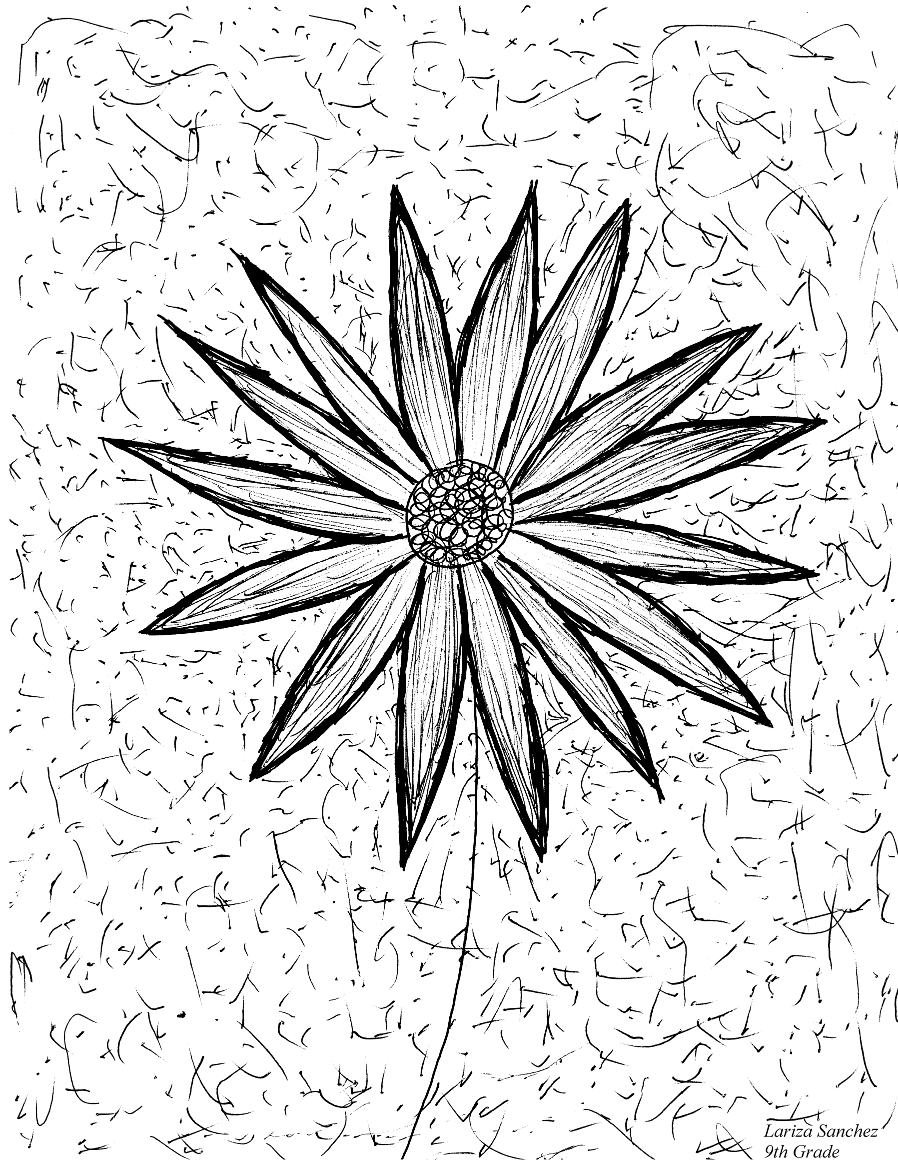
Texas Register

Volume 34 Number 21 *May 22, 2009* *Pages 3035 - 3328*



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*.

Texas Register, **(ISSN 0362-4781, USPS 120-090),** is published weekly (52 times per year) for $211.00 ($311.00 for first class mail delivery) by LexisNexis Matthew Bender & Co., Inc., 1275 Broadway, Albany, N.Y. 12204-2694.

Material in the ***Texas Register*** is the property of the State of Texas. However, it may be copied, reproduced, or republished by any person without permission of the ***Texas Register*** director, provided no such republication shall bear the legend ***Texas Register*** or "Official" without the written permission of the director.

The ***Texas Register*** is published under the Government Code, Title 10, Chapter 2002. Periodicals Postage Paid at Albany, N.Y. and at additional mailing offices.

POSTMASTER: Send address changes to the ***Texas Register,*** 136 Carlin Rd., Conklin, N.Y. 13748-1531.

TEXAS REGISTER

a section of the
Office of the Secretary of State
P.O. Box 13824
Austin, TX 78711-3824
(512) 463-5561
FAX (512) 463-5569

http://www.sos.state.tx.us
register@sos.state.tx.us

Secretary of State –
Hope Andrade

Director –
Dan Procter

Staff
Leti Benavides
Dana Blanton
Kris Hogan
Belinda Kirk
Roberta Knight
Jill S. Ledbetter
Juanita Ledesma
Preeti Marasini

In This Issue

GOVERNOR

Appointments 3041

Proclamation 41-3184 3042

ATTORNEY GENERAL

Opinions 3043

EMERGENCY RULES

TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

MANUFACTURED HOUSING

10 TAC §80.2 3045

10 TAC §80.21, §80.22 3045

PROPOSED RULES

TEXAS HEALTH AND HUMAN SERVICES COMMISSION

MEDICAID ELIGIBILITY

1 TAC §358.100, §358.105 3048

1 TAC §§358.200 - 358.205, 358.210, 358.215, 358.220 3049

1 TAC §§358.300, 358.301, 358.305, 358.310, 358.315, 358.316, 358.320, 358.325 3049

1 TAC §§358.400, 358.401, 358.405, 358.410, 358.415 - 358.417, 358.420, 358.425, 358.430 - 358.433, 358.435, 358.440 - 358.444 3049

1 TAC §§358.450 - 358.455, 358.460, 358.461, 358.465, 358.466, 358.470, 358.475 3050

1 TAC §§358.500 - 358.506, 358.510, 358.515 3050

1 TAC §§358.600, 358.601, 358.603 - 358.605, 358.607, 358.609 - 358.612, 358.615, 358.617, 358.619 - 358.621, 358.623 3051

1 TAC §§358.700, 358.701, 358.705, 358.710, 358.715, 358.720, 358.725 3051

1 TAC §§358.801, 358.803, 358.805, 358.807, 358.809, 358.811, 358.813, 358.815, 358.817, 358.819 3052

MEDICAID ELIGIBILITY FOR THE ELDERLY AND PEOPLE WITH DISABILITIES

1 TAC §§358.101, 358.103, 358.105, 358.107 3052

1 TAC §§358.201, 358.203, 358.205, 358.207, 358.209, 358.211, 358.213, 358.215, 358.217, 358.219 3057

1 TAC §358.301 3058

1 TAC §§358.321 - 358.327, 358.331, 358.333 - 358.339, 358.345 - 358.355, 358.371 3059

1 TAC §§358.381 - 358.387, 358.391 3065

1 TAC §358.401, §358.402 3066

1 TAC §§358.411 - 358.423 3072

1 TAC §§358.431 - 358.441 3075

1 TAC §§358.501, 358.505, 358.510, 358.515, 358.520, 358.525, 358.530, 358.535, 358.540, 358.545 3078

1 TAC §§358.601 - 358.605 3080

MEDICARE SAVINGS PROGRAM

1 TAC §§359.101, 359.103, 359.105, 359.107, 359.109 3080

MEDICAID BUY-IN PROGRAM

1 TAC §§360.101, 360.103, 360.105, 360.107, 360.109, 360.111, 360.113, 360.115, 360.117, 360.119 3082

TEXAS WORKS

1 TAC §§372.1 - 372.6 3089

1 TAC §§372.101 - 372.107 3089

1 TAC §§372.151 - 372.153 3089

1 TAC §§372.201 - 372.205 3090

1 TAC §372.251, §372.252 3090

1 TAC §372.301 3090

1 TAC §§372.351 - 372.358 3091

1 TAC §§372.401 - 372.410 3091

1 TAC §§372.451 - 372.459 3091

1 TAC §372.501 3092

1 TAC §372.601 3092

1 TAC §§372.651 - 372.656 3092

1 TAC §372.701, §372.702 3093

1 TAC §§372.751 - 372.754 3093

1 TAC §372.801, §372.802 3093

1 TAC §§372.901 - 372.906 3094

1 TAC §§372.951 - 372.958 3094

1 TAC §§372.1001 - 372.1003 3094

1 TAC §372.1101 3095

1 TAC §§372.1151 - 372.1156 3095

1 TAC §§372.1201 - 372.1204 3095

1 TAC §§372.1251 - 372.1253 3096

1 TAC §§372.1301 - 372.1304 3096

1 TAC §§372.1351 - 372.1353 3096

1 TAC §§372.1401 - 372.1404 3097

1 TAC §§372.1501 - 372.1529 3097

1 TAC §§372.1551 - 372.1554 3098

1 TAC §§372.1601 - 372.1603 3098

1 TAC §§372.1701 - 372.1720 3098

TEMPORARY ASSISTANCE FOR NEEDY FAMILIES AND SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAMS

1 TAC §§372.1 - 372.6 3099

1 TAC §§372.101 - 372.108 3101
1 TAC §§372.151 - 372.153 3102
1 TAC §§372.201 - 372.205 3103
1 TAC §372.251, §372.252 3104
1 TAC §372.301 3104
1 TAC §§372.351 - 372.356 3104
1 TAC §§372.401 - 372.411 3106
1 TAC §§372.451 - 372.457 3109
1 TAC §372.501 3111
1 TAC §372.601 3111
1 TAC §§372.651 - 372.655 3111
1 TAC §372.701, §372.702 3112
1 TAC §§372.751 - 372.753 3112
1 TAC §372.801, §372.802 3113
1 TAC §§372.901 - 372.906 3113
1 TAC §§372.951 - 372.958 3114
1 TAC §§372.1001 - 372.1003 3116
1 TAC §372.1101 3117
1 TAC §§372.1151 - 372.1156 3117
1 TAC §§372.1201 - 372.1204 3120
1 TAC §§372.1251 - 372.1253 3120
1 TAC §§372.1301 - 372.1303 3121
1 TAC §§372.1351 - 372.1353 3121
1 TAC §§372.1401 - 372.1404 3122
1 TAC §§372.1501 - 372.1521 3122
1 TAC §372.1551, §372.1552 3125
1 TAC §372.1601 3126
1 TAC §§372.1701 - 372.1716 3126

