patchouli, Pennyroyal, Pokeweed, St. John's wort, Senna, Skullcap, Sonchus, Sorrel, Stevia, Tansy, Urtica, Witch hazel, Wood betony, Wormwood, Yarrow

List of Ineligible Commodities.

Alfalfa, Barley, Borage, Canola Oil, Cotton, Cottonseed oil, Dairy products, Eggs,

Field corn, Fish (marine or freshwater), Flaxseed, Hay, Livestock products, Millet, Mustard seed oil, Oats, Peanut oil, Peanuts, Primrose, Rapeseed oil, Range grasses, Rice, Rye, Safflower oil, Shellfish (marine or freshwater), Sorghum, Soybean oil, Soybeans, Sugar beets, Sugarcane, Sunflower oil, Tobacco, Tofu, Wheat, Wild Rice.

TRD-200901714
Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
Filed: May 6, 2009

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Coastal Coordination Council

Notice and Opportunity to Comment on Requests for Consistency Agreement/Concurrence Under the Texas Coastal Management Program

On January 10, 1997, the State of Texas received federal approval of the Coastal Management Program (CMP) (62 Federal Register pp. 1439-1440). Under federal law, federal agency activities and actions affecting the Texas coastal zone must be consistent with the CMP goals and policies identified in 31 TAC Chapter 501. Requests for federal consistency review were deemed administratively complete for the following project(s) during the period of April 24, 2009, through April 30, 2009. As required by federal law, the public is given an opportunity to comment on the consistency of proposed activities in the coastal zone undertaken or authorized by federal agencies. Pursuant to 31 TAC §§506.25, 506.32, and 506.41, the public comment period for this activity extends 30 days from the date published on the Coastal Coordination Council web site. The notice was published on the web site on May 6, 2009. The public comment period for this project will close at 5:00 p.m. on June 5, 2009.

FEDERAL AGENCY ACTIONS:

Applicant: Brenda and Wayne Ganter; Location: The project is located on wetlands adjacent to the Gulf of Mexico, at 2444A Canal

Drive, in Sargent, Matagorda County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled: Cedar Lakes West, Texas. Approximate UTM Coordinates in NAD 83 (meters): Zone 15; Easting: 248093; Northing: 3187225. Project Description: The applicant proposes to fill 0.10 acre of wetlands to level land for a private residence. The applicant also proposes to construct approximately 100 feet of bulkhead to separate the filled wetlands from the undisturbed wetlands. The applicant has stated that the project area contains wetlands that prevent the construction of a new private residence to suit the applicant's needs. As such, the proposed plan places the house in such a location as to conserve 0.09 acre of wetlands. A conservation easement will be required by the U.S. Army Corps of Engineers to ensure that the 0.09 acre of wetlands will not be developed in the future. CCC Project No.: 09-0151-F1. Type of Application: U.S.A.C.E. permit application #SWG-2007-01318 is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403) and §404 of the Clean Water Act (33 U.S.C.A. §1344). Pursuant to §306(d)(14) of the Coastal Zone Management Act of 1972 (16 U.S.C.A. §§1451-1464), as amended, interested parties are invited to submit comments on whether a proposed action is or is not consistent with the Texas Coastal Management Program goals and policies and whether the action should be referred to the Coastal Coordination Council for review.

Further information on the applications listed above, including a copy the consistency certifications for inspection, may be obtained from Ms. Tammy Brooks, Consistency Review Coordinator, Coastal Coordination Council, P.O. Box 12873, Austin, Texas 78711-2873, or tammy.brooks@glo.state.tx.us. Comments should be sent to Ms. Brooks at the above address or by fax at (512) 475-0680.

TRD-200901687
Larry L. Laine
Chief Clerk/Deputy Land Commissioner, General Land Office
Coastal Coordination Council
Filed: May 4, 2009

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Comptroller of Public Accounts

Notice of Request for Proposals

Pursuant to Chapters 403; 2155; 2156, §2156.121; and Chapter 2305, §2305.036, Texas Government Code, the Comptroller of Public Accounts (Comptroller), State Energy Conservation Office (SECO) announces its Request for Proposals (RFP #191b) and invites proposals from qualified, interested firms and institutions to partner with the Housing Partnership Program (Program) and Comptroller to provide training, technical, and educational outreach materials and support to public entities and low-to-moderate income residents regarding available energy efficiency programs and incentives, provide updates, and report to SECO. The Comptroller reserves the right to award more than one contract under the RFP. If a contract award is made under the terms of this RFP, Contractor will be expected to begin performance of the contract on or about July 1, 2009, or as soon thereafter as practical.

Contact: Parties interested in submitting a proposal should contact William Clay Harris, Assistant General Counsel, Contracts, Comptroller of Public Accounts, in the Issuing Office at: 111 E. 17th St., Room 201, Austin, Texas 78774, (512) 305-8673, to obtain a complete copy of the RFP. The Comptroller will mail copies of the RFP only to those parties specifically requesting a copy. The RFP will be available for pick-up at the above-referenced address on Friday, May 15, 2009, after 10:00 a.m. Central Zone Time (CZT) and during normal business hours thereafter. The Comptroller will also make the entire RFP available electronically on the Electronic State Business Daily (ESBD) at: http://esbd.cpa.state.tx.us after 10:00 a.m. CZT on Friday, May 15, 2009.

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, May 22, 2009. Prospective proposers are encouraged to fax Non-mandatory Letters of Intent and Questions to (512) 463-3669 to ensure timely receipt. Non-mandatory Letters of Intent must be addressed to William Clay Harris, 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. On or about Friday, May 29, 2009, the Comptroller expects to post responses to questions on the ESBD. Late Non-mandatory Letters of Intent and Questions will not be considered under any circumstances. Respondents shall be solely responsible for verifying timely receipt of Non-Mandatory Letters of Intent and Questions in the Issuing Office.

Closing Date: Proposals must be delivered in the Issuing Office to the attention of the Assistant General Counsel, Contracts, no later than 2:00 p.m. CZT, on Friday, June 5, 2009. Late Proposals will not be considered under any circumstances. Respondents shall be solely responsible for verifying time receipt of Proposals in the Issuing Office.

Evaluation Criteria: Proposals will be evaluated under the evaluation criteria outlined in the RFP. The Comptroller will make the final decision. The Comptroller reserves the right to accept or reject any or all proposals submitted. The Comptroller is not obligated to execute a contract 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 to the RFP.

The anticipated schedule of events pertaining to this solicitation is as follows: Issuance of RFP - May 15, 2009, after 10:00 a.m. CZT; Non-Mandatory Letters of Intent and Questions Due - May 22, 2009, 2:00 p.m. CZT; Official Responses to Questions posted - May 29, 2009; Proposals Due - June 5, 2009, 2:00 p.m. CZT; Contract Execution - July 1, 2009, or as soon thereafter as practical; Commencement of Services - July 1, 2009.

TRD-200901707
William Clay Harris
Assistant General Counsel, Contracts
Comptroller of Public Accounts
Filed: May 6, 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, and 303.009, Texas Finance Code.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 05/11/09 - 05/17/09 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 05/11/09 - 05/17/09 is 18% for Commercial over $250,000.

The monthly ceiling as prescribed by §303.005[3] for the period of 05/01/09 - 05/31/09 is 18% for Consumer/Agricultural/Commercial/credit through $250,000.

The monthly ceiling as prescribed by §303.005 for the period of 05/01/09 - 05/31/09 is 18% for Commercial over $250,000.

[1]Credit for personal, family or household use.

[2]Credit for business, commercial, investment or other similar purpose.

[3]For variable rate commercial transactions only.

TRD-200901703
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: May 5, 2009

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 **June 15, 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 June 15, 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: Brazos Valley Septic & Water, Inc.; DOCKET NUMBER: 2009-0165-PWS-E; IDENTIFIER: RN102694106; LOCATION: Burleson County; TYPE OF FACILITY: public water supply (PWS); RULE VIOLATED: 30 Texas Administrative Code (TAC) §290.113(f)(4) and Texas Health and Safety Code (THSC), §341.0315(c), by failing to comply with the maximum contaminant level (MCL) for total trihalomethanes (TTHM); PENALTY: $735; ENFORCEMENT COORDINATOR: Epifanio Villarreal, (361) 825-3100; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(2) COMPANY: Chevron Phillips Chemical Company LP; DOCKET NUMBER: 2008-1927-AIR-E; IDENTIFIER: RN103919817; LOCATION: Baytown, Harris County; TYPE OF FACILITY: chemical manufacturing plant; RULE VIOLATED: 30 TAC §116.115(c), Air Permit Number 37063, Special Condition (SC) Number 1, and THSC, §382.085(b), by failing to prevent unauthorized emissions; 30 TAC §101.201(a)(1)(B) and THSC, §382.085(b), by failing to report Incident Number 111058 within 24 hours after discovery; 30 TAC §§111.111(a)(4)(A), 115.722(c), and 116.115(c), Air Permit Number 1504A and PSD-TX-748, SC Number 1, 40 Code of Federal Regulations (CFR) §60.18(c)(1), and THSC, §382.085(b), by failing to prevent unauthorized emissions during Incident Number 109537; and 30 TAC §101.201(a)(1)(B) and THSC, §382.085(b), by failing to report Incident Number 109537 within 24 hours after discovery; PENALTY: $23,624; Supplemental Environmental Project (SEP) offset amount of $9,450 applied to Houston-Galveston AERCO's Clean Cities/Clean Vehicles Program; ENFORCEMENT COORDINATOR: Rebecca Johnson, (361) 825-3100; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(3) COMPANY: CLW, Inc.; DOCKET NUMBER: 2009-0239-AIR-E; IDENTIFIER: RN101900579; LOCATION: Cleveland, San Jacinto County; TYPE OF FACILITY: sawmill; RULE VIOLATED: 30 TAC §116.110(a) and THSC, §382.0518(a) and §382.085(b), by failing to obtain a permit or meet the conditions of a permit by rule; PENALTY: $2,000; ENFORCEMENT COORDINATOR: Suzanne Walrath, (512) 239-2134; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(4) COMPANY: Combined Consumers Special Utility District; DOCKET NUMBER: 2009-0334-PWS-E; IDENTIFIER: RN101440568; LOCATION: Quinlan, Hunt County; TYPE OF FACILITY: PWS; RULE VIOLATED: 30 TAC §290.113(f)(5) and THSC, §341.0315(c), by failing to comply with the MCL for haloacetic acids; PENALTY: $695; ENFORCEMENT COORDINATOR: Amanda Henry, (713) 767-3500; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(5) COMPANY: DCP Midstream, LP; DOCKET NUMBER: 2009-0201-AIR-E; IDENTIFIER: RN100222330; LOCATION: Goldsmith, Ector County; TYPE OF FACILITY: natural gas processing plant; RULE VIOLATED: 30 TAC §116.115(b)(2) and (c) and §116.615(2), Air Permit Numbers 676A, SC Number 1, Standard Permit Number 73563, Maximum Allowable Emissions Rate Table (MAERT), and THSC, §382.085(b), by failing to prevent the unauthorized release of air contaminants into the atmosphere; PENALTY: $10,000; SEP offset amount of $5,000 applied to Keep Odessa Beautiful, Inc.; ENFORCEMENT COORDINATOR: Suzanne Walrath, (512) 239-2134; REGIONAL OFFICE: 3300 North A Street, Building 4-107, Midland, Texas 79705-5406, (432) 570-1359.

(6) COMPANY: DRS Rock Materials, LLC; DOCKET NUMBER: 2008-1938-AIR-E; IDENTIFIER: RN105096416; LOCATION: El Paso, El Paso County; TYPE OF FACILITY: rock crusher; RULE VIOLATED: 30 TAC §106.142(3) and THSC, §382.085(b), by failing to have water sprays located at all inlet/outlet points of rock crushers; and 30 TAC §106.512(1) and THSC, §382.085(b), by failing to obtain permits for two reciprocating engines rated greater than 240 horsepower; PENALTY: $1,500; ENFORCEMENT COORDINATOR: Audra Benoit, (409) 898-3838; REGIONAL OFFICE: 401 East Franklin Avenue, Suite 560, El Paso, Texas 79901-1212, (915) 834-4949.

(7) COMPANY: Enertech Industries, Inc.; DOCKET NUMBER: 2009-0173-AIR-E; IDENTIFIER: RN104177423; LOCATION: Odessa, Ector County; TYPE OF FACILITY: oil field equipment painting yard; RULE VIOLATED: 30 TAC §101.4 and THSC, §382.085(a) and (b), by failing to prevent nuisance conditions; PENALTY: $1,070; ENFORCEMENT COORDINATOR: Suzanne Walrath, (512) 239-2134; REGIONAL OFFICE: 3300 North A Street, Building 4-107, Midland, Texas 79705-5406, (432) 570-1359.

(8) COMPANY: GJN L.L.C. dba Sunmart 141; DOCKET NUMBER: 2009-0136-PST-E; IDENTIFIER: RN101954907; 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; and 30 TAC §115.246(3), (4), and (6), and THSC, §382.085(b), by failing to maintain Stage II records at the station; PENALTY: $8,601; ENFORCEMENT COORDINATOR: Elvia Maske, (512) 239-0789; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(9) COMPANY: Harris County Municipal Utility District Number 167; DOCKET NUMBER: 2009-0305-MWD-E; IDENTIFIER: RN103138335; LOCATION: Harris County; TYPE OF FACILITY: wastewater treatment plant; RULE VIOLATED: 30 TAC §305.125(1), Texas Pollutant Discharge Elimination System (TPDES) Permit Number WQ0012834001, Interim II Effluent Limitations and Monitoring Requirements Number 1, by failing to comply with permitted effluent limits for total suspended solids, ammonia nitrogen (NH_3N), and flow; PENALTY: $1,870; ENFORCEMENT COORDINATOR: Pamela Campbell, (512) 239-4493; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(10) COMPANY: City of La Joya; DOCKET NUMBER: 2009-0030-PWS-E; IDENTIFIER: RN101276863; LOCATION: La Joya, Hidalgo County; TYPE OF FACILITY: PWS; RULE VIOLATED: 30 TAC §290.45(a)(6), TCEQ Agreed Order Docket Number 2006-1986-PWS-E, Ordering Provision Number 2.a.i., and THSC, §341.0315(c), by failing to provide treatment facility capacity that is not less than the anticipated maximum daily demand of the water system; 30 TAC §290.45(b)(2)(A), TCEQ Agreed Order Docket Number 2006-1986-PWS-E, Ordering Provision Number 2.a.iii., and THSC, §341.0315(c), by failing to provide a raw water pump capacity of 0.6 gallons per minute per connection with the largest pump out of service; 30 TAC §290.46(m), by failing to initiate maintenance housekeeping practices to ensure the good working condition and general appearance of the system's facilities and equipment; 30 TAC §290.42(f)(1)(E)(ii)(I), by failing to provide containment facilities for a single container or for multiple interconnected containers large enough to hold the maximum amount of chemical that can be stored with a minimum freeboard of six vertical inches or to hold 110% of the total volume of the container(s), whichever is less; and 30 TAC §290.46(j), by failing to maintain customer service inspection certificates prior to providing continuous water service to new construction; PENALTY: $2,511; ENFORCEMENT COORDINATOR: Yuliya Dunaway, (210) 490-3096; REGIONAL OFFICE: 1804 West Jefferson Avenue, Harlingen, Texas 78550-5247, (956) 425-6010.

(11) COMPANY: Ledezma Ready-Mix, LLC; DOCKET NUMBER: 2009-0295-WQ-E; IDENTIFIER: RN103949699; LOCATION: Brady, McCullough County; TYPE OF FACILITY: ready mix concrete; RULE VIOLATED: 30 TAC §281.25(a)(4) and 40 CFR §122.26(c), by failing to obtain authorization to discharge process wastewater and/or storm water associated with industrial activities; PENALTY: $4,000; ENFORCEMENT COORDINATOR: Cheryl Thompson, (817) 588-5800; REGIONAL OFFICE: 622 South Oakes, Suite K, San Angelo, Texas 76903-7035, (325) 655-9479.

(12) COMPANY: Lide Industries, LLC; DOCKET NUMBER: 2008-1919-AIR-E; IDENTIFIER: RN101698439; LOCATION: Mexia, Freestone County; TYPE OF FACILITY: tank manufacturing plant; RULE VIOLATED: 30 TAC §106.433(6)(A), New Source Review (NSR) Permit by Rule Registration Number 27190, and THSC, §382.085(b), by failing to comply with Permit by Rule emissions limits; and 30 TAC §106.452(2)(A), NSR Permit by Rule Registration Number 27379, and THSC, §382.085(b), by failing to comply with Permit by Rule material usage limitations; PENALTY: $30,100; SEP offset amount of $15,050 applied to Texas Parent Teacher Association - *Clean School Bus Program*; ENFORCEMENT COORDINATOR: Terry Murphy, (512) 239-5025; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(13) COMPANY: Lucite International, Inc.; DOCKET NUMBER: 2009-0171-AIR-E; IDENTIFIER: RN102736089; LOCATION: Nederland, Jefferson County; TYPE OF FACILITY: industrial organic chemical plant; RULE VIOLATED: 30 TAC §116.115(b)(2)(F) and (c) and §122.143(4), Federal Operating Permit (FOP) Number 1960, General Terms and Conditions (GTC) and Special Terms and Conditions (STC) Number 2F, Air Permit Number 1743, SC Number 1, and THSC, §382.085(b), by failing to prevent unauthorized emissions; and 30 TAC §101.201(a)(2)(F) and §122.143(4), FOP Number 1960, GTC and STC Number 2F, and THSC, §382.085(b), by failing to identify the compound descriptive type of the individually listed compounds or mixtures of all air contaminants released during Incident Number 110434 which exceeded the reportable quantity; PENALTY: $5,357; SEP offset amount of $2,143 applied to Jefferson County: Retrofit/Replacement of Heavy Equipment and Vehicles with Alternative Fueled Equipment and Vehicles; ENFORCEMENT COORDINATOR: Raymond Marlow, (409) 898-3838; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(14) COMPANY: City of Marshall and Allied Waste Systems, Inc.; DOCKET NUMBER: 2008-1511-MSW-E; IDENTIFIER: RN102994753; LOCATION: Marshall, Harrison County; TYPE OF FACILITY: citizen's convenience station; RULE VIOLATED: 30 TAC §328.60(a), by failing to obtain a scrap tire storage site registration; 30 TAC §330.15 and §330.225(b) and the Code, §26.121, by failing to prevent the discharge of municipal solid waste (MSW) into or adjacent to waters of the state and to prohibit the unloading and depositing of MSW in an unauthorized area of a MSW facility; 30 TAC §330.233(a)(2), by failing to properly control windblown material and litter; and 30 TAC §330.245(k), by failing to take appropriate measures to control ponded water; PENALTY: $7,275; SEP offset amount of $2,910 applied to Texas Association of Resource Conservation and Development Areas, Inc. ("RC&D") - Unauthorized Trash Dump Clean-Up; ENFORCEMENT COORDINATOR: Clinton Sims, (512) 239-6933; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(15) COMPANY: Oak Manor Municipal Utility District; DOCKET NUMBER: 2009-0189-MWD-E; IDENTIFIER: RN102080736; LOCATION: Brazoria County; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number WQ0010700001, Effluent Limitations and Monitoring Requirements Numbers 1 and 2, and the Code, §26.121(a)(1), by failing to comply with permitted effluent limits for NH_3N and total chlorine; PENALTY: $2,740; ENFORCEMENT COORDINATOR: Pamela Campbell, (512) 239-4493; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(16) COMPANY: RACETRAC PETROLEUM, INC. dba Racetrac 573; DOCKET NUMBER: 2009-0280-PST-E; IDENTIFIER: RN102219730; 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; and 30 TAC §290.51(a)(3) and the Code, §5.702, by failing to pay outstanding water system fees and associated late fees; PENALTY: $4,846; ENFORCEMENT COORDINATOR: Tom Greimel, (512) 239-5690; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(17) COMPANY: RJR RESTAURANTS OF DENTON LIMITED PARTNERSHIP dba Rudy's Bar-B-Que and Country Store; DOCKET NUMBER: 2009-0323-PST-E; IDENTIFIER: RN104314729; LOCATION: Denton, Denton County; TYPE OF FACILITY: restaurant 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 vapor recovery system; PENALTY: $2,403; ENFORCEMENT COORDINATOR: Mike Pace, (817) 588-5800; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(18) COMPANY: Rockfield Investments, LLC; DOCKET NUMBER: 2009-0174-EAQ-E; IDENTIFIER: RN105618391; LOCATION: New Braunfels, Comal County; TYPE OF FACILITY: recreational vehicle park construction site; RULE VIOLATED: 30 TAC §213.4(a), by failing to obtain approval of a water pollution abatement plan; PENALTY: $5,625; ENFORCEMENT COORDINATOR: Samuel Short, (512) 239-5363; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(19) COMPANY: Safety-Kleen Systems, Inc.; DOCKET NUMBER: 2009-0074-IHW-E; IDENTIFIER: RN100703578; LOCATION: San Antonio, Bexar County; TYPE OF FACILITY: hazardous waste transportation, storage, and disposal; RULE VIOLATED: 30 TAC §335.2(b), 40 CFR §264.15(c), and Permit Number HW-50246-001, Section I.B and III.D., by failing to repair cracks and gaps in secondary containment; and 30 TAC §335.2(b), 40 CFR §265.15(a), and Permit Number HW-50246-001, Section I.B. and III.D., by failing to conduct adequate daily inspections of the solvent waste tank; PENALTY: $1,750; ENFORCEMENT COORDINATOR: Michael Meyer, (512) 239-4492; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(20) COMPANY: City of Sanger; DOCKET NUMBER: 2009-0183-MWD-E; IDENTIFIER: RN103014155; LOCATION: Denton County; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number WQ0014372001, Effluent Limitations and Monitoring Requirements Number 1, and the Code, §26.121(a), by failing to comply with permitted effluent limitations for NH_3N; PENALTY: $5,700; SEP offset amount of $5,700 applied to RC&D - Clean School Buses; ENFORCEMENT COORDINATOR: Jennifer Graves, (956) 425-6010; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(21) COMPANY: SELAWI UNLIMITED, INC. dba Sammy Food Store; DOCKET NUMBER: 2009-0077-PST-E; IDENTIFIER: RN101633048; LOCATION: Arlington, Tarrant County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.8(c)(4)(A)(vii) and (5)(B)(ii), by failing to renew a previously issued underground storage tank (UST) delivery certificate by submitting a properly completed UST registration and self-certification form; 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 §334.49(c)(2)(C) and the Code, §26.3475(d), by failing to inspect the impressed current cathodic protection system; and 30 TAC §334.50(b)(1)(A) and the Code, §26.3475(c)(1), by failing to monitor the USTs for releases; PENALTY: $10,915; ENFORCEMENT COORDINATOR: Wallace Myers, (512) 239-6580; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(22) COMPANY: Southwest Convenience Stores, LLC; DOCKET NUMBER: 2009-0397-PST-E; IDENTIFIER: RN105691042; LOCATION: El Paso, El Paso County; TYPE OF FACILITY: fuel distributor; RULE VIOLATED: 30 TAC §115.221 and §115.222 and THSC, §382.085(b), by failing to control displaced vapors by a vapor control or a vapor balance system during the transfer of gasoline from a tank-truck tank into the USTs; PENALTY: $750; ENFORCEMENT COORDINATOR: Wallace Myers, (512) 239-6580; REGIONAL OFFICE: 401 East Franklin Avenue, Suite 560, El Paso, Texas 79901-1212, (915) 834-4949.

(23) COMPANY: TOTAL PETROCHEMICALS USA, INC.; DOCKET NUMBER: 2009-0013-AIR-E; IDENTIFIER: RN100212109; LOCATION: La Porte, Harris County; TYPE OF FACILITY: petrochemical manufacturing plant; RULE VIOLATED: 30 TAC §116.615(2), Standard Permit Number 78962, MAERT, and THSC, §382.085(b), by failing to prevent unauthorized emissions; PENALTY: $20,000; ENFORCEMENT COORDINATOR: Trina Grieco, (210) 490-3096; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(24) COMPANY: Trent Water Works, Inc.; DOCKET NUMBER: 2009-0260-PWS-E; IDENTIFIER: RN101202752; LOCATION: Freeport, Brazoria County; TYPE OF FACILITY: PWS; RULE VIOLATED: 30 TAC §290.113(f)(4), TCEQ Agreed Order Docket Number 2005-1910-PWS-E, Ordering Provision Number 2.a., and THSC, §341.0315(c), by failing to comply with the MCL for TTHM; PENALTY: $1,275; ENFORCEMENT COORDINATOR: Andrea Linson-Mgbeoduru, (512) 239-1482; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(25) COMPANY: United States Department of the Army; DOCKET NUMBER: 2008-1853-WQ-E; IDENTIFIER: RN102947124; LOCATION: Fort Hood, Coryell County; TYPE OF FACILITY: wastewater collection system; RULE VIOLATED: the Code, §26.121(a)(1), by failing to prevent the unauthorized discharge of sewage; PENALTY: $855; ENFORCEMENT COORDINATOR: Evette Alvarado, (512) 239-2573; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

TRD-200901693
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: May 5, 2009

Enforcement Orders

An agreed order was entered regarding Teofilo R. Gonzalez dba Mini Super Las Palmas, Docket No. 2004-0342-PST-E on April 27, 2009 assessing $46,725 in administrative penalties with $43,125 deferred.

Information concerning any aspect of this order may be obtained by contacting Xavier Guerra, Staff Attorney at (210) 403-4016, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Walker Wood Preserving, Inc., Docket No. 2005-0349-MLM-E on April 27, 2009 assessing $101,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Barham Richard, 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 ASAP Enterprises, Inc. dba VIP Cleaners 5 and dba IP Cleaners, Docket No. 2006-1285-DCL-E on April 27, 2009 assessing $2,370 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Dinniah Chahin, 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 Fatima Family Village, Inc. dba Fatima Village Mobile Home Park, Docket No. 2006-1777-PWS-E on April 27, 2009 assessing $417 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Jennifer Cook, Staff Attorney at (512) 239-1873, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding AP Livingston Limited Partnership dba Texaco Food Mart, Docket No. 2006-1894-PST-E on April 27, 2009 assessing $3,675 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Jennifer Cook, Staff Attorney at (512) 239-1873, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Mike Lucio dba Mike Lucio's Auto Service, Docket No. 2007-1243-PST-E on April 27, 2009 assessing $17,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Rudy Calderon, 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 City of Kirbyville, Docket No. 2007-1599-MLM-E on April 27, 2009 assessing $29,470 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Pam Campbell, Enforcement Coordinator at (512) 239-4493, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Richard Ayala dba All State Auto & Truck Parts Corpus Christi, Docket No. 2007-1656-WQ-E on April 27, 2009 assessing $1,050 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Gary Shiu, Staff Attorney at (713) 422-8916, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding JKD Builder, LLC, Docket No. 2007-1672-WQ-E on April 27, 2009 assessing $3,600 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Gary Shiu, Staff Attorney at (713) 422-8916, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Joe Macias, Docket No. 2007-1686-PST-E on April 27, 2009 assessing $7,875 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Rudy Calderon, 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 Shane Walls, Docket No. 2007-1743-LII-E on April 27, 2009 assessing $400 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 Maria A. Beltran dba 1017 Cafe, Docket No. 2007-1803-PWS-E on April 27, 2009 assessing $2,500 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.

A default order was entered regarding JE Jalaram, Inc. dba JC's Food Mart, Docket No. 2007-1939-PST-E on April 27, 2009 assessing $16,320 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Barham Richard, 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 M-Co Auto Supply, Inc. dba M-Co Auto Parts, Docket No. 2008-0072-PST-E on April 27, 2009 assessing $6,096 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.

A default order was entered regarding Duran Properties, Inc., Docket No. 2008-0120-PST-E on April 27, 2009 assessing $23,625 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Xavier Guerra, Staff Attorney at (210) 403-4016, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Tynan Water Supply Corporation, Docket No. 2008-0540-MWD-E on April 27, 2009 assessing $26,750 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Rudy Calderon, 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 Lauro Gonzalez dba Lauro's Welding and Sandblasting, Docket No. 2008-0895-AIR-E on April 27, 2009 assessing $4,000 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 Jarrod L. Meyer dba Jarrod's Lawn and Landscaping, Docket No. 2008-1155-LII-E on April 27, 2009 assessing $300 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Tommy Tucker Henson, Staff Attorney at (512) 239-3400, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Guss Lines dba Lines Cactus Grove Mobile Home Park, Docket No. 2008-1164-PWS-E on April 27, 2009 assessing $1,191 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Peipey Tang, 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 Leonard Garcia, Leonard, Docket No. 2008-1211-PST-E on April 27, 2009 assessing $16,800 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Phillip Goodwin, Staff Attorney at (512) 239-0675, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Kazi Begum dba Quick Stop, Docket No. 2008-1256-PST-E on April 27, 2009 assessing $6,390 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Tommy Tucker Henson, Staff Attorney at (512) 239-0946, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding The Lubrizol Corporation, Docket No. 2008-1282-AIR-E on April 27, 2009 assessing $20,410 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Trina Grieco, Enforcement Coordinator at (210) 403-4006, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Rochester, Docket No. 2008-1295-MWD-E on April 27, 2009 assessing $7,490 in administrative penalties with $1,498 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 Targa Midstream Services Limited Partnership, Docket No. 2008-1299-AIR-E on April 27, 2009 assessing $21,602 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Rebecca Johnson, Enforcement Coordinator at (361) 825-3420, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding J.R. Garman, Jr. dba Garman & Sons Dairy, Docket No. 2008-1312-AGR-E on April 27, 2009 assessing $5,340 in administrative penalties with $1,068 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 CLS Excavation, Inc., Docket No. 2008-1397-EAQ-E on April 27, 2009 assessing $1,875 in administrative penalties with $375 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 C & R Distributing, Inc., Docket No. 2008-1417-AIR-E on April 27, 2009 assessing $1,000 in administrative penalties with $200 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 Chireno Independent School District, Docket No. 2008-1451-MWD-E on April 27, 2009 assessing $5,114 in administrative penalties with $1,022 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 LEADING EDGE AVIATION SERVICES AMARILLO, INC., Docket No. 2008-1459-AIR-E on April 27, 2009 assessing $26,750 in administrative penalties with $5,350 deferred.

Information concerning any aspect of this order may be obtained by contacting Tom Jecha, Enforcement Coordinator at (512) 239-2576, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Channel Energy Center, LP, Docket No. 2008-1476-AIR-E on April 27, 2009 assessing $2,017 in administrative penalties with $403 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 Cardinal Meadows Improvement District, Docket No. 2008-1485-MLM-E on April 27, 2009 assessing $1,804 in administrative penalties with $360 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 C. H. INVESTMENTS, INC., Docket No. 2008-1494-EAQ-E on April 27, 2009 assessing $4,500 in administrative penalties with $900 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 City of New Summerfield, Docket No. 2008-1558-PWS-E on April 27, 2009 assessing $2,492 in administrative penalties with $498 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 Huntsman Petrochemical Corporation, Docket No. 2008-1586-AIR-E on April 27, 2009 assessing $117,715 in administrative penalties with $23,543 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 Mike Hweidi dba Hicks Country Store, Docket No. 2008-1607-PST-E on April 27, 2009 assessing $16,858 in administrative penalties with $3,371 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 Circleville Store & Grain, Inc., Docket No. 2008-1610-AIR-E on April 27, 2009 assessing $3,000 in administrative penalties with $600 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 S.A.A.A. ENTERPRISES, INC. dba West Airport Food Mart, Docket No. 2008-1656-PST-E on April 27, 2009 assessing $3,150 in administrative penalties with $630 deferred.

Information concerning any aspect of this order may be obtained by contacting Wallace Myers, Enforcement Coordinator at (512) 239-6580, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding SANM INC. dba Rick's Drive In, Docket No. 2008-1665-PST-E on April 27, 2009 assessing $17,600 in administrative penalties with $3,520 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 Thomas Rifai dba J & J Truck Stop, Docket No. 2008-1678-PST-E on April 27, 2009 assessing $9,518 in administrative penalties with $1,903 deferred.

Information concerning any aspect of this order may be obtained by contacting Michael Pace, Enforcement Coordinator at (817) 588-5933, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Foster Consolidated Investments, L.L.C. dba Walburg Water System, Docket No. 2008-1688-PWS-E on April 27, 2009 assessing $168 in administrative penalties with $33 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 Ed Bell Construction Company, Docket No. 2008-1691-WQ-E on April 27, 2009 assessing $5,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Jeremy Escobar, Enforcement Coordinator at (512) 239-1460, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Bosque Utilities Corporation, Docket No. 2008-1696-MWD-E on April 27, 2009 assessing $6,600 in administrative penalties with $1,320 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 Madisonville, Docket No. 2008-1703-MWD-E on April 27, 2009 assessing $6,500 in administrative penalties with $1,300 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 JWR-HO, L.P., Docket No. 2008-1705-MWD-E on April 27, 2009 assessing $3,760 in administrative penalties with $752 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 City of Kennard, Docket No. 2008-1710-MWD-E on April 27, 2009 assessing $8,745 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 I.C.A. Properties, Inc. dba Airline Mobile Home Park, Docket No. 2008-1728-MLM-E on April 27, 2009 assessing $1,705 in administrative penalties with $341 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 KRAS INVESTMENTS, LLC dba Bastrop Texaco, Docket No. 2008-1736-PST-E on April 27, 2009 assessing $20,673 in administrative penalties with $4,134 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 CMCR CORPORATION dba ASPS Beer and Wine, Docket No. 2008-1737-PST-E on April 27, 2009 assessing $6,596 in administrative penalties with $1,319 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 City of Thornton, Docket No. 2008-1740-PWS-E on April 27, 2009 assessing $282 in administrative penalties with $56 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 QUICK TRACK INC dba Quick Track, Docket No. 2008-1744-PST-E on April 27, 2009 assessing $2,631 in administrative penalties with $526 deferred.