TEXAS DEPARTMENT OF AGRICULTURE

QUARANTINES AND NOXIOUS AND INVASIVE PLANTS

4 TAC §§19.51 - 19.53 3130

TEXAS ALCOHOLIC BEVERAGE COMMISSION

ADMINISTRATION

16 TAC §31.1 3133
16 TAC §31.1 3133

TEXAS BOARD OF ARCHITECTURAL EXAMINERS

ARCHITECTS

22 TAC §1.43 3134
22 TAC §1.161, §1.162 3134
22 TAC §1.163 3135
22 TAC §1.164, §1.165 3136
22 TAC §1.167 3137
22 TAC §§1.170 - 1.175 3137
22 TAC §1.177, §1.178 3141

LANDSCAPE ARCHITECTS

22 TAC §3.43 3144
22 TAC §3.161, §3.162 3144
22 TAC §3.163 3145
22 TAC §3.164, §3.165 3146
22 TAC §3.167 3147
22 TAC §§3.170 - 3.175 3147
22 TAC §3.177, §3.178 3151

INTERIOR DESIGNERS

22 TAC §5.53 3154
22 TAC §5.171, §5.172 3155
22 TAC §5.173 3155
22 TAC §5.174, §5.175 3156
22 TAC §5.177 3157
22 TAC §§5.180 - 5.185 3158
22 TAC §5.187, §5.188 3161

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CONSOLIDATED PERMITS

30 TAC §§305.42, 305.45, 305.50 3169
30 TAC §§305.64 - 305.66, 305.69 3175
30 TAC §305.144, §305.150 3183
30 TAC §305.172, §305.175 3183
30 TAC §305.571, §305.572 3185
30 TAC §§305.650 - 305.661 3186

INDUSTRIAL SOLID WASTE AND MUNICIPAL HAZARDOUS WASTE

30 TAC §§335.1, 335.2, 335.29, 335.31 3200
30 TAC §335.47 3215
30 TAC §335.69, §335.76 3215
30 TAC §§335.112, 335.116, 335.118, 335.125 3219
30 TAC §§335.152, 335.163 - 335.166, 335.173, 335.175 3222
30 TAC §335.221, §335.224 3230
30 TAC §335.261 3234
30 TAC §335.431 3236
30 TAC §335.504 3237
30 TAC §§335.582 - 335.584, 335.590 - 335.593 3237

30 TAC §335.601, §335.602 3241

TEXAS COUNTY AND DISTRICT RETIREMENT SYSTEM

CALCULATIONS OR TYPES OF BENEFITS

34 TAC §103.5 3242

MISCELLANEOUS RULES

34 TAC §107.3 3243

34 TAC §107.16 3244

DOMESTIC RELATIONS ORDERS

34 TAC §109.12 3244

TEXAS YOUTH COMMISSION

PROGRAM SERVICES

37 TAC §§91.75, 91.81, 91.83, 91.86, 91.92, 91.94 3246

37 TAC §§91.81, 91.83, 91.85 3250

ADOPTED RULES

TEXAS HEALTH AND HUMAN SERVICES COMMISSION

MEDICAID HEALTH SERVICES

1 TAC §§354.1430, 354.1432, 354.1434 3253

1 TAC §354.1430, §354.1432 3253

TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

MANUFACTURED HOUSING

10 TAC §80.2 3256

10 TAC §§80.20 - 80.22, 80.25 3256

10 TAC §80.32, §80.33 3257

10 TAC §80.100 3258

TEXAS RESIDENTIAL CONSTRUCTION COMMISSION

WARRANTIES AND BUILDING AND PERFORMANCE STANDARDS

10 TAC §304.1 3259

STATE-SPONSORED INSPECTION AND DISPUTE RESOLUTION PROCESS (SIRP)

10 TAC §313.20 3261

TEXAS ALCOHOLIC BEVERAGE COMMISSION

SCHEDULE OF SANCTIONS AND PENALTIES

16 TAC §34.1 3262

TEXAS APPRAISER LICENSING AND CERTIFICATION BOARD

RULES RELATING TO PROVISIONS OF THE TEXAS APPRAISER LICENSING AND CERTIFICATION ACT

22 TAC §153.5 3262

22 TAC §153.20 3263

TEXAS BOARD OF PROFESSIONAL GEOSCIENTISTS

TEXAS BOARD OF PROFESSIONAL GEOSCIENTISTS LICENSING RULES

22 TAC §851.30 3263

COMPTROLLER OF PUBLIC ACCOUNTS

TAX ADMINISTRATION

34 TAC §3.641 3263

TEXAS YOUTH COMMISSION

JUVENILE CORRECTIONAL OFFICERS

37 TAC §105.5 3264

TABLES AND GRAPHICS

.... 3265

IN ADDITION

Department of Aging and Disability Services

Public Notice Announcing the Pre-Application Orientation for Enrollment of Home and Community-Based Services and Texas Home Living Medicaid Waiver Program Providers 3309

Office of the Attorney General

Agreed Final Judgment and Permanent Injunction 3309

Coastal Coordination Council

Notice and Opportunity to Comment on Requests for Consistency Agreement/Concurrence Under the Texas Coastal Management Program 3309

Comptroller of Public Accounts

Notice of Contract Award 3310

Office of Consumer Credit Commissioner

Notice of Rate Ceilings 3310

Deep East Texas Local Workforce Development Board

Strategic Plan Modification 3311

Texas Commission on Environmental Quality

Agreed Orders 3311

Notice of Opportunity to Comment on Agreed Orders of Administrative Enforcement Actions 3312

Notice of Opportunity to Comment on Default Orders of Administrative Enforcement Actions 3315

Notice of Public Hearing on Proposed Revisions to 30 TAC Chapters 305 and 335 3316

Notice of Water Quality Applications 3317

Notice of Water Rights Application 3319
Proposal for Decision..3319
Proposal for Decision..3319
Request for Nominations 3319

Texas Facilities Commission

Request for Proposals #303-9-11760 3320
Request for Proposals #303-9-11765 3320

Texas Health and Human Services Commission

Public Notice..3320

Texas Department of Insurance

Company Licensing and Registration 3321
Notice of Public Hearing 3321
Third Party Administrator Applications 3321

Texas Lottery Commission

Instant Game Number 1194 "Cadillac® Escalade™ Cash" 3321

Public Utility Commission of Texas

Notice of Application for Approval of Code of Conduct and Organizational Structure 3325
Notice of Application for Designation as an Eligible Telecommunications Carrier 3326
Notice of Application for Service Provider Certificate of Operating Authority 3326
Notice of Application for Waiver of Denial of Request for NXX Code 3326
Notice of Application for Waiver of Denial of Request for NXX Code 3326
Notice of Application to Amend Certificated Service Area Boundaries 3327
Request for Comments..3327

Texas Water Development Board

Public Hearing Notice for Clean Water State Revolving Fund Intended Use Plan for American Recovery and Reinvestment Act of 2009.3327

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 6, 2009

Appointed to the Governing Board of the Texas School for the Deaf for a term to expire January 31, 2015, Angela Wolf of Austin. Ms. Wolf is being reappointed.

Appointed to the Texas Physician Assistant Board for a term to expire February 1, 2015, Ronald W. Bryce of Red Oak (Dr. Bryce is being reappointed).

Appointed to the Texas Physician Assistant Board for a term to expire February 1, 2015, Edward W. Zwanziger of Eustace (replacing Pamela Welch of Mount Vernon whose term expired).

Appointed to the Texas Board of Occupational Therapy Examiners for a term to expire February 1, 2013, Todd M. Novosad of Austin (replacing Clarissa Meyers of McAllen whose term expired).

Appointed to the Texas Board of Occupational Therapy Examiners for a term to expire February 1, 2015, Catherine Benavidez of Carrollton (replacing Cecilia Fierro of El Paso whose term expired).

Appointed to the Texas Board of Occupational Therapy Examiners for a term to expire February 1, 2015, Angela Sieffert of Dallas (replacing Michael Carreon of El Paso whose term expired).

Appointments for May 7, 2009

Appointed to the State Board for Educator Certification for a term to expire February 1, 2011, Grant W. Simpson, Jr. of Gainsville (replacing Jeanne Gerlach of Southlake who resigned).

Appointed to be Justice of the Court of Appeals, Fifth Appellate District for a term until the next General Election and until his successor shall be duly elected and qualified, Robert M. Fillmore of Plano. Mr. Fillmore is replacing Amos Mazzant who resigned.

Appointed to be the Criminal District Attorney of Tarrant County for a term until the next General Election and until his successor shall be duly elected and qualified, Joe Shannon, Jr. of Fort Worth. Mr. Shannon is replacing Tim Curry who is deceased.

Appointed to the State Board for Educator Certification for a term to expire February 1, 2015, Bradley W. Allard of Burleson (replacing Michael Acuff of Fort Worth whose term expired).

Appointed to the State Board for Educator Certification for a term to expire February 1, 2015, Bonny L. Cain of Pearland (Dr. Cain is being reappointed).

Appointed to the State Board for Educator Certification for a term to expire February 1, 2015, Benny W. Morris of Cleburne (replacing John Shirley of Richardson whose term expired).

Appointed to the State Board for Educator Certification for a term to expire February 1, 2015, Judith Robison of El Paso (replacing Patti Johnson of Canyon Lake whose term expired).

Appointed to the Texas Board of Licensure for Professional Medical Physicists for a term to expire February 1, 2013, John R. Leahy of Austin (replacing Lamk Lamki of Houston whose term expired).

Appointed to the Texas Board of Licensure for Professional Medical Physicists for a term to expire February 1, 2015, Valerie Foreman of Frisco (replacing Walter Grant of Bellaire whose term expired).

Appointed to the Texas Board of Licensure for Professional Medical Physicists for a term to expire February 1, 2015, Pamela M. Otto of San Antonio (replacing Isabel Menendez of Portland whose term expired).

Appointed to the Texas Residential Construction Commission for a term to expire February 1, 2015, Ross A. Benline of New Braunfels (replacing John Krugh of Houston whose term expired).

Appointed to the Texas Residential Construction Commission for a term to expire February 1, 2015, Donald Illingworth of Arlington (replacing Ken Davis of Weatherford whose term expired).

Appointed to the Texas Residential Construction Commission for a term to expire February 1, 2015, Steven R. Leipsner of Austin (Mr. Leipsner is being reappointed).

Appointed to the Texas Emancipation Juneteenth Cultural and Historical Commission for a term to expire February 1, 2013, Clarence E. Glover, Jr. of Dallas. Mr. Glover is replacing Willard Stimpson of Dallas whose term expired).

Appointed to the Commission on Human Rights for a term to expire February 1, 2015, Travis A. Morris of Austin. Mr. Morris is replacing Anwar Khalifa of Tyler whose term expired.

Appointed to the Central Texas Regional Mobility Authority for a term to expire February 1, 2011, Ray A. Wilkerson of Austin. Mr. Wilkerson is replacing Robert Tesch of Georgetown who resigned.

Appointed to the Sulphur River Basin Authority Board of Directors for a term to expire February 1, 2015, Kirby Hollingsworth of Mount Vernon (new position due to SB 287).

Appointed to the Brazos River Authority Board of Directors for a term to expire February 1, 2015, Trent McKnight of Throckmorton. Mr. McKnight is replacing Billy Wayne Moore of Willis whose term expired.

Appointed to the Texas Military Preparedness Commission for a term to expire February 1, 2015, Dora G. Alcala of Del Rio (Ms. Alcala is being reappointed).

Appointed to the Texas Military Preparedness Commission for a term to expire February 1, 2015, Ralph C. Gauer, Sr. of Harker Heights (Mr. Gauer is being reappointed).

Appointed to the Texas Military Preparedness Commission for a term to expire February 1, 2015, Alvin W. Jones of College Station (Mr. Jones is being reappointed).

Appointed to the Texas Military Preparedness Commission for a term to expire February 1, 2015, Paul F. Paine of Fort Worth (Mr. Paine is being reappointed).

Appointed to the Department of Information Resources for a term to expire February 1, 2015, Ramon F. Baez of Southlake (replacing William Wachel of Dallas whose term expired).

Appointed to the Department of Information Resources for a term to expire February 1, 2015, Robert E. Pickering, Jr. of Houston (Mr. Pickering is being reappointed).

Appointed to the Texas Industrialized Building Code Council for a term to expire February 1, 2010, Jesse E. Rider of Tyler. Mr. Rider is replacing Charles Wilson of Lubbock who resigned.

Appointed to the Texas Real Estate Commission for a term to expire January 31, 2015, Jaime Blevins Hensley of Lufkin (replacing Mary Frances Burleson of Sachse whose term expired).

Appointed to the Texas Real Estate Commission for a term to expire January 31, 2015, Joanne Justice of Arlington (replacing Elizabeth Leal of El Paso whose term expired).

Appointed to the Texas Real Estate Commission for a term to expire January 31, 2015, Dona Scurry of El Paso (replacing William Flores of Sugar Land whose term expired).

Appointed to the State Pension Review Board for a term to expire January 31, 2015, Paul A. Braden of Dallas (Mr. Braden is being reappointed).

Appointed to the State Pension Review Board for a term to expire January 31, 2015, Wayne R. Roberts of Austin (replacing Shari Shivers of Austin whose term expired).

Appointed to the State Pension Review Board for a term to expire January 31, 2015, Scott D. Smith of Cedar Park (replacing Frederick Rowe of Dallas whose term expired).

Appointed to the Health and Human Services Council for a term to expire February 1, 2015, Jerry Kane of Corpus Christi (Mr. Kane is being reappointed).

Appointed to the Health and Human Services Council for a term to expire February 1, 2015, Manson B. Johnson, II of Houston (Reverend Johnson is being reappointed).

Appointed to the Health and Human Services Council for a term to expire February 1, 2015, Teresa Wilkinson of Midland (replacing Adan Trevino of Bellaire whose term expired).

Appointed to the Texas State Board of Acupuncture Examiners for a term to expire January 31, 2015, Reynaldo Ximenes of Austin. Dr. Ximenes is replacing Donald Counts of Austin who resigned.

Rick Perry, Governor

TRD-200901755

Proclamation 41-3184

TO ALL TO WHOM THESE PRESENTS SHALL COME:

I, RICK PERRY, Governor of the State of Texas, did issue an Emergency Disaster Proclamation on September 8, 2008, as Hurricane Ike posed a threat of imminent disaster along the Texas Coast and in specified counties in Texas. The disaster proclamation was subsequently renewed through May 5, 2009, in the wake of Hurricane Ike; and

WHEREAS, Hurricane Ike struck the State of Texas on September 13, 2008, causing substantial destruction in South and East Texas; and

WHEREAS, Hurricane Ike continues to create a state of disaster for the people in the State of Texas; and

WHEREAS, the state of disaster includes the counties of Anderson, Angelina, Aransas, Archer, Austin, Bell, Bexar, Bowie, Brazoria, Brazos, Burleson, Calhoun, Cass, Chambers, Cherokee, Collin, Colorado, Comal, Coryell, Dallas, Denton, Ellis, El Paso, Fort Bend, Franklin, Freestone, Galveston, Grayson, Gregg, Grimes, Hardin, Harris, Harrison, Henderson, Hill, Hopkins, Houston, Hunt, Jackson, Jasper, Jefferson, Johnson, Kaufman, Lamar, Lavaca, Leon, Liberty, Limestone, Lubbock, Madison, Marion, Matagorda, McLennan, Milam, Montgomery, Morris, Nacogdoches, Navarro, Newton, Nueces, Orange, Panola, Parker, Polk, Potter, Randall, Robertson, Rusk, Sabine, San Augustine, San Jacinto, San Patricio, Shelby, Smith, Tarrant, Titus, Tom Green, Travis, Trinity, Tyler, Upshur, Van Zandt, Victoria, Waller, Walker, Washington, Webb, Wharton, Williamson, Wise and Wood;

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

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 incident.

The renewal of the disaster proclamation becomes effective on May 6, 2009, and shall remain in effect until June 4, 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 5th day of May, 2009.

Rick Perry, Governor

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

TRD-200901756

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-0713

The Honorable Rodney W. Anderson

Brazos County Attorney

300 East 26th Street, Suite 325

Bryan, Texas 77803

Re: Authority of a justice of the peace in a proceeding under section 25.094, Education Code (RQ-0762-GA)

S U M M A R Y

A justice court may use an electronic monitoring device as a condition of deferment of final disposition or probation for an individual found to have committed an offense under section 25.094, Education Code, if the justice court determines that the use of the device in a given proceeding is reasonable.

Opinion No. GA-0714

The Honorable Jeff Wentworth

Chair, Committee on Jurisprudence

Texas State Senate

Post Office Box 12068

Austin, Texas 78711-2068

Re: Authority of a county to contract with a private entity for the collection of delinquent fines, fees, and court costs (RQ-0752-GA)

S U M M A R Y

Code of Criminal Procedure article 103.0031, which authorizes the commissioners court of a county to enter into a contract with a private attorney or a public or private vendor for the provision of collection services, does not violate article V, section 21 of the Texas Constitution by depriving the criminal district attorney of the authority to prosecute suits by the state.

Opinion No. GA-0715

The Honorable Joseph D. Brown

Grayson County Criminal District Attorney

Grayson County Justice Center, Suite 116A

Sherman, Texas 75090

Re: Whether members of a county juvenile board may participate in the county's group health insurance program (RQ-0766-GA)

S U M M A R Y

A district judge serving as a juvenile board member and who is paid a supplemental income by the county for service on the board may be provided county medical insurance pursuant to Local Government Code section 157.002. A commissioners court, however, has discretion to discontinue, by rule, coverage for board members. Moreover, the Grayson County Commissioners Court has authority to determine whether members of the Juvenile Board of Grayson County are provided medical insurance because of the Commissioners Court's express authority to set the compensation of Board members.

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

TRD-200901908
Stacey Napier
Deputy Attorney General
Office of the Attorney General
Filed: May 13, 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 10. COMMUNITY DEVELOPMENT

PART 1. TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

CHAPTER 80. MANUFACTURED HOUSING

SUBCHAPTER A. CODES, STANDARDS, TERMS, FEES AND ADMINISTRATION

10 TAC §80.2

The Manufactured Housing Division of the Texas Department of Housing and Community Affairs is renewing the effectiveness of the emergency adoption of amended §80.2, for a 60-day period. The text of the amended section was originally published in the February 6, 2009, issue of the *Texas Register* (34 TexReg 777).

Filed with the Office of the Secretary of State on May 7, 2009.

TRD-200901730
Joe A. Garcia
Executive Director, Manufactured Housing Division
Texas Department of Housing and Community Affairs
Original Effective Date: January 26, 2009
Expiration Date: July 24, 2009
For further information, please call: (512) 475-2206

♦ ♦ ♦

SUBCHAPTER B. INSTALLATION STANDARDS AND DEVICE APPROVALS

10 TAC §80.21, §80.22

The Manufactured Housing Division of the Texas Department of Housing and Community Affairs is renewing the effectiveness of the emergency adoption of amended §80.21 and §80.22, for a 60-day period. The text of the amended sections were originally published in the February 6, 2009, issue of the *Texas Register* (34 TexReg 777).

Filed with the Office of the Secretary of State on May 7, 2009.