Information concerning any aspect of this order may be obtained by contacting Michael Pace, Enforcement Coordinator at (817) 588-5933, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding MPII, INC. dba Mission Park Funeral Chapel, Docket No. 2008-1745-EAQ-E on April 27, 2009 assessing $750 in administrative penalties with $150 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 Concan Country Club, Inc., Docket No. 2008-1752-MLM-E on April 27, 2009 assessing $14,000 in administrative penalties with $2,800 deferred.

Information concerning any aspect of this order may be obtained by contacting Lanae Foard, Enforcement Coordinator at (512) 239-2554, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Comcast of Houston, LLC, Docket No. 2008-1766-PWS-E on April 27, 2009 assessing $4,252 in administrative penalties.

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 Chevron Phillips Chemical Company LP, Docket No. 2008-1771-AIR-E on April 27, 2009 assessing $6,400 in administrative penalties with $1,280 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 Lone Star Petroleum, LP dba Cook Shell, Docket No. 2008-1782-PST-E on April 27, 2009 assessing $6,096 in administrative penalties with $1,219 deferred.

Information concerning any aspect of this order may be obtained by contacting Brianna Carlson, Enforcement Coordinator at (956) 430-6021, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Trinity Pines Conference Center, Inc., Docket No. 2008-1788-MWD-E on April 27, 2009 assessing $26,425 in administrative penalties with $5,285 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 NuStar Terminals Partners TX L.P., Docket No. 2008-1799-AIR-E on April 27, 2009 assessing $4,394 in administrative penalties with $878 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 Beach Road Municipal Utility District, Docket No. 2008-1806-MWD-E on April 27, 2009 assessing $4,350 in administrative penalties with $870 deferred.

Information concerning any aspect of this order may be obtained by contacting Cheryl Thompson, Enforcement Coordinator at (817) 588-5886, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Hawk Cove, Docket No. 2008-1821-MWD-E on April 27, 2009 assessing $2,500 in administrative penalties with $500 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 FRIENDSHIP ENTERPRISES, INC. dba In and Out Mini Mart, Docket No. 2008-1828-PST-E on April 27, 2009 assessing $2,684 in administrative penalties with $536 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 The Goodyear Tire & Rubber Company, Docket No. 2008-1859-AIR-E on April 27, 2009 assessing $5,150 in administrative penalties with $1,030 deferred.

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 Amirali Ladhani and Fatima Ladhani dba Rick's Drive In, Docket No. 2008-1916-PST-E on April 27, 2009 assessing $9,760 in administrative penalties with $1,952 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 Houston County Ready-Mix Concrete Co. Inc., Docket No. 2008-1920-AIR-E on April 27, 2009 assessing $1,500 in administrative penalties with $300 deferred.

Information concerning any aspect of this order may be obtained by contacting Trina Grieco, Enforcement Coordinator at (210) 403-4006, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding MERCANTILE ENTERPRISES, INC. dba In & Out Mini Mart #2, Docket No. 2008-1931-PST-E on April 27, 2009 assessing $2,309 in administrative penalties with $461 deferred.

Information concerning any aspect of this order may be obtained by contacting Michael Pace, Enforcement Coordinator at (817) 588-5933, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding John Ho Im dba Johns Market, Docket No. 2008-1932-PST-E on April 27, 2009 assessing $2,500 in administrative penalties with $500 deferred.

Information concerning any aspect of this order may be obtained by contacting Brianna Carlson, Enforcement Coordinator at (956) 430-6021, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding TC AND E REALTY, INC. dba Fastime Convenience, Docket No. 2008-1933-PST-E on April 27, 2009 assessing $9,200 in administrative penalties with $1,840 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 SUNESARA INVESTMENT INC. dba Baytown Market 2, Docket No. 2008-1944-PST-E on April 27, 2009 assessing $6,146 in administrative penalties with $1,229 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 Belco Manufacturing Company, Inc., Docket No. 2008-1952-AIR-E on April 27, 2009 assessing $2,500 in administrative penalties with $500 deferred.

Information concerning any aspect of this order may be obtained by contacting Trina Grieco, Enforcement Coordinator at (210) 403-4006, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Brumley Manufacturing, LLC, Docket No. 2009-0006-AIR-E on April 27, 2009 assessing $2,100 in administrative penalties with $420 deferred.

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 Texas Petrochemicals LLC, Docket No. 2009-0022-AIR-E on April 27, 2009 assessing $0 in administrative penalties.

A citation was entered regarding Southland Contracting, Inc., Docket No. 2008-1690-WQ-E on April 27, 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 citation was entered regarding Robert D. Myers, Docket No. 2008-1755-WOC-E on April 27, 2009 assessing $210 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 citation was entered regarding Doug Bowden, Docket No. 2008-1756-WOC-E on April 27, 2009 assessing $210 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 citation was entered regarding Steve Simpson & Associates, Inc., Docket No. 2008-1758-WR-E on April 27, 2009 assessing $350 in administrative penalties.

Information concerning any aspect of this citation may be obtained by contacting Melissa Keller, SEP Coordinator at (512) 239-1768, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A citation was entered regarding Dale K. Farrow, Docket No. 2008-1759-WR-E on April 27, 2009 assessing $350 in administrative penalties.

Information concerning any aspect of this citation may be obtained by contacting Melissa Keller, SEP Coordinator at (512) 239-1768, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A citation was entered regarding Armstrong Mechanical Co., Inc., Docket No. 2008-1847-PST-E on April 27, 2009 assessing $1,750 in administrative penalties.

Information concerning any aspect of this citation may be obtained by contacting Melissa Keller, SEP Coordinator at (512) 239-1768, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A citation was entered regarding Grand Texas Homes, Inc., Docket No. 2008-1847-WQ-E on April 27, 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.

An order was entered regarding Tanvir A. Malik d/b/a Malik Exxon, Docket No. 2005-1953-PST-E on April 27, 2009 assessing $17,500 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting John Shelton, Enforcement Coordinator at (512) 239-2563, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

Information concerning any aspect of this order may be obtained by contacting Terry Murphy, Enforcement Coordinator at (512) 239-5025, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An order was entered regarding City of Thornton, Docket No. 2006-0571-MWD-E on April 27, 2009 assessing $48,480 in administrative penalties with $24,240 deferred.

Information concerning any aspect of this order may be obtained by contacting Lynley Doyen, Enforcement Coordinator at (512) 239-1364, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An order was entered regarding Peach Cream Dam and Lake Club, Docket No. 2006-1304-PWS-E on April 27, 2009 assessing $1,400 in administrative penalties.

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 order was entered regarding Chester Hermes, Docket No. 2007-0452-MSW-E on April 27, 2009 assessing $2,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting John Shelton, Enforcement Coordinator at (512) 239-2563, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Gloria Serenil, Docket No. 2007-1503-PST-E on April 27, 2009 assessing $16,800 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Wallace Myers, Enforcement Coordinator at (512) 239-6580, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An order was entered regarding MPR Investments, LLC, dba Oakridge Square Mobil Home Park, Docket No. 2007-1935-PWS-E on April 27, 2009 assessing $13,420 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Yuilya Dunaway, Enforcement Coordinator at (210) 490-3096, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

TRD-200901718
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: May 6, 2009

Notice of Availability of the Draft April 2009 Update to the Water Quality Management Plan

The Texas Commission on Environmental Quality (TCEQ or commission) announces the availability of the draft April 2009 Update to the Water Quality Management Plan for the State of Texas (draft WQMP update).

The Water Quality Management Plan (WQMP) is developed and promulgated in accordance with the requirements of federal Clean Water Act, §208. The draft WQMP update includes projected effluent limits of indicated domestic dischargers useful for water quality management planning in future permit actions. Once the commission certifies a WQMP update, the update is submitted to the United States Environmental Protection Agency (EPA) for approval. For some Texas Pollutant Discharge Elimination System (TPDES) permits, the EPA's approval of a corresponding WQMP update is a necessary precondition to TPDES permit issuance by the commission. The draft WQMP update may contain service area populations for listed wastewater treatment facilities, designated management agency information and total maximum daily load (TMDL) updates.

A copy of the draft April 2009 WQMP update may be found on the commission's Web site located at *http://www.tceq.state.tx.us/nav/eq/eq_wqmp.html.* A copy of the draft may also be viewed at the TCEQ Library, Building A, 12100 Park 35 Circle, Austin, Texas.

Written comments on the draft WQMP update may be submitted to Nancy Vignali, Texas Commission on Environmental Quality, Water Quality Division, MC 150, P.O. Box 13087, Austin, Texas 78711-3087. Comments may also be faxed to (512) 239-4420, but must be followed up with the submission and receipt of the written comments within three working days of when they were faxed. Written comments must be submitted no later than 5:00 p.m. on June 15, 2009. For further information or questions, please contact Ms. Vignali at (512) 239-1303 or by e-mail at *nvignali@tceq.state.tx.us.*

TRD-200901689
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: May 5, 2009

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 **June 15, 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 A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Written comments about an AO should be sent to the attorney designated for the AO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on June 15, 2009**. Comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The designated attorney is available to discuss the AO and/or the comment procedure at the listed phone number; however, §7.075 provides that comments on an AO shall be submitted to the commission in **writing**.

(1) COMPANY: 10104, Inc. dba Northstar Food Store; DOCKET NUMBER: 2006-1472-PST-E; TCEQ ID NUMBER: RN101908481; LOCATION: 10104 Tidwell Road, Houston, Harris County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.49(a) and TWC, §26.3475(d), by failing to provide corrosion protection for the underground storage tank (UST) system; 30 TAC §334.50(a)(1)(A) and TWC, §26.3475(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 including the tanks, piping, and other ancillary equipment; 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 a motor fuel; 30 TAC §334.10(b), by failing to make available legible copies of all required UST records for inspection upon request by agency personnel; PENALTY: $7,650; 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.

(2) COMPANY: Alfonso Garza Jr., Trustee of the Alfonso Garza Testamentary Trust and and Emma G. Garza; DOCKET NUMBER: 2007-1276-MSW-E; TCEQ ID NUMBER: RN105237036; LOCATION: 1.8 miles North of the intersection of Iowa Road and 7 Mile Line Road, La Joya, Hildago County, Texas; TYPE OF FACILITY: property; RULES VIOLATED: 30 TAC §330.15(c), by failing to prevent the unauthorized disposal of municipal solid waste; PENALTY: $1,000; STAFF ATTORNEY: Becky Combs, Litigation Division, MC 175, (512) 239-6939; REGIONAL OFFICE: Harlingen Regional Office, 1804 West Jefferson Avenue, Harlingen, Texas 78550-5247, (956) 425-6010.

(3) COMPANY: Ali Shahjhan dba Brownies; DOCKET NUMBER: 2007-2035-PST-E; TCEQ ID NUMBER: RN101557205; LOCATION: 501 Bedford Road, Bedford, Tarrant 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 renew a previously issued UST delivery certificate by timely and proper submission of a completed UST registration and self-certification form to the agency at least 30 days before the expiration date of the certificate; 30 TAC §334.8(c)(5)(A)(i) and TWC, §26.3467(a), by

failing to make available to a common carrier a valid, current TCEQ delivery certificate before accepting delivery of a regulated substance into the USTs; and 30 TAC §115.245(2) and Texas Health and Safety Code (THSC), §382.085(b), by failing to verify proper operations of the Stage II equipment at least once every 12 months or upon major system replacement or modification; PENALTY: $5,821; STAFF ATTORNEY: Jacquelyn Boutwell, Litigation Division, MC 175, (512) 239-5846; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(4) COMPANY: Casey Layne Vickrey; DOCKET NUMBER: 2007-1137-LII-E; TCEQ ID NUMBER: RN105193163; LOCATION: 109 North Ranch Road 620, Lakeway, Travis County; TYPE OF FACILITY: landscape irrigation business; RULES VIOLATED: 30 TAC §30.5(b) and §344.4(a), TWC, §37.003, and Texas Occupations Code, §1903.251, by failing to hold an irrigator license or registration prior to advertising or representing to the public that he could perform services for which a license or registration is required; PENALTY: $262; STAFF ATTORNEY: Rudy Calderon, Litigation Division, MC 175, (512) 239-0205; REGIONAL OFFICE: Austin Regional Office, 2800 South Interstate Highway 35, Suite 100, Austin, Texas 78704-5712, (512) 339-2929.

(5) COMPANY: City of Goodrich; DOCKET NUMBER: 2006-1325-MWD-E; TCEQ ID NUMBER: RN101917649; LOCATION: east side of Southern Pacific Railroad, approximately 1,200 feet southwest of the intersection of Farm-to-Market (FM) Road 393 and United States (US) Highway 59, City of Goodrich, Polk County; TYPE OF FACILITY: wastewater treatment facility; RULES VIOLATED: 30 TAC §305.125(5) and Texas Pollutant Discharge Elimination System (TPDES) Permit Number 12711001, Operational Requirements Number 1, by failing to ensure that the facility and all its systems of treatment and control are properly operated and maintained; 30 TAC §305.125(1), TWC, §26.121(a), and TPDES Permit Number 12711001, Effluent Limitations and Monitoring Requirements Numbers 1 and 6, by failing to comply with permitted effluent limitations of 4.0 milligrams per liter (mg/L) minimum dissolved oxygen (DO) and 0.065 million gallons per day (MGD) annual average flow for Outfall 001; 30 TAC §319.7(c) and TPDES Permit Number 12711001, Monitoring and Reporting Requirements Number 3, by failing to maintain all records and information resulting from the required monitoring activities; 30 TAC §319.7(c) and TPDES Permit Number 12711001, Monitoring and Reporting Requirements Number 1, by failing to include on the Discharge Monitoring Reports (DMRs) results for DO, Biochemical Oxygen demand (BOD), hydrogen (pH), and total suspended solids for monitoring periods ending June 30 - July 15, 2005, results for daily maximum flow for monitoring periods ending August 31, 2005 and March 31, 2006, results for annual average flow for monitoring periods ending November 30, 2005, and results for BOD maximum single grab for monitoring period ending January 31, 2006; 30 TAC §305.125(17) and TPDES Permit Number 12711001, Sludge Provisions, by failing to submit the annual sludge report for the monitoring period ending July 31, 2005; and 30 TAC §305.125(1) and TPDES Permit Number 12711001, Monitoring and Reporting Requirements Number 7(c), by failing to notify the TCEQ of effluent violations that deviated from the permitted limitations by more than 40%; PENALTY: $12,150; STAFF ATTORNEY: James Sallans, Litigation Division, MC 175, (512) 239-2053; REGIONAL OFFICE: Beaumont Regional Office, 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(6) COMPANY: The Dow Chemical Company; DOCKET NUMBER: 2007-0923-AIR-E; TCEQ ID NUMBER: RN100225945; LOCATION: 2301 North Brazosport Boulevard, Freeport, Brazoria County; TYPE OF FACILITY: chemical manufacturing plant; RULES VIOLATED: 30 TAC §116.715(a) and §101.20(3), New Source Review (NSR) Flexible Air Permit Number 20432/PSD-TX-994M1, Special Condition (SC) Number III-1, and THSC, §382.085(b), by failing to comply with permitted emissions limits, during an excessive emissions event from June 26 - August 13, 2005; 30 TAC §116.715(a) and §101.20(3), NSR Flexible Air Permit Number 20432/PSD-TX-994M1, SC Number III-1, and THSC, §382.085(b), by failing to comply with permitted emissions limits, during an excessive emissions event from February 10 - 11, 2006; 30 TAC §116.115(c), NSR Air Permit Number 6803, SC Number 1, and THSC, §382.085(b), by failing to comply with permitted emissions limits, during a stack test on December 29, 2006; 30 TAC §116.115(c), NSR Air Permit Number 7531, SC Numbers 1 and 2, and THSC, §382.085(b), by failing to comply with permitted emissions limits, during an excessive emissions event on February 9, 2007; 30 TAC §116.715(a), §101.20(1) and (3), 40 Code of Federal Regulations (CFR) §60.18(c)(2) and (d), NSR Flexible Air Permit Number 20432/PSD-TX-994M1, SC General Requirement 4 and SC Condition Number III-1, and THSC, §382.085(b), by failing to comply with permitted emissions limits, during an emissions event on January 30, 2007; and 30 TAC §116.110(a) and THSC, §382.085(b) and §382.0518(a), by allowing unauthorized emissions, during an emissions event on March 8, 2007; PENALTY: $166,465; Supplemental Environmental Project offset amount of $83,232 applied to Houston-Galveston Area Emission Reduction Credit Organization Clean Cities/Clean Vehicles Program; STAFF ATTORNEY: Anna Cox, Litigation Division, MC 175, (512) 239-0974; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023, (713) 767-3500.