TRD-200901731
Joe A. Garcia
Executive Director, Manufactured Housing Division
Texas Department of Housing and Community Affairs
Original Effective Date: January 26, 2009
Expiration Date: July 24, 2009
For further information, please call: (512) 475-2206

♦ ♦ ♦

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 358. MEDICAID ELIGIBILITY

The Health and Human Services Commission (HHSC) proposes the repeal of Chapter 358, Medicaid Eligibility, consisting of Subchapter A, §358.100 and §358.105, concerning general information; Subchapter B, §§358.200 - 358.205, 358.210, 358.215, and 358.220, concerning Medicare and third-party resources; Subchapter C, §§358.300, 358.301, 358.305, 358.310, 358.315, 358.316, 358.320, and 358.325, concerning basic program requirements; Subchapter D, §§358.400, 358.401, 358.405, 358.410, 358.415 - 358.417, 358.420, 358.425, 358.430 - 358.433, 358.435, and 358.440 - 358.444, concerning resources; Subchapter E, §§358.450 - 358.455, 358.460, 358.461, 358.465, 358.466, 358.470, and 358.475, concerning income; Subchapter F, §§358.500 - 358.506, 358.510, and 358.515, concerning budgets and payment plans; Subchapter G, §§358.600, 358.601, 358.603 - 358.605, 358.607, 358.609 - 358.612, 358.615, 358.617, 358.619 - 358.621, and 358.623, concerning application for Medicaid; Subchapter H, §§358.700, 358.701, 358.705, 358.710, 358.715, 358.720, and 358.725, concerning client rights and responsibilities; and Subchapter I, §§358.801, 358.803, 358.805, 358.807, 358.809, 358.811, 358.813, 358.815, 358.817, and 358.819, concerning the Medicaid Buy-In Program.

HHSC also proposes new Chapter 358, Medicaid Eligibility for the Elderly and People with Disabilities, consisting of Subchapter A, §§358.101, 358.103, 358.105, and 358.107, concerning general information; Subchapter B, §§358.201, 358.203, 358.205, 358.207, 358.209, 358.211, 358.213, 358.215, 358.217, and 358.219, concerning nonfinancial requirements; Subchapter C, Financial Requirements, consisting of Division 1, §358.301, concerning introduction; Division 2, §§358.321 - 358.327, 358.331, 358.333 - 358.339, 358.345 - 358.355, and 358.371, concerning resources; Division 3, §§358.381 - 358.387 and 358.391, concerning income; Division 4, §358.401 and §358.402, concerning transfer of assets; Division 5, §§358.411 - 358.423, concerning spousal impoverishment; and Division 6, §§358.431 - 358.441, concerning budgeting for eligibility and co-payment; Subchapter D, §§358.501, 358.505, 358.510, 358.515, 358.520, 358.525, 358.530, 358.535, 358.540, and 358.545, concerning application and eligibility determination; and Subchapter E, §§358.601 - 358.605, concerning rights and responsibilities of applicants and recipients.

Background and Justification

The existing rules in Chapter 358 provide financial and nonfinancial eligibility criteria HHSC uses to determine a person eligible for a Medicaid-funded program for the elderly and people with disabilities (MEPD). They also provide requirements for the Medicaid Buy-In Program and the Medicare Savings Program.

The proposed new rules in Chapter 358 replace the existing MEPD eligibility rules in Chapter 358. The new rules are being proposed to update agency names and rule cross-references made obsolete during the consolidation of health and human services agencies in 2004, to delete unnecessary language, revise or eliminate obsolete terminology, and to provide better and more helpful organization. Unless otherwise indicated in this proposal, the new rules do not substantially change current MEPD policy. Existing rules that contain procedures for HHSC staff or explanatory material that does not apply to eligibility (for example, explanations of Medicare or Social Security policy) are not included in the proposal. Rules governing the Medicare Savings Program, currently found in Chapter 358, Subchapter B, are proposed in new Chapter 359 elsewhere in this issue of the *Texas Register.* New rules governing the Medicaid Buy-In Program, currently found in Chapter 358, Subchapter I, are proposed in new Chapter 360 elsewhere in this issue of the *Texas Register.*

Government Code, §2001.039, requires that each state agency review and consider for re-adoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (the Administrative Procedure Act). HHSC has reviewed all sections in Chapter 358 and has determined that, although the reasons for adopting rules governing Medicaid eligibility for the elderly and people with disabilities continue to exist, some of the rules in Chapter 358 are obsolete or unnecessary and others need updating. As a result of this review, HHSC is proposing these repeals and new sections.

Section-by-Section Summary

The proposed repeals delete Chapter 358 in its entirety.

New Subchapter A is entitled General Information and contains §§358.101, 358.103, 358.105, and 358.107. These sections set out HHSC's rules concerning purpose and scope, definitions, general Medicaid eligibility requirements, and coverage groups.

New Subchapter B is entitled Nonfinancial Requirements and contains §§358.201, 358.203, 358.205, 358.207, 358.209, 358.211, 358.213, 358.215, 358.217, and 358.219. These sections set out HHSC's rules concerning citizenship or qualified alien status; residence; social security numbers; eligibility as aged, blind, or disabled; and third-party resources.

New Subchapter C is entitled Financial Requirements and is further divided into five divisions. Division 1 is entitled Introduction and contains §358.301, which sets out the purpose and scope of the rules in the division.

Subchapter C, Division 2 is entitled Resources and contains §§358.321 - 358.327, 358.331, 358.333 - 358.339, 358.345 - 358.355, and 358.371. These sections set out HHSC's rules concerning resource eligibility and how a person's resources, including annuities, trusts, property, automobiles, and insurance policies, are counted in determining eligibility for MEPD.

Subchapter C, Division 3 is entitled Income and contains §§358.381 - 358.387 and 358.391. These sections set out HHSC's rules concerning income eligibility and how a person's income is counted in determining eligibility for MEPD.

Subchapter C, Division 4 is entitled Transfer of Assets and contains §358.401 and §358.402. These sections set out HHSC's rules governing a person's transfer of assets before and after the federal Deficit Reduction Act of 2005, including what constitutes a transfer of assets and how a transfer of assets affects Medicaid eligibility.

Subchapter C, Division 5 is entitled Spousal Impoverishment and contains §§358.411 - 358.423. These sections set out HHSC's rules governing the protection of income and resources for a community spouse, in accordance with 42 United States Code §1396r-5.

Subchapter C, Division 6 is entitled Budgeting for Eligibility and Co-payment and contains §§358.431 - 358.441. These sections set out HHSC's rules governing how HHSC budgets for a person's eligibility and co-payment, depending on whether the person is in an institutional or noninstitutional setting, whether the person is married, whether the person is considered a child, and whether the person is considered another person's parent. Proposed new §358.440 expands current policy concerning dependent allowances. Current policy allows for the deduction of a dependent allowance (in accordance with spousal impoverishment provisions) from the countable income of an institutionalized person's dependent relative if the institutionalized person has a community spouse. Proposed new §358.440 incorporates the current policy but also allows for the deduction of a dependent allowance (in the amount of the Social Security Income benefit rate) from the countable income of an institutionalized person's dependent relative if the person has no community spouse.

New Subchapter D is entitled Application and Eligibility Determination and contains §§358.501, 358.505, 358.510, 358.515, 358.520, 358.525, 358.530, 358.535, 358.540, and 358.545. These sections set out HHSC's rules concerning how a person applies for MEPD, application requirements, and time frames for eligibility determinations and redeterminations.

New Subchapter E is entitled Rights and Responsibilities of Applicants and Recipients and contains §§358.601 - 358.605. These sections set out HHSC's rules concerning the general rights and responsibilities of applicants and recipients, as well as disclosure of records, release of medical information, and restitution.

Fiscal Note

Thomas M. Suehs, Deputy Executive Commissioner for Financial Services, has determined that, for the first five years the proposed repeals and new sections are in effect, enforcing or administering the repeals and new sections does not have foreseeable implications relating to costs or revenues of state or local governments.

Small Business and Micro-business Impact Analysis

Mr. Suehs has determined that there will be no effect on small businesses or micro-businesses to comply with the proposal, because the proposed repeals and new rules will not require them to alter their business practices. There are no anticipated economic costs to persons who are required to comply with the proposed repeals and new sections. There is no anticipated negative impact on local employment.

Public Benefit and Costs

Joanne Molina, Deputy Executive Commissioner for Social Services, has determined that, for each year of the first five years the repeals and new sections are in effect, the anticipated public benefit expected as a result of enforcing the repeals and new sections is that the rules for determining eligibility for MEPD will be up-to-date, consistent with policy, and easier to use.

Regulatory Analysis

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

Takings Impact Assessment

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

Public Comment

Written comments on the proposal may be submitted to Mary Nan Haylor, Health and Human Services Commission, Office of Family Services, MC-2090, 909 West 45th Street, Austin, TX 78751, or by e-mail to marynan.haylor@hhsc.state.tx.us, within 30 days after publication of this proposal in the *Texas Register.*

Public Hearing

HHSC will hold a public hearing on June 22, 2009, at 9:00 a.m. (Central Time) to receive public comment on the proposal. The hearing will be held in the Lone Star Conference Room of the Health and Human Services Commission, Braker Center, Building H, 11209 Metric Boulevard, Austin, Texas. Entry is through Security at the main entrance of the building, which faces Metric Boulevard. Persons requiring Americans with Disabilities Act (ADA) accommodation or auxiliary aids or services should contact Graciela Reyna by calling (512) 206-4778, at least 72 hours prior to the hearing so appropriate arrangements can be made.

SUBCHAPTER A. GENERAL INFORMATION

1 TAC §358.100, §358.105

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

Statutory Authority

The repeals are proposed under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; and §531.021, which authorizes HHSC to administer the federal medical assistance (Medicaid) program in Texas.

The repeals affect Texas Government Code, Chapter 531. No other statutes, articles, or codes are affected by this proposal.

§358.100. Definitions.

§358.105. Description of Eligible Clients.

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 11, 2009.

TRD-200901758
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 424-6900

SUBCHAPTER B. MEDICARE AND THIRD-PARTY RESOURCES

1 TAC §§358.200 - 358.205, 358.210, 358.215, 358.220

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

Statutory Authority

The repeals are proposed under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; and §531.021, which authorizes HHSC to administer the federal medical assistance (Medicaid) program in Texas.

The repeals affect Texas Government Code, Chapter 531. No other statutes, articles, or codes are affected by this proposal.

§358.200. Medicare Benefits.

§358.201. Qualified Medicare Beneficiaries (QMB) (Type Program 24).

§358.202. Medicaid Qualified Medicare Beneficiaries.

§358.203. Qualified Disabled and Working Individuals (QDWI) (Type Program 25).

§358.204. Specified Low-Income Medicare Beneficiaries (SLMB).

§358.205. Eligibility Requirements for Buy-in.

§358.210. Time Frames for Buy-in Enrollment.

§358.215. Third-party Resources (TPRs).

§358.220. Qualifying Individuals (QIs).

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 11, 2009.

TRD-200901759
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 424-6900

SUBCHAPTER C. BASIC PROGRAM REQUIREMENTS

1 TAC §§358.300, 358.301, 358.305, 358.310, 358.315, 358.316, 358.320, 358.325

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

Statutory Authority

The repeals are proposed under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; and §531.021, which authorizes HHSC to administer the federal medical assistance (Medicaid) program in Texas.

The repeals affect Texas Government Code, Chapter 531. No other statutes, articles, or codes are affected by this proposal.

§358.300. United States Citizenship and Residence Requirements.

§358.301. Texas Residence Requirements.

§358.305. Eligibility Requirements for the Aged, Blind, or Disabled.

§358.310. Eligibility Requirements for Residents of Public Institutions.

§358.315. Preadmission Screening and Annual Resident Review (PASARR).

§358.316. Risk Assessment Criteria.

§358.320. Eligibility Requirements for Redetermination.

§358.325. Nursing Facility Recipients Discharged to Hospitals.

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 11, 2009.

TRD-200901760
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 424-6900

SUBCHAPTER D. RESOURCES

1 TAC §§358.400, 358.401, 358.405, 358.410, 358.415 - 358.417, 358.420, 358.425, 358.430 - 358.433, 358.435, 358.440 - 358.444

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

Statutory Authority

The repeals are proposed under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; and §531.021, which authorizes HHSC to administer the federal medical assistance (Medicaid) program in Texas.

The repeals affect Texas Government Code, Chapter 531. No other statutes, articles, or codes are affected by this proposal.

§358.400. General Resources.

§358.401. Fiduciary Agent.

§358.405. Categories of Resource Limits.

§358.410. Deeming of Resources.

§358.415. Ownership and Accessibility.

§358.416. Earned Income Tax Credits.

§358.417. Trusts--August 11, 1993, and After.

§358.420. Conversion of Resources.

§358.425. Replacement Value of Excluded Resources.

§358.430. Transfer of Assets.

§358.431. Transfer of Assets on or after February 8, 2006.

§358.432. Home Equity Treatment.

§358.433. Treatment of Entrance Fees of Individuals Residing in Continuing Care Retirement Communities.

§358.435. Liquid Resources.

§358.440. Nonliquid Resources.

§358.441. Real Property.

§358.442. Personal Property.

§358.443. Resources Essential to Self-support (Real and Personal Properties).

§358.444. Medicaid Treatment of Qualified Long-Term Care Partnership Program Insurance Policies.

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 11, 2009.

TRD-200901761
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 424-6900

SUBCHAPTER E. INCOME

1 TAC §§358.450 - 358.455, 358.460, 358.461, 358.465, 358.466, 358.470, 358.475

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

Statutory Authority

The repeals are proposed under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; and §531.021, which authorizes HHSC to administer the federal medical assistance (Medicaid) program in Texas.

The repeals affect Texas Government Code, Chapter 531. No other statutes, articles, or codes are affected by this proposal.

§358.450. General Principles Concerning Income.

§358.451. Sources of Earned Income.

§358.452. Earned Income Tax Credits.

§358.453. Wage-related Exemptions.

§358.454. Reduction of Pension and Benefit Checks for Recoupment of Overpayments.

§358.455. Unearned Income.

§358.460. Income Exemptions.

§358.461. Indian-related Exemptions.

§358.465. Income Exclusions.

§358.466. Special Income Exclusions.

§358.470. Variable Monthly Income.

§358.475. Deeming of Income.

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

Filed with the Office of the Secretary of State on May 11, 2009.

TRD-200901762
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 424-6900

SUBCHAPTER F. BUDGETS AND PAYMENT PLANS

1 TAC §§358.500 - 358.506, 358.510, 358.515

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

Statutory Authority

The repeals are proposed under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; and §531.021, which authorizes HHSC to administer the federal medical assistance (Medicaid) program in Texas.

The repeals affect Texas Government Code, Chapter 531. No other statutes, articles, or codes are affected by this proposal.

§358.500. Nonvendor Living Arrangements.

§358.501. Vendor Living Arrangements.

§358.502. Allowable Deductions.

§358.503. Protection of Spousal Income and Resources.

§358.504. Diversion of Income to a Dependent Relative.

§358.505. Budget Eligibility Requirements.

§358.506. Mandatory Payroll Deductions from Earned Income.

§358.510. Applied Income for SSI Clients.

§358.515. Medicare Skilled Nursing 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 May 11, 2009.

TRD-200901763
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 424-6900

SUBCHAPTER G. APPLICATION FOR MEDICAID

1 TAC §§358.600, 358.601, 358.603 - 358.605, 358.607, 358.609 - 358.612, 358.615, 358.617, 358.619 - 358.621, 358.623

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

Statutory Authority

The repeals are proposed under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; and §531.021, which authorizes HHSC to administer the federal medical assistance (Medicaid) program in Texas.

The repeals affect Texas Government Code, Chapter 531. No other statutes, articles, or codes are affected by this proposal.

§358.600. Date of Application.

§358.601. Eligibility Determination.

§358.603. Client Notification.

§358.604. Application Process.

§358.605. Medical Effective Date.

§358.607. Written Application.

§358.609. Applicants and Their Allowed Representatives.

§358.610. Medicaid Coverage.

§358.611. Allowed Signatures.

§358.612. Processing Deadlines.

§358.615. Medical Care Identification.

§358.617. Denials.

§358.619. Administrative Denials.

§358.620. Cases Placed on Hold.

§358.621. Failure to Furnish Information.

§358.623. Previously Completed Application for Assistance.

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 11, 2009.

TRD-200901764
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 424-6900

SUBCHAPTER H. CLIENT RIGHTS AND RESPONSIBILITIES

1 TAC §§358.700, 358.701, 358.705, 358.710, 358.715, 358.720, 358.725

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

Statutory Authority

The repeals are proposed under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; and §531.021, which authorizes HHSC to administer the federal medical assistance (Medicaid) program in Texas.

The repeals affect Texas Government Code, Chapter 531. No other statutes, articles, or codes are affected by this proposal.

§358.700. Confidentiality of Case Records.

§358.701. Disclosure and Release of Client Information.

§358.705. Disclosure of Client Medical Records.

§358.710. Requirement To Provide Information (Reporting Changes).

§358.715. Willful Withholding of Information.

§358.720. Client Right To Appeal.

§358.725. Restitution.

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 11, 2009.

TRD-200901765
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 424-6900

SUBCHAPTER I. MEDICAID BUY-IN PROGRAM

1 TAC §§358.801, 358.803, 358.805, 358.807, 358.809, 358.811, 358.813, 358.815, 358.817, 358.819

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

Statutory Authority

The repeals are proposed under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; and §531.021, which authorizes HHSC to administer the federal medical assistance (Medicaid) program in Texas.

The repeals affect Texas Government Code, Chapter 531. No other statutes, articles, or codes are affected by this proposal.

§358.801. Overview and Purpose.

§358.803. Applying and Providing Information.

§358.805. Citizenship, Immigration Status, and Residency.

§358.807. Disability.

§358.809. Work.

§358.811. Income.

§358.813. Resources.

§358.815. Deeming of Income and Resources.

§358.817. Cost Sharing.

§358.819. Medical Effective Date.

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 11, 2009.

TRD-200901766
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 424-6900

CHAPTER 358. MEDICAID ELIGIBILITY FOR THE ELDERLY AND PEOPLE WITH DISABILITIES

SUBCHAPTER A. GENERAL INFORMATION

1 TAC §§358.101, 358.103, 358.105, 358.107

Statutory Authority

The new sections are proposed under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; and §531.021, which authorizes HHSC to administer the federal medical assistance (Medicaid) program in Texas.

The new sections affect Texas Government Code, Chapter 531. No other statutes, articles, or codes are affected by this proposal.

§358.101. Purpose and Scope.

(a) This chapter establishes the Medicaid eligibility criteria for Medicaid-funded programs for the elderly and people with disabilities (MEPD) in Texas, which provide medical assistance to eligible persons as described in this chapter and in:

(1) Title XVI of the Social Security Act (42 U.S.C. §§1382 et seq.);

(2) Title XIX of the Social Security Act (42 U.S.C. §§1396a et seq.);

(3) 20 CFR Part 416, Supplemental security income for the aged, blind, and disabled;

(4) 42 CFR Part 435, Eligibility in the States, District of Columbia, the Northern Mariana Islands, and American Samoa;

(5) 42 U.S.C. Chapter 7, Social Security; and

(6) the Texas State Plan for Medical Assistance (Medicaid).

(b) Any section of the United States Code of Federal Regulations cited in this chapter is adopted by reference as a part of the rule in which it is cited.

(c) Medicaid eligibility, as described in this chapter, is only one of the criteria used to determine eligibility for MEPD. Additional criteria, including functional and other assessments, are established by each program and are governed by the rules of that program.

(d) Nothing in these rules shall be construed to violate the maintenance of eligibility requirements of section 5001 of the American Recovery and Reinvestment Act of 2009 (Public Law 111-5) and make eligibility standards, methodologies, or procedures under the Texas State Plan for Medical Assistance (or any waiver under section 1115 of the Social Security Act (42 U.S.C. §1315)) more restrictive than the eligibility standards, methodologies, or procedures, respectively, under such plan (or waiver) that were in effect on July 1, 2008.