(7) COMPANY: Fort Worth Excavating, Inc.; DOCKET NUMBER: 2007-0152-MSW-E; TCEQ ID NUMBER: RN100733138; LOCATION: 5265 Shelby Road, Fort Worth, Tarrant County; TYPE OF FACILITY: unauthorized municipal solid waste disposal site; RULES VIOLATED: 30 TAC §330.15(c), by failing to prevent the unauthorized disposal of municipal solid waste; PENALTY: $15,900; STAFF ATTORNEY: Kari Gilbreth, Litigation Division, MC 175, (512) 239-1320; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(8) COMPANY: Irma Maldonado-Rullan dba ACCI Forwarding, Inc.; DOCKET NUMBER: 2004-0189-IHW-E; TCEQ ID NUMBER: RN103711255; LOCATION: 109 Flecha Lane, Laredo, Webb County; TYPE OF FACILITY: freight forwarder; RULES VIOLATED: 30 TAC §335.62, by failing to make a hazardous waste determination on approximately 50 sacks of ammonium hydrogen fluoride, approximately 80 sacks of polyvinyl alcohol, approximately 60 sacks of sodium per carbonate, approximately 80 sacks of unknown material, approximately 250 sacks of various materials, 12 15-gallon containers of unknown material, four 55-gallon drums of solvent, and 64 55-gallon drums of unknown material; PENALTY: $18,000; STAFF ATTORNEY: Gary Shiu, Litigation Division, MC R-12, (713) 422-8916; REGIONAL OFFICE: Laredo Regional Office, 707 East Calton Road, Suite 304, Laredo, Texas 78041-3887, (956) 791-6611.

(9) COMPANY: Lancaster Mini Mart, Inc. dba Lancaster Mini Mart; DOCKET NUMBER: 2007-1300-PST-E; TCEQ ID NUMBER: RN102378999; LOCATION: 3950 East Lancaster Avenue, Fort Worth, Tarrant County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §115.245(2) and THSC, §382.085(b), by failing to verify proper operation of the Stage II equipment at least once every 12 months; PENALTY: $2,050; STAFF ATTORNEY: Rudy Calderon, Litigation Division, MC 175, (512) 239-0205; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(10) COMPANY: Lupe Mercado; DOCKET NUMBER: 2007-1653-PST-E; TCEQ ID NUMBER: RN101866036; LOCATION: State Highway 72, Nordheim, DeWitt County; TYPE OF FACILITY: former retail gasoline service station; RULES VIOLATED: 30 TAC §334.47(a)(2) and §334.54(b), by failing to permanently remove from service, no later than 60 days after the prescribed upgrade implementation date, two USTs for which any applicable component of the system is not brought into timely compliance with the upgrade requirements; PENALTY: $7,875; STAFF ATTORNEY: Anna Cox, Litigation Division, MC 175, (512) 239-0974; REGIONAL OFFICE: Corpus Christi Regional Office, 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5839, (361) 825-3100.

(11) COMPANY: Melvin Terral dba T-Mart Food and Martha Terral dba T-Mart Food; DOCKET NUMBER: 2006-1685-PST-E; TCEQ ID NUMBER: RN103051561; LOCATION: 612 Commerce, Robert Lee, Coke County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.50(b)(1)(A) and TWC, §26.3475(c)(1), by failing to monitor USTs for releases at a frequency of at least once per month (not to exceed 35 days between each monitoring); 30 TAC §334.49(a) and TWC, §26.3475(d), by failing to provide proper corrosion protection for the UST system; 30 TAC §37.815(a) and (b), by failing to demonstrate acceptable financial assurance for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of petroleum USTs; 30 TAC §334.22(a) and TWC, §5.702 by failing to pay outstanding UST fees for TCEQ Financial Account Number 0038551U for Fiscal Years 1994 - 2006; PENALTY: $8,000; STAFF ATTORNEY: Dinniah Chahin, Litigation Division, MC 175, (512) 239-0617; REGIONAL OFFICE: San Angelo Regional Office, 622 South Oakes, Suite K, San Angelo, Texas 76903-7035, (325) 655-9479.

(12) COMPANY: TETH Investment; DOCKET NUMBER: 2007-1783-PST-E; TCEQ ID NUMBER: RN101698785; LOCATION: 1454 North US Highway 77, La Grange, Fayette County; TYPE OF FACILITY: former gasoline service station; RULES VIOLATED: 30 TAC §334.47(a)(2), by failing to permanently remove from service, no later than 60 days after the prescribed implementation date, three USTs for which any applicable component of the system is not brought into timely compliance with the upgrade requirements; 30 TAC §334.22(a) and TWC, §5.702, by failing to pay UST fees for Fiscal Years 1988 - 2007 and associated late fees for Financial Administration Account Number 0038072U; PENALTY: $2,625; STAFF ATTORNEY: Anna Cox, Litigation Division, MC 175, (512) 239-0974; REGIONAL OFFICE: Austin Regional Office, 2800 South Interstate Highway 35, Suite 100, Austin, Texas 78704-5712, (512) 339-2929.

(13) COMPANY: Victor C. Lopez; DOCKET NUMBER: 2007-1223-MSW-E; TCEQ ID NUMBER: RN105225718; LOCATION: 6607 FM Road 1346, San Antonio, Bexar County; TYPE OF FACILITY: property; RULES VIOLATED: 30 TAC §330.15(c), by failing to prevent the unauthorized disposal of municipal solid waste at an unauthorized disposal site; PENALTY: $2,000; STAFF ATTORNEY: Rudy Calderon, Litigation Division, MC 175, (512) 239-0205; REGIONAL OFFICE: San Antonio Regional Office, 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(14) COMPANY: WTG Jameson, L.P.; DOCKET NUMBER: 2008-0979-AIR-E; TCEQ ID NUMBER: RN101246478; LOCATION: 1000 Gas Plant Road, Silver, Coke County; TYPE OF FACILITY: natural gas processing plant; RULES VIOLATED: 30 TAC §122.143(4), THSC, §382.085(b), and Site Operating Permit (SOP) O-00865, SC Number 3, by failing to conduct quarterly observations for visible emissions from all stationary vents for emission units in operation; 30 TAC §122.143(4), THSC, §382.085(b), and SOP, SC Number 7, by failing to conduct weekly visible emissions observations and to keep appropriate records for the acid gas flare (Emission Point Number (EPN) 384); 30 TAC §116.115(c), THSC, §382.085(b), and Permit 9941, SC Number 5, by failing to calculate the mass rate of hydrogen sulfide (H_2S) in pounds per hour (lbs/hr) that is sent to the acid gas flare (EPN 384) at least daily to calculate the total annual quantity at the end of each calendar year in tons per year; 30 TAC §116.115(c), THSC, §382.085(b), and Permit 55477, SC Number 5, by failing to conduct initial stack sampling for carbon monoxide (CO) and nitrogen oxide (NO_x) on two of the four engines (EPN Numbers E-31-1 - E-31-4) authorized under the permit, within 180 days of the issuance of the permit on November 6, 2003; 30 TAC §116.115(c), THSC, §382.085(b), and Permit 55477, SC Number 6, by failing to conduct evaluations of the engine performance of EPN Numbers E-31-1 - E-31-4 within 360 days after the issuance of the permit, and quarterly thereafter, by measuring the NO_x, CO, and oxygen content of the exhaust and using the results to calculate emissions of NO_x and CO in lbs/hr; 30 TAC §106.512(2)(C)(iii) and THSC, §382.085(b), by failing to conduct testing for NO_x and CO emissions from engine EPN Numbers E-1, E-44-1A, and E-44-iB at least biennially; 30 TAC §106.512(2)(C)(i) and (ii) and THSC, §382.085(b), by failing to change oxygen sensors quarterly, and to perform required emissions testing within seven days of oxygen sensor replacements for EPN Numbers E-1 - E-3, E-44-1A, E-44-1B, E-45-1B, 36-6 - 36-8; 30 TAC §122.147(a) and THSC, §382.085(b), by failing to install, calibrate, maintain and operate a monitoring system for engines that are subject to Compliance Assurance Monitoring (CAM) requirements; 30 TAC §122.221(a) and THSC, §382.085(b), by failing to submit a significant revision for SOP O865 to the TCEQ in a timely manner; and 30 TAC §122.145(2) and THSC, §382.085(b), by failing to report, in writing, to the TCEQ all instances of deviations documented in the investigation, in all deviation reports from July 20, 2005 - January 19, 2006 reporting period to the present; PENALTY: $57,705; STAFF ATTORNEY: Jacquelyn Boutwell, Litigation Division, MC 175, (512) 239-5846; REGIONAL OFFICE: San Angelo Regional Office, 622 South Oakes, Suite K, San Angelo, Texas 76903-7013, (915) 655-9479.

TRD-200901698
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: May 5, 2009

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 **June 15, 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, in-

adequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction, or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed DO is not required to be published if those changes are made in response to written comments.

A copy of each proposed DO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Written comments about the DO should be sent to the attorney designated for the DO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on June 15, 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: AMK Enterprises, LLC dba The Olde Tymer; DOCKET NUMBER: 2008-1783-PWS-E; TCEQ ID NUMBER: RN102404399; LOCATION: 28295 Interstate Highway 10 West, Boerne, Bexar County; TYPE OF FACILITY: convenience store with a public water supply; RULES VIOLATED: 30 TAC §290.109(c)(3)(A)(ii), by failing to collect all repeat bacteriological monitoring samples within 24 hours of being notified of a coliform-found result during the months of October 2007 and 2008; 30 TAC §290.109(c)(2)(F) and §290.122(c)(2)(B), by failing to collect at least five distribution coliform samples during the month following a total coliform positive sample result and by failing to provide public notice of the failure to collect the proper number of samples; 30 TAC §290.109(f)(3) and §290.122(b)(2)(B) and Texas Health and Safety Code (THSC), §341.031(a), by exceeding the maximum contaminant level (MCL) for total coliform in May - June and October 2008, and by failing to provide public notice of the MCL exceedance in June 2008; PENALTY: $4,867; STAFF ATTORNEY: Phillip Goodwin, Litigation Division, MC 175, (512) 239-0675; REGIONAL OFFICE: San Antonio Regional Office, 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(2) COMPANY: Albert E. Ellis; DOCKET NUMBER: 2008-0056-LII-E; TCEQ ID NUMBER: RN103862447; LOCATION: 7507 Dawn Mist Court, Sugar Land, Fort Bend County; TYPE OF FACILITY: landscape and lawn maintenance business; RULES VIOLATED: 30 TAC §30.5(a) and §344.4(a), TWC, §37.003, Texas Occupations Code, §1903.251, and Default Findings Order Docket Number 2003-1553-LII-E, Ordering Provision Number 2.a., by failing to possess a valid irrigator license issued by the TCEQ prior to selling, designing, consulting, installing, maintaining, altering, repairing or servicing an irrigation system; PENALTY: $872; STAFF ATTORNEY: Peipey Tang, Litigation Division, MC 175, (512) 239-0654; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023, (713) 767-3500.

(3) COMPANY: Baudelio Hernandez dba Chelas Landscaping; DOCKET NUMBER: 2008-1722-MSW-E; TCEQ ID NUMBER: RN105390496; LOCATION: 3811 Katy Lane, Bellmead, McLennan County; TYPE OF FACILITY: unauthorized disposal site; RULES VIOLATED: 30 TAC §330.15(c), by failing to prevent the unauthorized disposal of municipal solid waste; PENALTY: $2,625; STAFF ATTORNEY: Jennifer Cook, Litigation Division, MC 175, (512) 239-1873; REGIONAL OFFICE: Waco Regional Office, 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(4) COMPANY: James C. Dunn dba Fillmore Cleaners; DOCKET NUMBER: 2006-0992-DCL-E; TCEQ ID NUMBER: RN104029194; LOCATION: 619 North Fillmore Street, Amarillo, Potter County; TYPE OF FACILITY: dry cleaning facility; RULES VIOLATED: 30 TAC §337.11(e) and THSC, §374.102, by failing to renew the facility's registration by completing and submitting the required registration form to the TCEQ for a dry cleaning and/or drop station facility; and 30 TAC §337.14(c) and TWC, §5.702, by failing to pay outstanding dry cleaner and late fees for TCEQ Financial Account Number 24001447 for Fiscal Year 2006; PENALTY: $3,185; STAFF ATTORNEY: Tommy Tucker Henson II, Litigation Division, MC 175, (512) 239-0946; REGIONAL OFFICE: Amarillo Regional Office, 3918 Canyon Drive, Amarillo, Texas 79109-4933, (806) 353-9251.

(5) COMPANY: Jay L. Hutchins; DOCKET NUMBER: 2008-1489-WOC-E; TCEQ ID NUMBER: RN104954961; LOCATION: approximately two miles east of the intersection of State Highway 36 and Farm-to-Market (FM) Road 1476, Comanche County; TYPE OF FACILITY: wastewater treatment plant; RULES VIOLATED: 30 TAC §30.5(a) and §30.331(b) and TWC, §26.0301 and §37.003, by failing to obtain a wastewater treatment operator Class "C" license prior to performing activities as a wastewater treatment operator; PENALTY: $1,367; STAFF ATTORNEY: Tommy Tucker Henson II, Litigation Division, MC 175, (512) 239-0946; REGIONAL OFFICE: Abilene Regional Office, 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (325) 698-9674.

(6) COMPANY: John R. Preston dba Refugio Exxon North; DOCKET NUMBER: 2007-0944-PST-E; TCEQ ID NUMBER: RN102483823; LOCATION: 601 North Alamo, Refugio, Refugio County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §37.815(a) and (b), by failing to demonstrate acceptable financial assurance for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of petroleum underground storage tanks (USTs); 30 TAC §334.50(b)(2)(A)(i)(III) and TWC, §26.3475(c)(1), by failing to test the line leak detectors annually for performance and operational reliability; 30 TAC §334.7(d)(3), §334.8(c)(4)(A)(vii), (B), and (5)(B)(ii), by failing to provide an amended registration for any change or additional information regarding USTs within 30 days from the date of the occurrence of the change or addition; 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 §334.10(b), by failing to maintain UST records and immediately make them available for inspection upon request by agency personnel; 30 TAC §334.72, by failing to report a suspected release to the agency within 24 hours of discovery; and 30 TAC §334.74, by failing to investigate a suspected release within 30 days of discovery; PENALTY: $26,250; STAFF ATTORNEY: Tracy Chandler, Litigation Division, MC 175, (512) 239-0629; REGIONAL OFFICE: Corpus Christi Regional Office, 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5839, (361) 825-3100.

(7) COMPANY: Juan Miguel Mata; DOCKET NUMBER: 2008-0111-MSW-E; TCEQ ID NUMBER: RN105370712; LOCATION: FM Road 186 south of Whispering Tree Apartments, Carrizo Springs, Dimmit County; TYPE OF FACILITY: unauthorized used and scrap tire disposal service; RULES VIOLATED: 30 TAC §328.57(c)(3), by failing to insure that used or scrap tires or tire pieces are transported to an authorized scrap tire facility; 30 TAC §328.60(a), by failing to obtain from the commission a scrap tire storage site registration for the facility prior to storing more than 500 used scrap tires on the ground; and 30 TAC §328.57(c)(1), by failing to register with the commission as a scrap tire transporter prior to transporting used or scrap tires; PENALTY: $7,500; STAFF ATTORNEY: Barham A. Richard, Litigation Division, MC 175, (512) 239-0107; REGIONAL

OFFICE: Laredo Regional Office, 707 East Calton Road, Suite 304, Laredo, Texas 78041-3887, (956) 791-6611.