§358.103. Definitions.

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

(1) Section 1915(c) waiver program--A home or community-based service authorized for use in Texas by the Centers for Medicare and Medicaid Services in accordance with §1915(c) of the Social Security Act.

(2) Adverse action--A termination, suspension, or reduction of Medicaid eligibility or covered services.

(3) Annual review--The process of redetermining a person's continued eligibility for Medicaid.

(4) Appeal--A request for a review of an action or failure to act by the Texas Health and Human Services Commission (HHSC) that may result in a fair hearing.

(5) Applicant--A person seeking benefits under a Medicaid-funded program for the elderly and people with disabilities (MEPD) who is not currently receiving MEPD services.

(6) Application for assistance--A form prescribed by HHSC that a person uses to apply for MEPD or to have MEPD eligibility redetermined.

(7) Assets--All items a person owns that have monetary value. Assets include both income and resources.

(8) Authorized representative--An individual:

(A) who assists and represents a person in the application or eligibility redetermination process, and who is familiar with that person and that person's financial affairs; or

(B) who is a representative payee for an applicant or recipient for another federal benefit.

(9) Benefits office--A local HHSC office.

(10) Blind--A person who meets Supplemental Security Income (SSI) program requirements for blindness, as defined in 42 U.S.C. §1382c(a)(2).

(11) Budgeting--The process of determining a person's financial eligibility for MEPD or for calculating a co-payment.

(12) Burial space--A burial plot, grave site, crypt, mausoleum, urn, casket, niche, or other repository customarily and traditionally used for a deceased person's bodily remains. The term also includes necessary and reasonable improvements or additions to these spaces, including vaults, headstones, markers, or plaques; burial containers; arrangements for opening and closing the grave site; and contracts for care and maintenance of the grave site. Contracts for care and maintenance are sometimes referred to as endowment or perpetual care.

(13) Certification--HHSC's official authorization of an eligibility determination.

(14) CFR--Code of Federal Regulations.

(15) Community spouse--See Subchapter C, Division 5, §358.412 of this chapter (relating to Definitions).

(16) Co-payment--The amount of personal income a person must pay toward the cost of his or her care. Co-payment was formerly known as applied income.

(17) Countable income--The amount of a person's income that is not exempt or excluded.

(18) Countable resource--A resource owned by and accessible to a person that is not exempt or excluded.

(19) Coverage group--A group of people who are categorically eligible for MEPD under the Texas State Plan for Medical Assistance.

(20) Current market value--The amount of money an item would bring if sold in the current local market.

(21) Date of application--See §358.520 of this chapter (relating to Date of Application).

(22) Deeming--Counting all or part of the income or resources of another person (for example, a parent or spouse) as income or resources available to an applicant or recipient.

(23) Disabled--A person who meets SSI program requirements as defined in 42 U.S.C. §1382c(a)(3).

(24) Earned income--Income a person receives for services performed as an employee or from self-employment.

(25) Earned income tax credit--A special tax credit that reduces the federal tax liability of certain low-income working taxpayers.

(26) Eligibility determination--A decision made by HHSC concerning a person's initial eligibility for MEPD. This term does not include any functional or other assessment required for some MEPD services, unless the context clearly indicates otherwise.

(27) Eligibility redetermination--A decision made by HHSC concerning a person's continued eligibility for MEPD. This term does not include any functional or other assessment required for some MEPD services, unless the context clearly indicates otherwise.

(28) Equity value--The value of a resource based on its fair market value or current market value minus all money owed on the resources and, if sold, any costs usually associated with the sale.

(29) Exempt--Income or resources not counted for the purpose of determining eligibility or calculating a co-payment.

(30) Excluded--Income or resources not counted for the purpose of determining eligibility only.

(31) Fair hearing--An informal proceeding held before an impartial hearings officer in which a person or the person's representative appeals an action taken on the person's case.

(32) Fair market value--The current market value of a resource at the time of its sale or transfer.

(33) Family member--An applicant's or recipient's spouse, minor child, adult child, stepchild, adopted child, brother, sister, parent, or adoptive parent; or a spouse of the applicant's or recipient's minor child, adult child, stepchild, adopted child, brother, sister, parent, or adoptive parent.

(34) Fiduciary agent--A person or organization acting on behalf of or with the authorization of another person under circumstances that involve a high degree of confidence, good faith, and honesty. The term applies to anyone who acts in a financial capacity, whether formal or informal, regardless of title, such as representative payee, guardian, or conservator.

(35) Fraud--Deliberate misrepresentation or willful withholding of information for the purpose of obtaining public assistance, either for self or another person.

(36) Health Insurance Premium Payment Program--A Medicaid program that pays for the cost of medical premiums. The program reimburses recipients or employers for private health insurance payments for Medicaid-eligible persons when it is cost effective to do so.

(37) HHSC--The Texas Health and Human Services Commission.

(38) Home--A structure in which a person lives (including a mobile home, a houseboat, and a motor home), other buildings on the home property, and all adjacent land (including land separated by a road, river, or stream), in which the person has an ownership interest and that serves as his or her principal place of residence.

(39) Income--Any item a person receives in cash or in kind that can be used to meet his or her need for food or shelter. For purposes of determining MEPD financial eligibility, income includes the receipt of any item that can be applied, either directly or by sale or conversion, to meet the basic needs of food or shelter.

(40) Inheritance--Cash, other liquid resources, noncash items, or any right in real or personal property received as the result of someone's death. A person may not have access to his or her inheritance pending legal action or the discovery of the inheritance.

(41) Initial eligibility period--The time from a person's certification date to the person's first annual review.

(42) In-kind--Consisting of something (such as food, shelter, or replacement of a resource) that is not cash.

(43) Institution for mental diseases (IMD)--A hospital, nursing facility, or other institutional setting of more than 16 beds that is primarily engaged in providing diagnosis, treatment, or care of persons with mental diseases, including medical attention, nursing care, and related services. An IMD includes a state mental health facility operated by the Texas Department of State Health Services.

(44) Institutional care--Long-term nursing care, treatment, or services received in a Medicaid-certified long-term care facility.

(45) Institutional setting--A living arrangement in which a person applying for or receiving Medicaid lives in a Medicaid-certified long-term care facility or receives services under a §1915(c) waiver program.

(46) Insurance--The following terms apply to the definition of insurance:

(A) "The insured" means the person named in a life insurance policy whose death affects the proceeds and distribution of the policy.

(B) "The beneficiary" means the person or entity named in a contract to receive the proceeds of the policy upon the death of the insured.

(C) "The owner" means the person with the right to change the policy as the person sees fit. The owner is the only person who can receive the cash surrender value of the policy.

(D) "The insurer" is the company that contracts with the owner.

(E) "Cash surrender value" means the amount that the insurer pays the owner if the policy is cancelled before death or before it has matured. The cash surrender value usually increases with the age of the policy.

(F) A "participating life insurance policy" is one in which dividends are distributed to the policyholder.

(G) "Term life insurance" means life insurance that has no cash, loan, or dividend value, nor the potential for cash, loan, or dividend value.

(H) "Dividend" means a share of surplus funds allocated to the policyholders of a participating insurance policy. A dividend generally represents a previous overpayment of premiums.

(47) Intermediate care facility for persons with mental retardation or related conditions (ICF/MR)--A Medicaid-certified facility that provides care in a 24-hour specialized residential setting for persons with mental retardation or a related condition. An ICF/MR includes a state mental retardation facility operated by the Texas Department of Aging and Disability Services.

(48) Inter vivos trust--A trust established while the person creating the trust is still living.

(49) Level of care--The type of care a person is eligible to receive in an ICF/MR based upon an assessment of the person's need for care.

(50) Level of care determination--A determination made by the Texas Department of Aging and Disability Services that determines a person's level of care.

(51) Life estate--A right to real property conferred in a legal instrument on a person (beneficiary). The right is conferred for the duration of the beneficiary's lifetime or the lifetime of another person. The beneficiary usually has the right to possess, use, and receive profits from the real property during his or her possession.

(52) Liquid resource--Cash or other property that can be converted to cash within 20 working days.

(53) Long-term care facility--A nursing facility, ICF/MR, or IMD in which medical services are provided.

(54) Look-back period--The period of time HHSC considers to determine if a person transferred, gave away, disposed of, or otherwise reduced his or her countable resources and income without receiving equal value in return and with the intent to give away resources in order to qualify for MEPD.

(55) Medicaid--A state and federal cooperative program, authorized under Title XIX of the Social Security Act and the Texas Human Resources Code, that pays for certain medical and health care costs for people who qualify. Also known as the medical assistance program.

(56) Medical effective date--The date a person's Medicaid coverage begins.

(57) Medical necessity--The determination that a person requires the services of a licensed nurse in an institutional setting to carry out a physician's planned regimen for total care.

(58) Medical services--Services that are directed toward diagnostic, preventive, therapeutic, or palliative treatment of a medical condition and that are performed, directed, or supervised by a state-licensed health professional.

(59) Medicare--Medical coverage available under Title XVIII of the Social Security Act to people 65 years of age or older and to certain disabled people under 65 years of age.

(60) MEPD--A Medicaid-funded program for the elderly and people with disabilities. A public assistance program providing institutional and community-based health-related care for the elderly and people with disabilities. MEPD does not provide cash assistance. Examples of MEPD services and programs are:

(A) primary home care services;

(B) §1915(c) waiver programs, which provide community-based care as an alternative to institutional care;

(C) care in a Medicaid-certified long-term care facility; and

(D) the Program of All-Inclusive Care for the Elderly (PACE).

(61) Mineral rights--Ownership interest in the oil, gas, or minerals beneath the surface of a piece of property.

(62) Month of application--The month in which the date of application falls.

(63) Noninstitutional setting--A living arrangement in which a person applying for or receiving Medicaid does not live in a long-term care facility or receive services under a §1915(c) waiver program.

(64) Nursing facility--An entity that provides organized and structured nursing care and services, and is subject to licensure under Texas Health and Safety Code, Chapter 242.

(65) Parent--A child's natural or adoptive parent or the spouse of the natural or adoptive parent.