(8) COMPANY: M.L. Stringer; DOCKET NUMBER: 2008-0257-PST-E; TCEQ ID NUMBER: RN101548774; LOCATION: Interstate 45 at Exit 221, south of Angus, Navarro County; TYPE OF FACILITY: inactive USTs; RULES VIOLATED: 30 TAC §334.47(a)(2), by failing to perform the permanent removal of four USTs that had not met the upgrade requirements; PENALTY: $10,500; STAFF ATTORNEY: Benjamin O. Thompson, Litigation Division, MC 175, (512) 239-1297; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(9) COMPANY: Pat Walker dba Walker Waterfront; DOCKET NUMBER: 2007-1241-PWS-E; TCEQ ID NUMBER: RN101277770; LOCATION: 907 Tripple Creek Loop, Livingston, Polk County; TYPE OF FACILITY: public water system; RULES VIOLATED: 30 TAC §290.46(r), by failing to maintain a minimum pressure of 35 pounds per square inch (psi) throughout the distribution system under normal operating conditions; 30 TAC §290.46(e)(4)(A) and THSC, §341.033(a), by failing to ensure that the public water supply operation is under the direct supervision of a water works operator who holds a minimum of a Class D license; 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 §290.46(1), by failing to flush all dead-end mains at monthly intervals; 30 TAC §290.46(n)(2), by failing to maintain an up-to-date map of the distribution system so that valves and mains may be easily located during emergencies; 30 TAC §290.42(j), by failing to use an approved chemical or media for the disinfection of potable water that conforms to the American National Standards/National Sanitation Foundation standards; 30 TAC §290.42(1), by failing to compile and maintain a facility operations manual for operator review and reference; 30 TAC §290.121(a) and (b), by failing to maintain an up-to-date chemical and microbiological monitoring plan that identifies all sampling locations, describes the sampling frequency, and specifies the analytical procedures and laboratories that the public water system will use to comply with the monitoring requirements; 30 TAC §290.46(m)(1), by failing to conduct an annual inspection of the water system's pressure tank; 30 TAC §290.45(b)(1)(E)(i) and THSC, §341.0315(c), by failing to meet the minimum well capacity requirement of 1.0 gallons per minute per connection; 30 TAC §290.45(b)(1)(A)(ii) and THSC, §341.0315(c), by failing to provide a minimum pressure tank capacity of 50 gallons per connection; 30 TAC §290.46(f)(2) and (3)(B)(iii), by failing to provide disinfectant residual monitoring records to commission personnel at the time of the investigation; 30 TAC §290.46(m)(4), by failing to maintain all treatment units, storage and pressure maintenance facilities, distribution system lines and related appurtenances in watertight condition; and 30 TAC §290.46(m), by failing to initiate maintenance and housekeeping practices to ensure the good working condition and general appearance of the system's facilities and equipment at the facility; PENALTY: $3,196; STAFF ATTORNEY: Dinniah Chahin, Litigation Division, MC 175, (512) 239-0617; REGIONAL OFFICE: Beaumont Regional Office, 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(10) COMPANY: Suncoast Environmental & Construction, Inc.; DOCKET NUMBER: 2008-0871-WQ-E; TCEQ ID NUMBER: RN105172878; LOCATION: 23460 Old San Antonio Road, Leon County; TYPE OF FACILITY: construction site; 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 related to construction activities; PENALTY: $2,100; STAFF ATTORNEY: Gary Shiu, Litigation Division, MC R-12, (713) 422-8916; REGIONAL OFFICE: Waco Regional Office, 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(11) COMPANY: TCS #1 Management Company, L.L.C. dba Texas Country Store 1; DOCKET NUMBER: 2008-1327-PST-E; TCEQ ID NUMBER: RN102791191; LOCATION: 3701 North 16th Street, Orange, Orange County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.74(a)(2) and §334.77(a)(3) and (4), by failing to conduct initial abatement measures and site check of contaminated soil in the excavated zone resulting from a prior confirmed release; PENALTY: $7,650; STAFF ATTORNEY: Phillip Goodwin, Litigation Division, MC 175, (512) 239-0675; REGIONAL OFFICE: Beaumont Regional Office, 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(12) COMPANY: Tillie Grimes dba Gold Mine Restaurant; DOCKET NUMBER: 2008-1252-MLM-E; TCEQ ID NUMBER: RN105552707; LOCATION: 21 Raisin Road, Victoria, Victoria County; TYPE OF FACILITY: restaurant with a public water system; RULES VIOLATED: 30 TAC §290.42(b)(1) and (e)(3), by failing to provide disinfection facilities for the groundwater supply to ensure that continuous and effective disinfection can be secured under all conditions for the purpose of microbiological control throughout the distribution system; 30 TAC §290.39(m), by failing to provide written notification to the commission immediately upon the startup of a new public water supply system; and 30 TAC §335.62 and §335.504 and 40 CFR §262.11, by failing to conduct a waste determination on the contents of the concrete holding tank located approximately 50 feet east of the Gold Mine Restaurant; PENALTY: $3,350; STAFF ATTORNEY: Stephanie J. Frazee, Litigation Division, MC 175, (512) 239-3693; REGIONAL OFFICE: Corpus Christi Regional Office, 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5839, (361) 825-3100.

(13) COMPANY: Warren Hughes and Hughes Development, Inc.; DOCKET NUMBER: 2008-1565-WQ-E; TCEQ ID NUMBER: RN105109011; LOCATION: southeast of the intersection of FM Road 439 and Westcliff Road, Killeen, Bell County; TYPE OF FACILITY: residential subdivision construction site; RULES VIOLATED: 30 TAC §281.25(a)(4), 40 CFR §122.26(c), Texas Pollutant Discharge Elimination System Construction General Permit Number TXR150000, Part II Section D1(b), by failing to obtain authorization to discharge storm water associated with construction activities; and 30 TAC §205.6 and TWC, §5.702, by failing to pay General Permits Storm Water fees for Fiscal Years 2007 and 2008 (TCEQ Financial Administration Account Number 20024375); PENALTY: $7,280; STAFF ATTORNEY: Rebecca Combs, Litigation Division, MC 175, (512) 239-6939; REGIONAL OFFICE: Waco Regional Office, 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

TRD-200901699
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: May 5, 2009

Notice of Opportunity to Comment on Shut Down/Default Orders 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 Orders (S/DOs). 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 **June 15, 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.

Copies of each 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 June 15, 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/DOs and/or the comment procedure at the listed phone numbers; however, comments on the S/DOs shall be submitted to the commission in **writing**.

(1) COMPANY: Armando Cantu dba E-Z Mart 5; DOCKET NUMBER: 2008-1218-PST-E; TCEQ ID NUMBER: RN101687986; LOCATION: 1500 West Business Highway 83, Mission, Hidalgo County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.50(b)(1)(A) and TWC, §26.3475(c)(1), by failing to monitor underground storage tanks (USTs) for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring); 30 TAC §334.50(d)(1)(B)(ii) 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 as small as the sum of 1.0% of the total substance flow-through for the month, plus 130 gallons; 30 TAC §334.50(d)(1)(B)(iii)(I) and TWC, §26.3475(c)(1), by failing to record inventory volume measurement for regulated substance inputs, withdrawals, and the amount remaining in the tank each operating day; and 30 TAC §334.48(c), by failing to conduct effective manual or automatic inventory control procedures for an UST involved in the retail sale of petroleum substances used as a motor fuel; PENALTY: $5,000; STAFF ATTORNEY: Peipey Tang, Litigation Division, MC 175, (512) 239-0654; REGIONAL OFFICE: Harlingen Regional Office, 1804 West Jefferson Avenue, Harlingen, Texas 78550-5247, (956) 425-6010.

(2) COMPANY: Logics Enterprise, L.L.C. dba Goodrich Food Mart; DOCKET NUMBER: 2008-1544-PST-E; TCEQ ID NUMBER: RN101913606; LOCATION: 7183 United States Highway 59 North, Goodrich, Polk County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 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 at a frequency of at least once every three years; 30 TAC §334.50(d)(1)(B)(ii) and TWC, §26.3475(c)(1), by failing to provide proper release detection 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 §334.10(b), by failing to maintain UST records and make them available for inspection upon request by agency personnel; 30 TAC §114.316(g), §115.226(1) and (2), and Texas Health and Safety Code (THSC), §382.085(b), by failing to maintain copies of records of product transfer documents for a minimum of two years and make such copies or records available to representatives of the commission; 30 TAC §334.7(d)(3) and §334.8(c)(4)(A)(vii) and (5)(B)(ii), by failing to notify the agency of any change or additional information regarding USTs within 30 days from the date of occurrence of the change or addition and by failing to timely renew a previously issued UST delivery certificate by submitting a properly completed UST registration and self-certification form within 30 days of installation of a new tank; 30 TAC §334.8(c)(5)(A)(i) and TWC, §26.3467(a), by failing to make available to a common carrier a valid, current TCEQ delivery certificate before accepting delivery of a regulated substance into the UST; PENALTY: $35,696; STAFF ATTORNEY: Tommy Tucker Henson II, Litigation Division, MC 175, (512) 239-0946; REGIONAL OFFICE: Beaumont Regional Office, 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(3) COMPANY: R.D.S.A., Inc. dba Texas Food Store; DOCKET NUMBER: 2006-1098-PST-E; TCEQ ID NUMBER: RN101780922; LOCATION: 8700 South Braeswood Boulevard, Houston, Harris County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.50(b)(1)(A), (2), and (A)(i)(III) and TWC, §26.3475(a) and (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 provide release detection for the piping associated with the USTs, and by failing to test the line leak detectors at least once per year for performance and operational reliability; and 30 TAC §334.48(c), by failing to conduct effective manual or automatic inventory control procedures for USTs involved in the retail sale of petroleum substances used as a motor fuel; PENALTY: $5,100; 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.

TRD-200901697
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: May 5, 2009

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Notice of Water Quality Applications

The following notices were issued during the period of April 28, 2009 through May 1, 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

CITY OF BRYAN which operates Atkins Street Power Station, an electric power plant, has applied for a renewal of TPDES Permit No. WQ0001906000, which authorizes the discharge of cooling tower blowdown, low volume waste sources, and storm water at a daily average flow not to exceed 385,000 gallons per day via Outfall 001. The facility is located at 601 Atkins Street, on a tract of land bounded on the north by Finfeather Lake, on the east by the Missouri Pacific Railroad, on the south by Union Street, and on the west by Fountain Street, in the City of Bryan, Brazos County, Texas.

CITY OF TEMPLE has applied for a renewal of TPDES Permit No. WQ0010470002, which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 7,500,000 gallons per day. The facility is located on the west side of State Highway Loop 363, approximately one mile south of the intersection of State Highway 53 and State Highway Loop 363 in Bell County, Texas.

EXTERRAN ENERGY SOLUTIONS LP has applied for a renewal of TCEQ Permit No. WQ0011975001, which authorizes the disposal of treated domestic wastewater at a daily average flow not to exceed 6,000 gallons per day via surface irrigation of 50 acres of non-public access pastureland. This permit will not authorize a discharge of pollutants into waters in the State. The wastewater treatment facility and disposal site are located approximately four miles east of the City of Alleyton, 2,100 feet west of the intersection of Interstate Highway 10 and Farm-to-Market Road 949 in Colorado County, Texas.

U S ARMY CORPS OF ENGINEERS has applied for a renewal of Permit No. WQ0012253001 which authorizes the disposal of treated domestic wastewater at a daily average flow of 1,400 gallons per day via surface irrigation of 0.53 acres of non-public access unimproved range land. This permit will not authorize a discharge of pollutants into waters in the State. The wastewater treatment facility and disposal site are located in the Yegua Creek Park which is on the southeastern side of Somerville Lake and is east of Road F in the Park and approximately 650 feet due south of Park Roads F and J in Washington County, Texas.

MARTIN OPERATING PARTNERSHIP LP which operates Martin Operating Neches Terminal, an industrial park comprised of various manufacturing/commercial operations, has applied for a major amendment to TPDES Permit No. WQ0001202000 to authorize: changing the flow volume limits of Outfall 004 and 008 to dry weather flow limits; additional sources of wastestreams at Outfalls 002, 005, 006, and 007; and the removal of the term "diminimus" in the description of the sources of effluent to Outfall 003. The facility is located on the west bank of the Neches River, approximately three miles east of the intersection of U.S. Highway 90 and State Highway 380, and southeast of the City of Beaumont, Jefferson County, Texas. The TCEQ Executive Director has reviewed this action for consistency with the Texas Coastal Management Program goals and policies in accordance with the regulations of the Coastal Coordination Council, and has determined that the action is consistent with the applicable CMP goals and policies.

TEXAS A & M UNIVERSITY which operates Texas A&M Power Plant, a steam electric power generating and thermal supply plant, and cyclotron, has applied for a renewal of TPDES Permit No. WQ0004002000, which authorizes the discharge of cooling tower blowdown, low volume wastes, storm water runoff, and water treatment waste at a daily average flow not to exceed 930,000 gallons per day via Outfall 001. The facility is located at the steam electric power generating station and thermal supply plant located on Ireland Street immediately west of the intersection of Ireland Street and Ross Street; and the cyclotron is located on Spence Street at the intersection of Spence Street and University Drive on the Texas A&M University main campus, in the City of College Station, Brazos County, Texas.

SOUTHERN FOREST PRODUCTS LLC which operates the Southern Forest Products Facility, a sawmill and wood products manufacturing facility, has applied for a renewal of TPDES Permit No. WQ0004241000, which authorizes the discharge of wet decking wastewater and storm water runoff on an intermittent and flow variable basis via Outfall 001, and wet decking wastewater, utility wastewater (boiler blowdown), and storm water on an intermittent and flow variable basis via Outfall 002. The draft permit authorizes wet decking wastewater, utility wastewater (boiler blowdown), and storm water on an intermittent and flow variable basis via Outfall 001 (formerly Outfall 002). The facility is located adjacent to and east of Farm-to-Market Road 2626, approximately 2.3 miles northeast of the intersection of U.S. Highway 190 and Farm-to-Market Road 2626, Newton County, Texas.

KOPPERS INC AND BNSF RAILWAY COMPANY which operates Somerville Corrective Action Management Unit, a hazardous waste processing and post-closure care facility associated with a former tie-treating facility, has applied for a renewal of TPDES Permit No. WQ0004642000, which authorizes the discharge of storm water associated with industrial activity on an intermittent and flow variable basis via Outfalls 001 and 002. The facility is located on State Highway 36 approximately 0.7 miles northwest of the intersection of State Highway 36 and Farm-to-Market Road 1361 in the City of Somerville, Burleson County, Texas.

CITY OF ANTON has applied for a renewal of TCEQ Permit No. WQ0010021001, which authorizes the disposal of treated domestic wastewater at a daily average flow not to exceed 100,000 gallons per day via surface irrigation of 150 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 north of Yellow House Draw, approximately 0.5 mile south of the City of Anton, southwest of the intersection of U.S. Highway 84 and Farm-to-Market Road 168 in Hockley County, Texas.

CITY OF JOHNSON CITY has applied for a renewal of TPDES Permit No. WQ0010198001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 303,000 gallons per day. The facility is located approximately 2,500 feet south-southwest of the U.S. Highway 281 crossing of the Pedernales River and 3,700 feet north of the intersection of Farm-to-Market Road 2766 and U.S. Highway 281 in Blanco County, Texas.

CITY OF RICHMOND has applied for a renewal of TPDES Permit No. WQ0010258001, which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 1,000,000 gallons per day. The facility is located at 206 North Second Street, at the southeast corner of the intersection of Ferry Street and North Second Street in the City of Richmond in Fort Bend County, Texas.

THE CITY OF HOUSTON has applied for a new TPDES Permit No. WQ0010495152, to authorize the discharge of treated domestic wastewater at an annual average flow not to exceed 5,000,000 gallons per day. This facility was previously authorized under TPDES Permit No. WQ0010495136, which expired September 1, 2008. The facility is located approximately 1.6 miles east-northeast of the intersection of Farm-to-Market Road 1959 and Interstate Highway 45, adjacent to the southeast corner of Ellington Air Field in Harris County, Texas. The TCEQ Executive Director has reviewed this action for consistency with the Texas Coastal Management Program goals and policies in accordance with the regulations of the Coastal Coordination Council, and has determined that the action is consistent with the applicable CMP goals and policies.

CITY OF MORAN has applied for a renewal of Permit No.WQ0011420001, which authorizes the disposal of treated domestic

wastewater at a daily average flow not to exceed 32,000 gallons per day via surface irrigation of 10 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 approximately 1,500 feet east of the intersection of State Highway 6 and Farm-to-Market Road 576 on the east bank of Post Oak Creek in the City of Moran in Shackelford County, Texas.

CITY OF ROCKSPRINGS has applied for a renewal of TPDES Permit No. 13490-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 133,000 gallons per day. The facility is located approximately 4,000 feet northwest of the intersection of U.S. Highway 377 and State Highway 55 in Edwards County, Texas.

CITY OF SINTON has applied for a renewal of TPDES Permit No. WQ0013641001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 15,000 gallons per day. The facility is located in the Rob and Bessie Welder Park on U. S. Highway 181, approximately 2.4 miles north of the intersection of U. S. Highway 181 and Farm-to-Market Road 881 in San Patricio County, Texas.