(66) Pension funds--Monies held in a retirement fund under a plan administered by an employer or union, or an individual retirement account (IRA) or Keogh account as described in the Internal Revenue Code.

(67) Personal needs allowance--An amount of the recipient's income that a recipient in an institutional setting may retain for personal use.

(68) Primary home care services--Medicaid-funded, in-home attendant services provided to a person with a medical need for specific tasks to delay or prevent the person's need for institutional care.

(69) Principal place of residence--The home where a person resides, occupies, and lives.

(70) Provider--A person, group, or agency contracted to provide a Medicaid-funded service to a person for a fee.

(71) Public institution--An institution defined in 20 CFR §416.201.

(72) Real property--Land and improvements, including buildings and structures. Real property may also include a mine or quarry, standing timber, or minerals.

(73) Recipient--A person receiving benefits under MEPD, including a person whose Medicaid eligibility is being redetermined.

(74) Representative payee--A person or an organization selected to receive benefits on behalf of a recipient, if the recipient is not able to manage or direct the management of benefit payments in his or her own interest.

(75) Resources--Cash, other liquid assets, or any real or personal property, that a person (or spouse or parent, as appropriate):

(A) owns;

(B) has the right, authority, or power to convert to cash (if not already cash); and

(C) is not legally restricted from using for his or her support and maintenance.

(76) Restitution--Securing payment from a recipient when fraud is not indicated or pursued and when the recipient's co-payment has been undercharged because of previously unreported or underreported monthly income or resources.

(77) Retirement, Survivors, and Disability Insurance (RSDI)--Benefits provided under Title II of the Social Security Act.

(78) Retroactive coverage--Payment for Medicaid-reimbursable medical services received up to three months before the month of application.

(79) Social Security--A federal system of retirement and disability insurance for various categories of employed and dependent persons, funded through dedicated payroll taxes.

(80) Social Security Act--The federal statute that provides the authority for various programs referenced in this chapter, including Medicare and Medicaid. See also the definition in this section for certain titles in the Social Security Act.

(81) Social Security Administration (SSA)--The federal agency that issues Social Security numbers, administers Social Security benefit programs, and manages the SSI program.

(82) Social service--A service, other than a medical service, that is intended to assist a person with a physical disability or social disadvantage to function in society on a level comparable to that of a person who does not have such a disability or disadvantage. No in-kind items are expressly identified as social services.

(83) Special income limit--The income limit used to test MEPD eligibility for a person or couple in an institutional setting in accordance with §358.433 of this chapter (relating to Special Income Limit).

(84) Spousal impoverishment--Legislation implemented under §1924 of the Social Security Act (42 U.S.C. §1396r-5) designed to prevent the impoverishment of a family, usually a couple, when one spouse needs care in an institutional setting.

(85) State mental health facility--A state hospital or state center operated by the Texas Department of State Health Services that provides care for people with mental illness who need the safety, structure, and resources of an in-patient setting.

(86) State mental retardation facility--A state school or state center operated by the Texas Department of Aging and Disability Services that provides residential services and supports to assist people with mental retardation who may benefit from 24-hour supervision and active treatment.

(87) Supplemental Security Income (SSI) benefit rate--Standard payment amount in the SSI program.

(88) Supplemental Security Income (SSI) program--A federal income supplement program, funded by general tax revenues and managed by the SSA, that provides monthly income to people who are aged, blind, or disabled and have limited income and resources.

(89) Support and maintenance--The value of food and shelter that a person receives.

(90) Temporary Assistance for Needy Families--A program that provides temporary benefits (cash assistance) and work opportunities to families with needy dependent children, authorized under Title IV of the Social Security Act.

(91) Testamentary trust--A trust established by a will.

(92) Texas State Plan for Medical Assistance--Document describing the Medicaid-funded services provided in Texas, in accordance with §1902 of the Social Security Act (42 U.S.C. §1396a).

(93) Third-party resource--A source of payment for medical expenses other than Medicaid.

(94) Three months prior--The three calendar months before the month of application.

(95) Titles to Social Security Act--Divisions of the Social Security Act. Titles referenced in this chapter are:

(A) Title II, which governs RSDI benefits;

(B) Title XVI, which governs the SSI program;

(C) Title XVIII, which governs Medicare; and

(D) Title XIX, which governs Medicaid.

(96) Trust--A trust includes any legal instrument, device, or arrangement which may not be called a trust under state law, but which is similar to a trust. That is, it involves a grantor who transfers property to an individual or entity with fiduciary obligations with the intention that it be held, managed, or administered by the individual or entity for the benefit of the grantor or others. This can include (but is not limited to) escrow accounts, investment accounts, pension funds, irrevocable burial trusts, limited partnerships, and other similar entities managed by an individual or entity with the fiduciary obligations.

(97) Unearned income--Income that is not earned.

(98) U.S.C.--United States Code.

(99) Working day--Any day except Saturday, Sunday, a state holiday, or a federal holiday.

§358.105. General Medicaid Eligibility Requirements.

(a) To be determined eligible for a Medicaid-funded program for the elderly and persons with disabilities (MEPD), a person must:

(1) meet the criteria for an eligible coverage group, as described in §358.107 of this subchapter (relating to Coverage Groups);

(2) comply with the Texas Health and Human Services Commission's application and redetermination requirements, in accordance with Subchapter D of this chapter (relating to Application and Eligibility Determination);

(3) meet the nonfinancial eligibility requirements in Subchapter B of this chapter (relating to Nonfinancial Requirements); and

(4) meet the financial eligibility requirements in Subchapter C of this chapter (relating to Financial Requirements).

(b) Additional eligibility criteria for MEPD are established by each program and governed by the rules of that program.

§358.107. Coverage Groups.

(a) General. This section describes the groups of people who are categorically eligible for a Medicaid-funded program for the elderly and people with disabilities (MEPD) under the Texas State Plan for Medical Assistance.

(b) Mandatory coverage groups. In accordance with 42 CFR Part 435, Subpart B, the Texas Health and Human Services Commission (HHSC) determines eligibility for MEPD for a person who falls into at least one of the following mandatory coverage groups:

(1) Supplemental Security Income (SSI) eligible. In accordance with 42 CFR §435.120, this is a person who is aged, blind, or disabled and is receiving SSI or deemed to be receiving SSI. The Social Security Administration (SSA) determines eligibility for SSI under Title XVI of the Social Security Act. If SSA determines that a person is eligible for SSI, HHSC accepts SSA's determination as an automatic determination of eligibility for Medicaid.

(2) Coverage for certain aliens. In accordance with 42 CFR §435.139, an alien, as defined in 42 CFR §435.406, is provided services necessary for the treatment of an emergency medical condition, as defined in 42 CFR §440.255.

(3) Disabled adult child. In accordance with §1634(c) of the Social Security Act (42 U.S.C. §1383c), this is a person who:

(A) is at least 18 years of age;

(B) became disabled before 22 years of age;

(C) is denied SSI because of receipt of or an increase in Retirement, Survivors, and Disability Insurance (RSDI) disabled children's benefits received on or after July 1, 1987, and any subsequent increase; and

(D) meets current SSI criteria, excluding the RSDI benefit described in subparagraph (C) of this paragraph.

(4) Historical 1972 income disregard. In accordance with 42 CFR §435.134, this is a person who:

(A) was receiving both public assistance and Social Security benefits in August 1972; and

(B) meets current SSI eligibility criteria, excluding from income the October 1972 cost-of-living adjustment (COLA) increase in Social Security benefits but not excluding subsequent COLA increases in Social Security benefits.

(5) Title II COLA disregard (Pickle). In accordance with 42 CFR §435.135(a) - (b), this is a person who:

(A) has been denied SSI for any reason since April 1977; and

(B) meets current SSI eligibility criteria, excluding from countable income any Social Security COLA increases received after the person last received both SSI and Social Security benefits in the same month.

(6) Disabled widow's or widower's COLA disregard. In accordance with 42 CFR §435.137, this is a person who:

(A) is 50 to 60 years of age;

(B) is ineligible for Medicare;

(C) was denied SSI due to an increase in a disabled widow's or widower's and surviving divorced spouse's RSDI; and

(D) meets SSI eligibility criteria, excluding from countable income the RSDI benefit and any subsequent COLA increases in RSDI.

(7) Early age widow's or widower's COLA disregard. In accordance with 42 CFR §435.138, this is a disabled person who was denied SSI due to early receipt of Social Security widow's or widower's benefits and:

(A) is at least 60 years of age;

(B) is not eligible for Medicare; and

(C) meets current SSI eligibility criteria, excluding from countable income the RSDI benefit and any subsequent COLA increases in RSDI.

(8) SSI denied children. In accordance with §1902(a)(10)(A)(i)(II) of the Social Security Act (42 U.S.C. §1396a(a)(10)(A)(i)(II)), this is a person who:

(A) is under 18 years of age;

(B) was receiving SSI on August 22, 1996;

(C) was subsequently denied SSI because of the change in disability criteria implemented by the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (Public Law 104-193); and

(D) meets SSI eligibility criteria, including the disability criteria in effect before August 22, 1996.

(c) Optional coverage groups. In accordance with 42 CFR Part 435, Subpart C, HHSC determines Medicaid eligibility for MEPD for a person who falls into an optional coverage group described in this subsection. Although federal regulations may allow other optional coverage groups, HHSC does not provide benefits to a member of an optional coverage group unless the group is included in the Texas State Plan for Medical Assistance.

(1) Institutional. In accordance with 42 CFR §435.211, this is a person who would be eligible for SSI, as specified in 42 CFR §435.230, if the person were not in an institutional setting.

(2) Institutional special income limit. In accordance with 42 CFR §435.236, this is a person who has lived in an institutional setting for at least 30 consecutive days, as described in §358.433 of this chapter (relating to Special Income Limit), and is eligible under the special income limit.

(3) Section 1915(c) waiver program. In accordance with 42 CFR §435.217, this is a person who would be eligible for Medicaid if institutionalized, but is living in the community and receiving services under a §1915(c) waiver program.