DRIPPING SPRINGS APARTMENTS LP has applied for a renewal of Permit No. WQ0014146001 which authorizes the disposal of treated domestic wastewater at a daily average flow not to exceed 0.014 gallons per day via subsurface drip irrigation system on 3.57 acres of non-public access land. This permit will not authorize a discharge of pollutants into the Waters of the State. The wastewater treatment facility and disposal site are located on the north side of U.S. Route 290, approximately 13,000 feet west along U.S. Route 290 from its intersection with State Route 12 in Hays County, Texas.

FORT BEND COUNTY MUNICIPAL UTILITY DISTRICT NO 5 has applied for a renewal of TPDES Permit No. WQ0014757001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 500,000 gallons per day. The facility is located approximately 400 feet west of the intersection of State Highway 36 and Ustinik Road in Fort Bend County, Texas.

SPRIPES LLC has applied for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0014932001, to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 5,000 gallons per day. The facility will be located at 1801 West Mount Houston Road, northwest of the intersection of West Mount Houston Road (State Highway 249) and Veterans Memorial Drive in Harris County, Texas 77038.

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-200901716
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: May 6, 2009

Notice of Water Rights Applications

Notices issued April 27, 2009.

APPLICATION NO. 5635A; Michael Pawelek, 6630 Shady Bend Drive, San Antonio, Texas 78256, Applicant, has applied to amend Water Use Permit No. 5635 on Cibolo Creek, San Antonio River Basin, in Karnes County to extend the expiration date of the term water. Applicant also seeks to correct the Longitude of the authorized diversion point. More information on the application and how to participate in the permitting process is given below. The application was received on November 7, 2008, and additional information was received on January 30, February 5, 19, and 23, 2009. Fees were received on January 30, 2009. The application was declared administratively complete and accepted for filing on February 26, 2009. Written public comments and requests for a public meeting should be received in the Office of Chief Clerk, at the address provided in the information section below, within 30 days of the date of newspaper publication of the notice.

APPLICATION NO. 12-3580E; George E., Juanita Sue, Brian, Kellie, and Carey Bingham, 2191 Highway 2247, Comanche, Texas, 76442, Applicants, have applied for an amendment to Certificate of Adjudication No. 12-3580 to extend the expiration date of their water right from December 31, 2009 to at least December 31, 2019 to divert and use water from two reservoirs, one located on an unnamed tributary of Beattie Branch and the other located on Beattie Branch, Brazos River Basin in Comanche County. More information on the application and how to participate in the permitting process is given below. The application and a portion of the fees were received on December 22, 2009. Additional information and fees were received on February 17 and 18, and March 4, 12, and 26, 2009. The application was accepted for filing and declared administratively complete on March 31, 2009. Written public comments and requests for a public meeting should be submitted to the Office of Chief Clerk, at the address provided in the information section below, within 30 days of the date of newspaper publication of the notice.

APPLICATION NO. 4264C; George E., Juanita Sue, Brian, Kellie, and Carey Bingham, 2191 Highway 2247, Comanche, Texas, 76442, Applicants, have applied for an amendment to Water Use Permit No. 4264 (Application No. 4577) to extend the expiration date of their water right from December 31, 2009 to at least December 31, 2019 to divert and use water from a reservoir on an unnamed tributary of Martins Creek, Brazos River Basin in Comanche County. More information on the application and how to participate in the permitting process is given below. The application and a portion of the fees were received on December 22, 2009. Additional information and fees were received on February 17 and 18, and March 4, 12, and 26, 2009. The application was accepted for filing and declared administratively complete on March 31, 2009. Written public comments and requests for a public meeting should be submitted to the Office of Chief Clerk, at the address provided in the information section below, within 30 days of the date of newspaper publication of the notice.

INFORMATION SECTION

To view the complete issued notice, view the notice on our web site at www.tceq.state.tx.us/comm_exec/cc/pub_notice.html or call the Office of the Chief Clerk at (512) 239-3300 to obtain a copy of the complete notice. When searching the web site, type in the issued date range shown at the top of this document to obtain search results.

A public meeting is intended for the taking of public comment, and is not a contested case hearing.

The Executive Director can consider approval of an application unless a written request for a contested case hearing is filed. To request a contested case hearing, you must submit the following: (1) your name (or for a group or association, an official representative), mailing address, daytime phone number, and fax number, if any; (2) applicant's name and permit number; (3) the statement "I/we request a contested case hearing"; and (4) a brief and specific description of how you would be affected by the application in a way not common to the general public.

You may also submit any proposed conditions to the requested application which would satisfy your concerns. Requests for a contested case hearing must be submitted in writing to the TCEQ Office of the Chief Clerk at the address provided in the information section below.

If a hearing request is filed, the Executive Director will not issue the requested permit and may forward the application and hearing request to the TCEQ Commissioners for their consideration at a scheduled Commission meeting.

Written hearing requests, public comments or requests for a public meeting should be submitted 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 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. Si desea información en Español, puede llamar al 1-800-687-4040.

TRD-200901717
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: May 6, 2009

Proposal for Decision

The State Office of Administrative Hearings issued a Proposal for Decision and Order to the Texas Commission on Environmental Quality on May 4, 2009, in the matter of the Executive Director of the Texas Commission on Environmental Quality, Petitioner v. Paul LaVoie; SOAH Docket No. 582-08-3669; TCEQ Docket No. 2007-0382-MLM-E. The commission will consider the Administrative Law Judge's Proposal for Decision and Order regarding the enforcement action against Paul LaVoie on a date and time to be determined by the Office of the Chief Clerk in Room 201S of Building E, 12100 N. Interstate 35, Austin, Texas. This posting is Notice of Opportunity to Comment on the Proposal for Decision and Order. The comment period will end 30 days from date of this publication. Written public comments should be submitted to the Office of the Chief Clerk, MC-105, TCEQ, P.O. Box 13087, Austin, Texas 78711-3087. If you have any questions or need assistance, please contact Melissa Chao, Office of the Chief Clerk, (512) 239-3300.

TRD-200901719
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: May 6, 2009

Texas Ethics Commission

List of Late Filers

Listed below are the names of filers from the Texas Ethics Commission who did not file reports, or failed to pay penalty fines for late reports in reference to the listed filing deadline. If you have any questions, you may contact Robbie Douglas at (512) 463-5800 or (800) 325-8506.

Deadline: Semiannual Report due January 15, 2009 for Candidates and Officeholders

Carlos H. Garza, 12380 Edgemere Blvd., Ste. 102, El Paso, Texas 79938-2627

Terry E. Hockman Jr., P.O. Box 60153, Midland, Texas 79711-0153

Kevin T. Howell, 3423 S. Julian Blvd., Amarillo, Texas 79102-2032

Jeffrey S. Joyner, 2600 E. Renner Rd., Apt. 145, Richardson, Texas 75082-3459

TRD-200901625
David Reisman
Executive Director
Texas Ethics Commission
Filed: April 29, 2009

Texas Health and Human Services Commission

Public Notice

The Texas Health and Human Services Commission announces its intent to submit an amendment to the Texas State Plan for Medicaid services delivered by Physician Assistants, and Advanced Practice Nurses, including Nurse Practitioners, Clinical Nurse Specialists, and Certified Nurse Midwives under Title XIX of the Social Security Act. The proposed amendment is effective May 16, 2009.

The amendment will modify the reimbursement methodology in the Texas Medicaid State Plan for Certified Nurse Midwife services by allowing increased payments to Certified Nurse Midwives when services are delivered in a birthing center.

The proposed amendment has no estimated fiscal impact for federal fiscal year (FFY) 2009 through FFY 2013 since the increased payments to Certified Nurse Midwives will be offset by decreased payments to birthing centers. This change in payment methodology is mandated by the Centers for Medicare and Medicaid Services.

Interested parties may obtain copies of the proposed amendment by contacting Dan Huggins, Director of Rate Analysis for Acute Care Services, by mail at the Rate Analysis Department, Texas Health and Human Services Commission, P.O. Box 85200, H-400, Austin, Texas 78708-5200; by telephone at (512) 491-1432; by facsimile at (512) 491-1998; or by e-mail at Dan.Huggins@hhsc.state.tx.us. Copies of the proposals will also be made available for public review at the local offices of the Texas Department of Aging and Disability Services.

TRD-200901705
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Filed: May 5, 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
Austin	Westlake Surgical L.P. dba The Hospital at Westlake Medical Center	L06234	Austin	00	04/28/09
Midland	Anand Cholia, M.D., P.A.	L06233	Midland	00	04/22/09
Plano	Mordecai N. Klein, M.D., P.A.	L06237	Plano	00	04/20/09
Throughout Tx	URI Inc.	L06158	Lewisville	00	04/21/09

AMENDMENTS TO EXISTING LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Abilene	Cardinal Health dba National Central Pharmacy	L04781	Abilene	29	04/28/09
Amarillo	Texas Oncology P.A. dba Texas Oncology Cancer Center - Amarillo	L06149	Amarillo	02	04/24/09
Arlington	Texas Oncology P.A. dba Texas Cancer Center - Arlington	L05116	Arlington	21	04/17/09
Austin	St. David's Healthcare Partnership L.L.P. dba St. David's Medical Center	L00740	Austin	104	04/20/09
Austin	Texas Cardiovascular Consultants P.A.	L05246	Austin	32	04/17/09
Bay City	Matagorda County Hospital District dba Matagorda General Hospital	L02701	Bay City	14	04/24/09
Baytown	San Jacinto Methodist Hospital	L02388	Baytown	58	04/23/09
Baytown	Sarma Challa, M.D., P.A.	L05040	Baytown	13	04/17/09
Baytown	DMS Health Technologies	L05594	Baytown	09	04/20/09
Beaumont	The Goodyear Tire & Rubber Company	L06063	Beaumont	01	04/22/09
Conroe	CHCA Conroe L.P. dba Conroe Regional Medical Center	L01769	Conroe	80	04/17/09
Conroe	Montgomery County Cardiovascular Associates P.A.	L05151	Conroe	17	04/28/09
Corpus Christi	Spohn Hospital	L02495	Corpus Christi	99	04/14/09
Corpus Christi	Radiology Associates L.L.P.	L04169	Corpus Christi	51	04/19/09
Corpus Christi	Samuel Duro Oloyo, M.D. dba South Texas Medical Associates	L05881	Corpus Christi	03	04/17/09
Dallas	Baylor University Medical Center	L01290	Dallas	94	04/13/09
Dallas	Cardiology Consultants of Texas	L04997	Dallas	39	04/17/09
Denton	Paramount Cardiovascular Associates P.A.	L05596	Denton	05	04/22/09
Denton	Denton Cancer Center L.L.P.	L05945	Denton	04	04/17/09
Duncanville	Duncanville Medical Center Inc.	L05471	Duncanville	07	04/29/09
El Paso	El Paso Healthcare System L.P. dba Del Sol Diagnostic Center	L03395	El Paso	45	04/20/09
El Paso	East El Paso Physicians' Medical Center L.L.C.	L05676	El Paso	14	04/22/09
Fort Worth	Weatherford International Inc.	L00747	Fort Worth	84	04/22/09
Fort Worth	Adventist Health System Sunbelt Healthcare Corporation dba Huguley Health System	L02920	Fort Worth	34	04/29/09
Fort Worth	Harris Methodist Hospital Southwest	L04146	Fort Worth	13	04/20/09
Fort Worth	Fort Worth Heart P.A.	L05480	Fort Worth	28	04/20/09
Fort Worth	Physician Reliance L.P. dba Texas Oncology at Klabzuba	L05545	Fort Worth	29	04/20/09
Fort Worth	Osteopathic Surgery Center of Fort Worth dba Physicians Surgical Center of Fort Worth	L05863	Fort Worth	04	04/20/09
Grapevine	Gravepine Imaging & Pain Management L.L.C.	L05922	Grapevine	09	04/20/09

AMENDMENTS TO EXISTING LICENSES ISSUED (Continued):

Location	Name	License #	City	Amend-ment #	Date of Action
Houston	Kelsey Seybold Clinic P.A.	L00391	Houston	65	04/17/09
Houston	The Methodist Hospital	L00457	Houston	167	04/28/09
Houston	St. Luke's Episcopal Health System Corporation dba St. Luke's Episcopal Health System and Texas Heart Institute	L00581	Houston	88	04/20/09
Houston	Memorial Hermann Hospital System dba Memorial Hospital Memorial City	L01168	Houston	107	04/20/09
Houston	Eric A. Orzeck, M.D., P.A.	L01599	Houston	17	04/20/09
Houston	V. B. Shenoy, M.D., P.A. dba Northwest Cardiology Clinic	L05513	Houston	06	04/17/09
Houston	Heart Care Center of Northwest Houston	L05539	Houston	10	04/07/09
Houston	Hillcroft Medical Clinic Association	L05618	Houston	06	04/22/09
Houston	NIS Holdings Inc. dba Nuclear Imaging Services	L05775	Houston	48	04/28/09
Houston	Northwest Diagnostic Clinic P.A.	L05814	Houston	06	04/22/09
Houston	CHCA West Houston L.P. dba West Houston Medical Center	L06055	Houston	04	04/09/09
Houston	The University of Texas M.D. Anderson Cancer Center	L06227	Houston	01	04/24/09
Jewett	Nucor Steel	L02504	Jewett	19	04/16/09
Kingsville	Texas A&M University Kingsville	L01821	Kingsville	39	04/20/09
La Porte	Cardiorad Inc.	L05755	La Porte	16	04/28/09
Lubbock	Texas Tech University Environmental Health and Safety	L01536	Lubbock	88	04/24/09
Lufkin	Piney Woods Healthcare System dba Woodland Heights Medical Center	L01842	Lufkin	56	04/20/09
Midland	West Texas Nuclear Pharmacy Partners	L04573	Midland	20	04/14/09
Paris	Essent PRMC L.P. dba Paris Regional Medical Center	L03199	Paris	48	04/22/09
Paris	Essent PRMC L.P. dba Paris Regional Medical Center	L03199	Paris	49	04/28/09
Pasadena	Chevron Phillips Chemical Company L.P.	L00230	Pasadena	81	04/27/09
Pasadena	Equistar Chemicals L.P.	L04409	Pasadena	05	04/27/09
Pasadena	David S. Hamer, M.D., P.A. dba Southeast Houston	L05364	Pasadena	09	04/27/09
Pasadena	Patients Medical Center	L06066	Pasadena	01	04/28/09
Plano	Presbyterian Hospital of Plano	L04467	Plano	52	04/20/09
Plano	Clements Clinic P.L.L.C.	L06194	Plano	01	04/13/09
Port Neches	Texas Petrochemicals L.L.C.	L06106	Port Neches	01	04/28/09
San Antonio	VHS San Antonio Partners L.L.C. dba Baptist Health System	L00455	San Antonio	185	04/14/09
San Antonio	The University of Texas Health Science Center at San Antonio	L01279	San Antonio	119	04/27/09
San Antonio	Southwest General Hospital L.L.P. dba Southwest General Hospital	L02689	San Antonio	38	04/27/09
San Antonio	San Antonio Endovascular and Heart Institute	L05766	San Antonio	05	04/13/09
San Antonio	Jeremy Nyle Wiersig, M.D., P.A.	L05915	San Antonio	05	04/15/09
Southlake	Healthcare Associates of Southlake L.L.P. dba Executive Medicine of Texas	L05854	Southlake	03	04/28/09
Sugarland	Methodist Sugarland Hospital	L05788	Sugarland	16	04/23/09
Sugarland	Heart and Vascular Assn. of Houston P.A.	L05892	Sugarland	04	04/27/09
Throughout Tx	Desert Industrial X-Ray L.P.	L04590	Abilene	95	04/14/09
Throughout Tx	Jacob and Martin Ltd.	L06083	Abilene	01	04/22/09
Throughout Tx	Team Industrial Services Inc.	L00087	Alvin	204	04/14/09
Throughout Tx	Team Industrial Services Inc.	L00087	Alvin	205	04/28/09

AMENDMENTS TO EXISTING LICENSES ISSUED (Continued):

Location	Name	License #	City	Amend-ment #	Date of Action
Throughout Tx	Texas Department of Transportation	L00197	Austin	146	04/28/09
Throughout Tx	Tank and Vessel Builders L.P. dba NDE Services	L06168	Baird	02	04/15/09
Throughout Tx	R&R Testing Inc.	L06222	Channelview	01	04/13/09
Throughout Tx	N-Spec Quality Services Inc.	L05113	Corpus Christi	35	04/13/09
Throughout Tx	Team Consultants Inc.	L04012	Dallas	12	04/13/09
Throughout Tx	Reed Engineering Group Inc.	L04343	Dallas	16	04/20/09
Throughout Tx	Globe Engineers Inc.	L05527	Dallas	04	04/15/09
Throughout Tx	IRISNDT Inc.	L04769	Deer Park	71	04/15/09
Throughout Tx	Savage-Tolk Corporation	L02672	Earth	22	04/21/09
Throughout Tx	The Dow Chemical Company	L00451	Freeport	88	04/22/09
Throughout Tx	Bonded Inspections Inc.	L00693	Garland	80	04/14/09
Throughout Tx	Varco L.P. FKA Tuboscope Vetco	L00287	Houston	124	04/16/09
Throughout Tx	Associated Testing Laboratories Inc.	L01553	Houston	27	04/15/09
Throughout Tx	Mandes Inspection & Testing Services Inc.	L05220	Houston	64	04/14/09
Throughout Tx	Material Inspection Technology Inc.	L05672	Houston	31	04/15/09
Throughout Tx	Weldsonix Inc.	L05718	Houston	41	04/16/09
Throughout Tx	RTD Pipeline Services USA L.P.	L05985	Houston	11	04/17/09
Throughout Tx	Acuren Inspection Inc.	L01774	La Porte	254	04/16/09
Throughout Tx	Applied Physics and Measurements Inc.	L06120	Missouri City	03	04/23/09
Throughout Tx	Anatec Texas Inc.	L04865	Nederland	80	04/15/09
Throughout Tx	Turner Specialty Services L.L.C.	L05417	Nederland	37	04/22/09
Throughout Tx	Big State X-Ray	L02693	Odessa	76	04/22/09
Throughout Tx	All American Inspection Inc.	L01336	San Antonio	67	04/16/09
Throughout Tx	Schlumberger Technology Corporation	L00764	Sugarland	111	04/21/09
Throughout Tx	B.J. Services Company USA	L02684	Tomball	62	04/16/09
Throughout Tx	Kleinfelder Central Inc.	L01351	Waco	65	04/15/09
Tyler	Trinity Mother Frances Health System	L01670	Tyler	145	04/14/09
Tyler	Tyler Cardiovascular Consultants P.A.	L05242	Tyler	18	04/28/09
Waco	Hillcrest Baptist Medical Center	L00845	Waco	88	04/15/09
Wharton	South Texas Medical Clinics P.A.	L05163	Wharton	12	04/29/09

RENEWAL OF LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Bryan	Texas Municipal Power Agency, Gibbons Creek Steam Electric	L02913	Bryan	23	04/15/09
Houston	U.T. M.D. Anderson Cancer Center	L00466	Houston	116	04/15/09
Midlothian	Chaparral Steel Midlothian L.P. dba Gerdau Ameristeel Midlothian	L02015	Midlothian	33	04/15/09
Seguin	American Biological Technologies Inc.	L04265	Seguin	09	04/13/09
Stafford	Burzynski Research Institute Inc.	L02948	Stafford	25	04/16/09

TERMINATIONS OF LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Bridgeport	BASC Management L.L.C. dba Bridgeport Ambulatory Surgical Center	L05734	Bridgeport	03	04/27/09
Graham	Wedge Wireline Services Inc.	L04108	Graham	08	04/15/09
Katy	Hector Ubaldo M.D., P.A. dba Physicians of Katy	L05876	Katy	6	04/20/09
Richmond	Worden Gravity Meter Company	L04407	Richmond	06	04/20/09
San Antonio	Saint Mary's University	L00421	San Antonio	24	04/17/09

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-200901721
Lisa Hernandez
General Counsel
Department of State Health Services
Filed: May 6, 2009

Texas Department of Housing and Community Affairs

Notice of Public Hearing - Community Services Block Grant American Recovery and Reinvestment Act of 2009

In accordance with the U.S. Department of Health and Human Services' requirement for the CSBG American Reinvestment and Recovery Act (Recovery Act) Plan and as part of the public information consultation and public hearing requirement for the Community Services Block Grant (CSBG) American Recovery and Reinvestment Act (ARRA) of 2009, the Texas Department of Housing and Community Affairs (TDHCA) is conducting a public hearing. The primary purpose of the hearing is to solicit comments on the proposed Texas CSBG Recovery Act Plan which describes the proposed use and distribution of CSBG ARRA funds to CSBG eligible entities and the proposed use of one percent of the funds which are to be utilized by the State for benefits enrollment coordination activities as it relates to the identification and enrollment of eligible individuals and families in federal, state, and local benefit programs. The funding period for CSBG ARRA funds is for the remainder of Federal Fiscal Year 2009 and all of Federal Fiscal Year 2010.

The schedule for the public hearing is as follows:

Tuesday, May 19th

11:00 a.m. - 1:00 p.m.

Texas Department of Housing and Community Affairs

221 East 11th Street

Conference Room 116

Austin, TX 78711-3941

Individuals who require auxiliary aids or services should contact Gina Esteves, ADA Responsible Employee, at least two days before the scheduled hearing at (512) 475-3943 or Relay Texas at 1-800-735-2989 so that appropriate arrangements can be made.

A representative from TDHCA will be present to explain the planning process and receive comments from interested citizens and affected groups regarding the proposed plan. For questions, contact J. Al Almaguer, Senior Planner, in the Community Services Section at (512) 475-3908. Comments may be in the form of written comments or oral testimony at the hearing. Written comments may be submitted to TDHCA at the time of the hearing or by mail no later than May 22, 2009.

TRD-200901722
Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Filed: May 6, 2009

Texas Department of Insurance

Notice of Application by a Small Employer Health Benefit Plan Issuer to be a Risk-Assuming Health Benefit Plan Issuer

Notice is given to the public of the application of the listed small employer health benefit plan issuer to be a risk-assuming health benefit plan issuer under Insurance Code §1501.312. A small employer health benefit plan issuer is defined by Insurance Code §1501.002(16) as a health benefit plan issuer offering, delivering, issuing for delivery, or renewing health benefit plans subject to the Insurance Code, Chapter 1501, Subchapters C - H. A risk-assuming health benefit plan issuer is defined by Insurance Code §1501.301(4) as a small employer health benefit plan issuer that does not participate in the Texas Health Reinsurance System. The following small employer health benefit plan issuer has applied to be a risk-assuming health benefit plan issuer:

BEST Life and Health Insurance Company

The application is subject to public inspection at the offices of the Texas Department of Insurance, Legal Division - Nick Hoelscher, 333 Guadalupe, Tower I, Room 920, Austin, Texas.

If you wish to comment on the application of BEST Life and Health Insurance Company to be a risk-assuming health benefit plan issuer, you must submit your written comments within 60 days after publication of this notice in the *Texas Register* to Gene C. Jarmon, General Counsel and Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-91204. Upon consideration of the application and comments, and a determination that all requirements of law have been met, the Commissioner or his designee may take final action on the applicant's election to be a risk-assuming health benefit plan issuer.

TRD-200901723
Brenda Caldwell
Assistant General Counsel
Texas Department of Insurance
Filed: May 6, 2009

Notice of Application by a Small Employer Health Benefit Plan Issuer to be a Risk-Assuming Health Benefit Plan Issuer

Notice is given to the public of the application of the listed small employer health benefit plan issuer to be a risk-assuming health benefit plan issuer under Insurance Code §1501.312. A small employer health benefit plan issuer is defined by Insurance Code §1501.002(16) as a health benefit plan issuer offering, delivering, issuing for delivery, or renewing health benefit plans subject to the Insurance Code, Chapter 1501, Subchapters C - H. A risk-assuming health benefit plan issuer is defined by Insurance Code §1501.301(4) as a small employer health benefit plan issuer that does not participate in the Texas Health Reinsurance System. The following small employer health benefit plan issuer has applied to be a risk-assuming health benefit plan issuer:

Guarantee Trust Life Insurance Company

The application is subject to public inspection at the offices of the Texas Department of Insurance, Legal Division - Nick Hoelscher, 333 Guadalupe, Tower I, Room 920, Austin, Texas.

If you wish to comment on the application of Guarantee Trust Life Insurance Company to be a risk-assuming health benefit plan issuer, you must submit your written comments within 60 days after publication of this notice in the *Texas Register* to Gene C. Jarmon, General Counsel and Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-91204. Upon consideration of the application and comments and a determination that all requirements of law have been met, the Commissioner or his designee may take final action on the applicant's election to be a risk-assuming health benefit plan issuer.

TRD-200901724
Brenda Caldwell
Assistant General Counsel
Texas Department of Insurance
Filed: May 6, 2009

Third Party Administrator Applications

The following third party administrator (TPA) applications have been filed with the Texas Department of Insurance and are under consideration.

Application of MAXIM INSURANCE SOLUTIONS, LC, (using the assumed name MAXIM ADMINISTRATORS LLC), a foreign third party administrator. The home office is JEFFERSON CITY, MISSOURI.

Application of CONSOLIDATED ASSOCIATIONS OF RAILROAD EMPLOYEES, a foreign third party administrator. The home office is TOPEKA, KANSAS.

Application of ETMG, LLC, a domestic third party administrator. The home office is AUSTIN, TEXAS.

Application of MHEALTH, INC., a domestic third party administrator. The home office is HOUSTON, TEXAS.

Application to change the name of AIG RETIREMENT SERVICES COMPANY to VALIC RETIREMENT SERVICES COMPANY, a domestic third party administrator. The home office is HOUSTON, TEXAS.

Application to change the name of CAREMARKPCS HEALTH, L.P. to CAREMARKPCS HEALTH, L.L.C., a foreign third party administrator. The home office is WILMINGTON, DELAWARE.

Application to change the name of FISERV HEALTH PLAN ADMINISTRATORS, INC. (doing business as FISERV HEALTH - WAUSAU BENEFITS) to UMR, INC., a foreign third party administrator. The home office is WILMINGTON, DELAWARE.

Application to change the name of HARRINGTON BENEFIT SERVICES, INC. (doing business as FISERV HEALTH - HARRINGTON), a foreign third party administrator. The home office is WILMINGTON, DELAWARE.

Application to change the name of ANCILLARY CARE MANAGEMENT, INC. to NOVOLOGIX, INC., a foreign third party administrator. The home office is WILMINGTON, DELAWARE.

Any objections must be filed within 20 days after this notice is published in the *Texas Register,* addressed to the attention of David Moskowitz, MC 305-2E, 333 Guadalupe, Austin, Texas 78701.

TRD-200901725
Brenda Caldwell
Assistant General Counsel
Texas Department of Insurance
Filed: May 6, 2009

Texas Lottery Commission

Instant Game Number 1197 "Set for Life"

1.0 Name and Style of Game.

A. The name of Instant Game No. 1197 is "SET FOR LIFE". The play style is "key number match with auto win".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 1197 shall be $10.00 per ticket.

1.2 Definitions in Instant Game No. 1197.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - The printed data under the latex on the front of the instant ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black play symbols are: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, MONEY BAG SYMBOL, STAR SYMBOL, LIFE SYMBOL, $10.00, $20.00, $50.00, $100, $200, $1,000, $2,500 or $250K/YR SYMBOL.

D. Play Symbol Caption - the printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 1197 - 1.2D

PLAY SYMBOL	CAPTION
1	ONE
2	TWO
3	THR
4	FOR
5	FIV
6	SIX
7	SVN
8	EGT
9	NIN
10	TEN
11	ELV
12	TLV
13	TRN
14	FTN
15	FFN
16	SXN
17	SVT
18	ETN
19	NTN
20	TWY
21	TWON
22	TWTO
23	TWTH
24	TWFR
25	TWFV
26	TWSX
27	TWSV
28	TWET
29	TWNI
30	TRTY
31	TRON
32	TRTO
33	TRTH
34	TRFR
35	TRFV
36	TRSX
37	TRSV
38	TRET
39	TRNI
40	FRTY
MONEY BAG SYMBOL	MBAG
STAR SYMBOL	WINX10
LIFE SYMBOL	WIN
$10.00	TEN$
$20.00	TWENTY
$50.00	FIFTY

$100	ONE HUND
$200	TWO HUND
$1,000	ONE THOU
$2,500	25 HUND
$250K/YR	250K/YR

E. Serial Number - A unique 14 (fourteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There will be a four (4)-digit "security number" which will be individually boxed and randomly placed within the number. The remaining ten (10) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 00000000000000.

F. Low-Tier Prize - A prize of $10.00 or $20.00.

G. Mid-Tier Prize - A prize of $50.00, $100, $200 or $500.

H. High-Tier Prize - A prize of $1,000, $2,500 or $250,000/year (not to exceed $5,000,000).

I. Bar Code - A 24 (twenty-four) character interleaved two (2) of five (5) bar code which will include a four (4) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the ten (10) digit Validation Number. The bar code appears on the back of the ticket.

J. Pack-Ticket Number - A 14 (fourteen) digit number consisting of the four (4) digit game number (1197), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 001 and end with 050 within each pack. The format will be: 1197-0000001-001.

K. Pack - A pack of "SET FOR LIFE" Instant Game tickets contains 50 tickets, packed in plastic shrink-wrapping and fanfolded in pages of one (1). Ticket back 050 will be exposed on one side of the pack and ticket 001 on the other side.

L. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401.

M. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "SET FOR LIFE" Instant Game No. 1197 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule 401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "SET FOR LIFE" Instant Game is determined once the latex on the ticket is scratched off to expose 44 (forty-four) play symbols. If the player matches any of YOUR NUMBERS to any of the WINNING NUMBERS, the player wins the PRIZE shown for that number. If the player reveals a MONEY BAG SYMBOL, the player wins the PRIZE shown instantly. If the player reveals a STAR SYMBOL, the player wins 10 times the prize shown. If the player reveals a LIFE SYMBOL, the player wins $250,000 a year (not to exceed $5,000,000 total). No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 44 (forty-four) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 44 (forty-four) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 44 (forty-four) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures.

17. Each of the 44 (forty-four) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets will not have identical play data, spot for spot.

B. No five or more like non-winning prize symbols on a ticket.

C. No duplicate WINNING NUMBERS play symbols on a ticket.

D. No duplicate non-winning YOUR NUMBERS play symbols on a ticket.

E. The STAR (win x 10) play symbol will only appear on intended winning tickets as dictated by the prize structure.

F. The LIFE (win $250,000/year) play symbol will only appear with the $250,000/YR prize symbol and both symbols will only appear on the three winning tickets as dictated by the prize structure.

G. Non-winning prize symbols will never be the same as the winning prize symbol(s).

H. No prize amount in a non-winning spot will correspond with the YOUR NUMBERS play symbol (i.e. 10 and $10).

2.3 Procedure for Claiming Prizes.

A. To claim a "SET FOR LIFE" Instant Game prize of $10.00, $20.00, $50.00, $100, $200 or $500, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, if appropriate, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not required to pay a $50.00, $100, $200 or $500 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim a "SET FOR LIFE" Instant Game prize of $1,000 or $2,500, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. To claim a "SET FOR LIFE" top level prize of $250,000 per year, (not to exceed $5,000,000 total), the claimant must sign the winning ticket and present it at Texas Lottery Commission headquarters in Austin, Texas. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. When claiming a "SET FOR LIFE" Instant Game prize of $250,000 per year, (not to exceed $5,000,000 total the claimant will receive,

1. Annually via direct deposit to the winner's account. With this plan, upon validation of the prize, a payment of $250,000 less any taxes and/or other offsets or mandatory withholdings required by law, will be made once a year on the first business day of the anniversary month of the claim. Annual payments will be made for a period of 19 years or a total of 19 annual payments. One additional payment of $250,000 less any taxes and/or other offsets or mandatory withholdings required by law, will be made to reach the total maximum payment of $5,000,000.

2. If a payment falls on a holiday or weekend, the payment will be made on the following business day.

E. As an alternative method of claiming a "SET FOR LIFE" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

F. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General; or

3. delinquent in reimbursing the Texas Health and Human Services Commission for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resources Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code.

G. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "SET FOR LIFE" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "SET FOR LIFE" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code Section 466.408. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed. An Instant Game ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 12,000,000 tickets in the Instant Game No. 1197. The approximate number and value of prizes in the game are as follows:

Figure 2: GAME NO. 1197 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in**
$10	1,440,000	8.33
$20	1,200,000	10.00
$50	200,000	60.00
$100	161,500	74.30
$200	26,000	461.54
$500	3,500	3,428.57
$1,000	300	40,000.00
$2,500	200	60,000.00
$250K/YR	3	4,000,000.00

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.

**The overall odds of winning a prize are 1 in 3.96. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 1197

without advance notice, at which point no further tickets in that game may be sold. The determination of the closing date and reasons for closing the game will be made in accordance with the instant game closing procedures and the Instant Game Rules, 16 TAC §401.302(j).

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 1197, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401, and all final decisions of the Executive Director.

TRD-200901631
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: May 1, 2009

Instant Game Number 1198 "Cash Bingo"

1.0 Name and Style of Game.

A. The name of Instant Game No. 1198 is "CASH BINGO". The play style is "bingo".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 1198 shall be $2.00 per ticket.

1.2 Definitions in Instant Game No. 1198.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - The printed data under the latex on the front of the instant ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black play symbols are: B01, B02, B03, B04, B05, B06, B07, B08, B09, B10, B11, B12, B13, B14, B15, I16, I17, I18, I19, I20, I21, I22, I23, I24, I25, I26, I27, I28, I29, I30, N31, N32, N33, N34, N35, N36, N37, N38, N39, N40, N41, N42, N43, N44, N45, G46, G47, G48, G49, G50, G51, G52, G53, G54, G55, G56, G57, G58, G59, G60, O61, O62, O63, O64, O65, O66, O67, O68, O69, O70, O71, O72, O73, O74, O75, 01, 02, 03, 04, 05, 06, 07, 08, 09, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, FREE SYMBOL, TRY AGAIN SYMBOL, $2.00, $3.00, $5.00, $10.00, $20.00, $50.00 and $100.

D. Play Symbol Caption - the printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 1198 - 1.2D

PLAY SYMBOL	CAPTION
B01	
B02	
B03	
B04	
B05	
B06	
B07	
B08	
B09	
B10	
B11	
B12	
B13	
B14	
B15	
I16	
I17	
I18	
I19	
I20	
I21	
I22	
I23	
I24	
I25	
I26	
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N41	
N42	
N43	
N44	
N45	
G46	

G47	
G48	
G49	
G50	
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61	
62	
63	
64	
65	
66	
67	
68	
69	

70	
71	
72	
73	
74	
75	
FREE	
TRY AGAIN	TRY AGAIN
$2.00	TWO$
$3.00	THREE$
$5.00	FIVE$
$10.00	TEN$
$20.00	TWENTY
$50.00	FIFTY
$100	ONE HUND

E. Serial Number - A unique 14 (fourteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There will be a four (4)-digit "security number" which will be individually boxed and randomly placed within the number. The remaining ten (10) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 00000000000000.

F. Low-Tier Prize - A prize of $2.00, $3.00, $5.00, $10.00, $15.00 or $20.00.

G. Mid-Tier Prize - A prize of $30.00, $50.00, $100 or $500.

H. High-Tier Prize - A prize of $1,000 or $30,000.

I. Bar Code - A 24 (twenty-four) character interleaved two (2) of five (5) bar code which will include a four (4) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the ten (10) digit Validation Number. The bar code appears on the back of the ticket.

J. Pack-Ticket Number - A 14 (fourteen) digit number consisting of the four (4) digit game number (1198), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 001 and end with 125 within each pack. The format will be: 1198-0000001-001.

K. Pack - A pack of "CASH BINGO" Instant Game tickets contains 125 tickets, packed in plastic shrink-wrapping and fanfolded in pages of one (1). There will be 2 fanfold configurations for this game. Configuration A will show the front of ticket 001 and the back of ticket 125. Configuration B will show the back of ticket 001 and the front of ticket 125.

L. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401.

M. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "CASH BINGO" Instant Game No. 1198 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule 401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "CASH BINGO" Instant Game is determined once the latex on the ticket is scratched off to expose 131 (one hundred thirty-one) play symbols. The player must scratch off the "CALLER'S CARD" area to reveal 24 (twenty-four) Bingo Numbers and 6 (six) Bonus Numbers. The player must scratch all the Bingo Numbers on cards 1 through 4 that match the Bingo Numbers and the Bonus Numbers on the "CALLER'S CARD". Each "CARD" has a corresponding prize box. Players win by matching those same numbers on the four Bingo Cards. If the player matches all bingo numbers in a complete horizontal, vertical or diagonal line, the four corners of the grid, or an X pattern, they win the prize shown in the corresponding prize box. Examples of play: If a player matches all bingo numbers plus the Free Space in a complete horizontal, vertical or diagonal line pattern in any one card, the player wins the prize shown in the corresponding prize box. If the player matches all bingo numbers in all four (4) corners in any one card, the player wins the prize shown in the corresponding prize box. If the player matches all bingo numbers plus Free Space to make a complete "X" pattern in any one card, the player wins the prize shown in the corresponding prize box. In the INSTANT BONUS play area, if a player reveals a prize amount, the player wins that amount instantly! The player can only win one prize per "CARD". No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 131 (one hundred thirty-one) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 131 (one hundred thirty-one) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 131 (one hundred thirty-one) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures.

17. Each of the 131 (one hundred thirty-one) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets in a pack will not have identical play data, spot for spot.

B. The CALLING AREA is defined as the combined areas of the CALLER'S CARD and the BONUS NUMBERS.

C. No duplicate CALLING AREA play symbols.

D. The CALLING AREA will have a minimum of three (3) numbers from each letter (B, I, N, G and O) letter range.

E. The CALLING AREA will have a maximum of eight (8) numbers from each letter (B, I, N, G and O) letter range.

F. Each number in the CALLING AREA will appear on at least one of the BINGO CARDS.

G. There will be one (1) FREE symbol per card fixed in the center of each BINGO CARD.

H. No duplicate BINGO CARDS (same symbols in same position) on a ticket.

I. Non-winning BINGO CARDS will have a minimum of three (3) numbers called.

J. All numbers within each BINGO CARD will be unique.

K. There can be only one winning pattern on each BINGO CARD on winning cards.

L. A "near win" is a winner less one (1) number, except "X" where there are two (2) distinct numbers less, (one from each diagonal line, one of which must be from a corner).

M. The non-winning INSTANT BONUS box will always contain the TRY AGAIN symbol.

N. The winning INSTANT BONUS box will contain one (1) prize symbol per the prize structure.

2.3 Procedure for Claiming Prizes.

A. To claim a "CASH BINGO" Instant Game prize of $2.00, $3.00, $5.00, $10.00, $15.00, $20.00, $30.00, $50.00, $100 or $500, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, if appropriate, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not, required to pay a $30.00, $50.00, $100 or $500 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim a "CASH BINGO" Instant Game prize of $1,000 or $30,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "CASH BINGO" Instant Game prize, the claimant must sign the winning ticket, thoroughly

complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General; or

3. delinquent in reimbursing the Texas Health and Human Services Commission for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resources Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "CASH BINGO" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "CASH BINGO" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code Section 466.408. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed. An Instant Game ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 30,000,000 tickets in the Instant Game No. 1198. The approximate number and value of prizes in the game are as follows:

Figure 2: GAME NO. 1198 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in**
$2	1,980,000	15.15
$3	2,160,000	13.89
$5	1,440,000	20.83
$10	360,000	83.33
$15	120,000	250.00
$20	240,000	125.00
$30	60,750	493.83
$50	82,500	363.64
$100	30,000	1,000.00
$500	2,500	12,000.00
$1,000	65	461,538.46
$30,000	30	1,000,000.00

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.

**The overall odds of winning a prize are 1 in 4.63. The individual odds of winning for a particular prize level may vary based on sales, distribution, and number of prized claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 1198 without advance notice, at which point no further tickets in that game may be sold. The determination of the closing date and reasons for closing the game will be made in accordance with the instant game closing procedures and the Instant Game Rules, 16 TAC §401.302(j).

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 1198, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401, and all final decisions of the Executive Director.

TRD-200901675
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: May 4, 2009

North Central Texas Council of Governments

Consultant Contract Award

Pursuant to the provisions of Government Code, Chapter 2254, the North Central Texas Council of Governments publishes this notice of consultant contract award. The consultant proposal request appeared in the February 20, 2009, issue of the *Texas Register* (34 TexReg 1301). The selected consultant will perform technical and professional work for the Dallas-Garland Road Vision Study.

The consultant selected for this project is HOK, 2711 North Haskell Avenue, Suite 2250, LB 26, Dallas, Texas 75204. The maximum amount of this contract is $150,000.

TRD-200901695
R. Michael Eastland
Executive Director
North Central Texas Council of Governments
Filed: May 5, 2009

Consultant Contract Award

Pursuant to the provisions of Government Code, Chapter 2254, the North Central Texas Council of Governments publishes this notice of consultant contract award. The consultant proposal request appeared in the February 27, 2009, issue of the *Texas Register* (34 TexReg 1479). The selected consultant will perform technical and professional work for the North Texas Aviation Education Initiative: Development and Implementation.

The consultant selected for this project is Pavlik and Associates, 6115 Camp Bowie, Suite 270, Fort Worth, Texas 76116. The maximum amount of this contract is $85,000.

TRD-200901696
R. Michael Eastland
Executive Director
North Central Texas Council of Governments
Filed: May 5, 2009

Texas Department of Public Safety

Consultant Services Award

In accordance with §2254.030 of the Texas Government Code, the Texas Department of Public Safety ("Department") announces the award of the contract pursuant to Request for Qualifications 405-HQ9-9053 - Agreement for Internal Audit Services, which was published in the February 20, 2009, issue of the *Texas Register* (34 TexReg 1303).

A description of the work to be performed under the contract:

Deloitte & Touche LLP ("Deloitte") will provide the Department with governmental auditing, risk assessment services, and accounting expertise for fiscal years 2009 through 2013 on a blanket order basis. Deloitte will: (a) complete certain internal audit projects; (b) evaluate and contribute to the improvement of risk management and control processes within the Department; and (c) provide internal auditing services to include risk assessments, informal and formal advice, analysis or assessments of Department business processes, governance processes, and related controls.

Name and business address of the consultant selected:

Deloitte & Touche LLP

400 W. 15th Street, Suite 1700

Austin, Texas 78701

The amount of the contract:

$500,000.00

Beginning and ending dates of the contract:

The contract became effective on April 27, 2009 and expires August 31, 2013.

Date for completion of work to be performed:

To date, the Department has ordered the following audit projects, which are currently due on the 35th business day after the effective date of the contract: (1) grant cash management audit; (2) grant acquisition audit; and (3) grant management audit.

TRD-200901708
Stanley E. Clark
Director
Texas Department of Public Safety
Filed: May 6, 2009

♦ ♦ ♦

Public Utility Commission of Texas

Announcement of Application for Amendment to a State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas received an application on April 28, 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 36941 before the Public Utility Commission of Texas.

The requested amendment is to (1) consolidate SICFA Numbers 90019, 90020, and 90021, reassigning all current service area footprint to SICFA Number 90019 and reflect the ownership/control transfer to Time Warner NY Cable LLC d/b/a Time Warner Cable; (2) amend SICFA Number 90019 to expand its area service footprint to include the unincorporated areas of Delta and Denton counties, excluding federal properties; and the cities of Double Oak and Princeton, 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 36941.

TRD-200901651
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: May 1, 2009

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Notice of Application for Designation as a Limited Eligible Telecommunications Carrier in the State of Texas

Notice is given to the public of an application filed with the Public Utility Commission of Texas on April 29, 2009, for designation as a limited eligible telecommunications carrier (ETC) in the State of Texas.

Docket Title and Number: Application of Virgin Mobile USA, L.P. for Limited Designation as an Eligible Telecommunications Carrier in the State of Texas. Docket Number 36946.

The Application: The company is requesting limited ETC designation for the limited purpose of providing Lifeline-supported services to qualifying Texas customers.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by June 4, 2009. Requests for further information should be mailed to the Public Utility Commission of Texas, P.O. Box 13326, Austin, Texas 78711-3326, or you may call the Public Utility Commission's Customer Protection Division at (512) 936-7120 or (888) 782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (800) 735-2989 to reach the commission's toll free number (888) 782-8477. All comments should reference Docket Number 36946.

TRD-200901652
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: May 1, 2009

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Notice of Application for Designation as an Eligible Telecommunications Carrier and Request to Relinquish ETC Designation

Notice is given to the public of an application filed with the Public Utility Commission of Texas on April 28, 2009, for designation as an eligible telecommunications carrier (ETC) and request to relinquish ETC designation.

Docket Title and Number: Application of Telenational Communications, Inc. for Designation as an Eligible Telecommunications Carrier (ETC) in Areas Served by Cedar Valley Communications and Request of Cedar Valley Communications to Relinquish its ETC Designation. Docket Number 36940.

The Application: The company is requesting ETC designation in those areas in which Cedar Valley Communications currently is designated as an ETC. Simultaneously, Cedar Valley Communications requests to

relinquish its ETC designation in those areas in which it is currently so designated effective on the date of its merger into Telenational.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by June 4, 2009. Requests for further information should be mailed to the Public Utility Commission of Texas, P.O. Box 13326, Austin, Texas 78711-3326, or you may call the Public Utility Commission's Customer Protection Division at (512) 936-7120 or (888) 782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (800) 735-2989 to reach the commission's toll free number (888) 782-8477. All comments should reference Docket Number 36940.

TRD-200901650
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: May 1, 2009

Notice of Proceeding to Sequence Certificate of Convenience and Necessity Applications for the Subsequent Projects for the Competitive Renewable Energy Zones

Notice is given to the public of a Public Utility Commission of Texas (commission) proceeding established to sequence certificate of convenience and necessity applications for the subsequent projects for the competitive renewable energy zones pursuant to the Public Utility Regulatory Act, Texas Utility Code Annotated. §§11.001 - 66.016 (Vernon 2007 and Supp. 2008) (PURA).

Docket Style and Number: Proceeding to Sequence Certificate of Convenience and Necessity Applications for the Subsequent Projects for the Competitive Renewable Energy Zones, Docket Number 36802.

The Application: On March 30, 2009, the commission issued its Order in *Commission Staff's Petition for Selection of Entities Responsible for Transmission Improvements Necessary to Deliver Renewable Energy From Competitive Renewable Energy Zones,* Docket Number 35665, wherein commission staff was directed, along with Cross Texas Transmission, LLC, Electric Transmission Texas, LLC, LCRA Transmission Services Corporation, Lonestar Transmission, LLC, Oncor Electric Delivery Company, LLC, Sharyland Utilities, LP, South Texas Electric Cooperative, and Wind Energy Transmission Texas (collectively, Designated TSPs) and the Electric Reliability Council of Texas, Inc. (ERCOT) to participate in the above styled and numbered docket to sequence subsequent project certificate of convenience and necessity (CCN) applications.

Persons who wish to intervene in the proceeding or comment upon the action sought should contact the Public Utility Commission of Texas, P.O. Box 13326, Austin, Texas 78711-3326, or call the commission's Office of Customer Protection at (512) 936-7120 or (888) 782-8477 no later than May 15, 2009. A request to intervene should be submitted in writing by the June 12, 2009, deadline. Hearing or speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) 1-800-735-2989. All correspondence should refer to Docket Number 36802.

TRD-200901704
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: May 5, 2009

Notice of Request for Proposals to Provide Program Oversight Services for Transmission Build-Out in Support of Competitive Renewable Energy Zones

RFP No. 473-09-00320

Deadline for proposal submission: 5:00 p.m., Central Daylight Time, Friday, June 26, 2009.

The Public Utility Commission of Texas (PUCT or Commission) is issuing a Request for Proposals (RFP) for an entity to provide program and project oversight of the planning, financing, and constructing of transmission capacity necessary to deliver renewable energy from competitive renewable energy zones (CREZs) to electric customers.

In 2005, the Texas Legislature amended the Public Utility Regulatory Act (PURA) by requiring the PUCT to identify areas in the state where renewable energy resources and land area are sufficient to develop electric generating capacity from renewable energy technologies and to designate these areas as competitive renewable energy zones (CREZs). In addition, the statute required the PUCT to develop a plan to construct the transmission capacity necessary to transmit the electric output from the CREZs to electric customers.

On October 7, 2008, the PUCT issued its final order, which identified the CREZs and announced that the PUCT would proceed to select the entity or entities responsible for constructing, operating, and maintaining the transmission improvements. The entities that will construct the transmission improvements are known as "transmission service providers," or TSPs. On March 30, 2009, the PUCT issued its final order naming the TSPs for each CREZ.

In addition to naming the TSPs, the PUCT delegated authority to the agency's executive director to select, engage, and oversee an entity that will be responsible for overseeing the planning, financing, and constructing of all the transmission improvements and facilities to ensure their timely completion.

Eligible proposers must be knowledgeable about planning, financing, constructing, and operating electric transmission facilities. Proposers must demonstrate that their project and program management experience is consistent with the size and complexity of the work described in Attachment A, Statement of Work, of the RFP.

The complete RFP is on the PUC website at: http://www.puc.state.tx.us/about/procurement/currentrfps.cfm

To obtain a copy of the RFP, contact Chris Wood, Purchaser at (512) 936-7069; chris.wood@puc.state.tx.us; or PUCT, P.O. Box 13326, Austin, TX 78711-3326.

TRD-200901706
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: May 5, 2009

Notice of Second Amended Application for Waiver from Requirements

Notice is given to the public of a second amended application filed on April 30, 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 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. Flat Wireless proposes that a regular waiver, not a permanent waiver, to use the commission-ordered safe-harbor TUSF assessment methodology to calculate TUSF assessments, is in the public interest and is appropriate.

Persons wishing to comment on the action sought or intervene should contact the Public Utility Commission of Texas by June 1, 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-200901715
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: May 6, 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).