(d) Other. In accordance with the Texas State Plan for Medical Assistance, HHSC determines Medicaid eligibility for MEPD for a person who meets the criteria for one of the following services:

(1) Primary home care services. This is a person who needs primary home care services and meets the criteria established in §1929(b)(2)(B) of the Social Security Act (42 U.S.C. §1396t(b)(2)(B)) but is not otherwise eligible for Medicaid.

(2) Program of All-Inclusive Care for the Elderly (PACE). In accordance with 42 CFR Part 460, this is a person who is enrolled in a PACE program under a PACE program agreement.

(3) *Susan Walker v. Bayer Corporation* services. A person who has received payments from the class action settlement of *Susan Walker v. Bayer Corporation* may be eligible for Medicaid as a result of excluding from countable resources the payments from the settlement.

(e) Retroactive coverage. In accordance with 42 CFR §435.914, HHSC may determine eligibility for retroactive coverage:

(1) for up to three months before the date of application for:

(A) an applicant;

(B) a person who has been denied SSI;

(C) a deceased person, if a representative for the deceased person requests that HHSC determine eligibility for retroactive coverage; and

(D) a person eligible under the SSI-denied-children coverage group in subsection (b)(8) of this section; and

(2) for up to two months before the month in which an SSI recipient's Medicaid coverage automatically begins.

(f) Medicare Savings Program. In accordance with 42 U.S.C. §1396a(a)(10)(E), HHSC may determine eligibility for a person who meets the criteria in Chapter 359 of this title (relating to Medicare Savings Program) for a Medicare Savings Program, which uses Medicaid funds to help the person pay for all or some of the person's out-of-pocket Medicare expenses, such as premiums, deductibles, or coinsurance.

(g) Medicaid Buy-In Program. In accordance with §1902(a)(10)A) (ii)(XIII) of the Social Security Act (42 U.S.C. §1396a(a)(10)(A)(ii)(XIII)), HHSC may determine eligibility for a person with a disability who is working and earning income and meets the criteria established in Chapter 360 of this title (relating to Medicaid Buy-In 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 11, 2009.

TRD-200901767
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 424-6900

SUBCHAPTER B. NONFINANCIAL REQUIREMENTS

1 TAC §§358.201, 358.203, 358.205, 358.207, 358.209, 358.211, 358.213, 358.215, 358.217, 358.219

Statutory Authority

The new sections are proposed under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; and §531.021, which authorizes HHSC to administer the federal medical assistance (Medicaid) program in Texas.

The new sections affect Texas Government Code, Chapter 531. No other statutes, articles, or codes are affected by this proposal.

§358.201. Purpose and Scope.

(a) This subchapter describes the nonfinancial Medicaid eligibility criteria for a Medicaid-funded program for the elderly and people with disabilities (MEPD).

(b) Financial Medicaid eligibility criteria for MEPD are described in Subchapter C of this chapter (relating to Financial Requirements).

§358.203. Citizenship and Qualified Alien Status.

(a) In accordance with 42 CFR §435.406, to be eligible for a Medicaid-funded program for the elderly and people with disabilities (MEPD), a person must be:

(1) a citizen or national of the United States (U.S.);

(2) an alien who entered the U.S. before August 22, 1996, who has lived in the U.S. continuously since entry, and who meets the definition of a qualified alien at 8 U.S.C. §1641; or

(3) an alien who entered the U.S. on or after August 22, 1996, who has lived in the U.S. continuously since entry, and who meets the definition of a qualified alien at 8 U.S.C. §1641 with the eligibility limitations in 8 U.S.C. §1612 and §1613.

(b) A person must provide proof of eligibility under subsection (a) of this section that establishes both identity and citizenship or alien status, unless the person:

(1) receives Supplemental Security Income (SSI) or has ever received SSI and was not denied due to citizenship;

(2) is entitled to or enrolled in any part of Medicare, as determined by the Social Security Administration (SSA); or

(3) is entitled to federal disability benefits based on SSA disability criteria.

§358.205. Alien Status for Treatment of an Emergency Medical Condition.

(a) Title XIX of the Social Security Act (42 U.S.C. §1396 et seq.) and 42 CFR §440.255 require the state to provide Medicaid for the treatment of an emergency medical condition to an alien who is ineligible for regular Medicaid due to immigration status. The Texas Health and Human Services Commission administers the program in Texas.

(b) To qualify for Medicaid for the treatment of an emergency medical condition, an alien must:

(1) be:

(A) a qualified alien as defined in 8 U.S.C. §1641 and not meet the requirements to receive Medicaid as described in 8 U.S.C. §1612 and §1613; or

(B) an undocumented non-qualifying alien as described in 8 U.S.C. §1611;

(2) be otherwise eligible for regular Medicaid services; and

(3) require treatment of an emergency medical condition as described in 42 CFR §440.255.

(c) An undocumented non-qualifying alien applying for Medicaid for the treatment of an emergency medical condition is exempt from providing proof of alien status or providing a Social Security number as described in 42 CFR §435.406(b).

§358.207. Residence.

To be eligible for a Medicaid-funded program for the elderly and people with disabilities, a person must be a resident of the United States (U.S.) and the state of Texas.

(1) U.S. residence.

(A) The U.S. residence requirement does not apply to:

(i) a child who is a citizen and is living with a parent who is a member of the U.S. Armed Forces assigned to permanent duty ashore outside the U.S.; or

(ii) to certain persons temporarily abroad for study.

(B) Once eligible for benefits, a person must maintain a presence in the U.S. in accordance with 42 U.S.C. §1382(f)(1). If a person has been outside the U.S. for 30 consecutive days, the person is not eligible for benefits until the person has been in the U.S. for 30 consecutive days.

(2) Texas residence. The Texas Health and Human Services Commission follows 42 CFR §435.403 in determining a person's state residence.

§358.209. Social Security Number.

In accordance with 42 CFR §435.910, a person must give his or her social security number to the Texas Health and Human Services Commission as a condition of eligibility, except as provided in §358.205(c) of this subchapter (relating to Alien Status for Treatment of an Emergency Medical Condition).

§358.211. Aged, Blind, or Disabled.

(a) To be eligible for a Medicaid-funded program for the elderly and people with disabilities (MEPD), a person must be aged, blind, or disabled, according to the following criteria:

(1) Aged. A person must be 65 years of age or older to be considered aged, in accordance with 42 U.S.C. §1382c(a)(1)(A).

(2) Blind.

(A) To be considered blind for eligibility purposes, a person must meet the criteria in 42 U.S.C. §1382c(a)(2).

(B) There is no minimum age requirement for a person who is blind.

(C) A person must have a medical determination of blindness before the Texas Health and Human Services Commission (HHSC) can determine eligibility.

(3) Disabled.

(A) To be considered disabled for eligibility purposes, a person must meet the criteria in 42 U.S.C. §1382c(a)(3).

(B) There is no minimum age requirement for a person who is disabled, unless the person lives in an institution for mental diseases as described in §358.213 of this subchapter (relating to Resident of an Institution for Mental Diseases).

(C) A person must have a medical determination of a disability before HHSC can determine eligibility.

(b) A person under 65 years of age who has applied for Supplemental Security Income, and subsequently applies for retroactive coverage, must have a medical determination of blindness or a disability effective during any month of coverage that the person was under 65 years of age.

§358.213. Resident of an Institution for Mental Diseases.

A person who lives in an institution for mental diseases must be 65 years of age or older to be eligible for a Medicaid-funded program for the elderly and people with disabilities.

§358.215. Inmates of Public Institutions.

An inmate of a public institution, including a jail, prison, reformatory, or other correctional or holding facility, as defined in 42 CFR §435.1009 and §435.1010, is not eligible for Medicaid payment for Medicaid-covered services received while residing in the public institution.

§358.217. Application for Other Benefits.

To be eligible for a Medicaid-funded program for the elderly and people with disabilities, a person must apply for and obtain, if eligible, all other benefits to which the person may be entitled, in accordance with 42 U.S.C. §1382(e)(2).

§358.219. Third-party Resources.

(a) Medicaid is considered the payor of last resort for a person's medical expenses. As a condition of eligibility, in accordance with 42 CFR §§433.138 - 433.148, an applicant or recipient must:

(1) assign to the Texas Health and Human Services Commission (HHSC) the applicant's or recipient's right to recover any third-party resources available for payment of medical expenses covered under the Texas State Plan for Medical Assistance; and

(2) report to HHSC any third-party resource within 60 days after learning about the third-party resource.

(b) If HHSC determines that a person's employer-based health insurance is cost-effective, the person must participate in HHSC's Health Insurance Premium Payment program as a condition of eligibility. HHSC denies eligibility to a person who voluntarily drops his or her employer-based health insurance or fails to provide HHSC with the information needed to determine cost effectiveness.

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 11, 2009.

TRD-200901768
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 424-6900

SUBCHAPTER C. FINANCIAL REQUIREMENTS

DIVISION 1. INTRODUCTION

1 TAC §358.301

Statutory Authority

The new section is proposed under Texas Government Code, §531.0055, which provides the Executive Commissioner of

HHSC with rulemaking authority; and §531.021, which authorizes HHSC to administer the federal medical assistance (Medicaid) program in Texas.

The new section affects Texas Government Code, Chapter 531. No other statutes, articles, or codes are affected by this proposal.

§358.301. Purpose and Scope.

(a) This subchapter describes:

(1) the financial eligibility criteria for a Medicaid-funded program for the elderly and people with disabilities (MEPD); and

(2) the budgeting process for determining financial eligibility and a co-payment amount, if applicable.

(b) The Texas Health and Human Services Commission determines a person's financial eligibility for MEPD by assessing the person's income and resources and applying federal income and resources eligibility criteria.

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 11, 2009.

TRD-200901769
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 424-6900

DIVISION 2. RESOURCES

1 TAC §§358.321 - 358.327, 358.331, 358.333 - 358.339, 358.345 - 358.355, 358.371

Statutory Authority

The new sections are proposed under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; and §531.021, which authorizes HHSC to administer the federal medical assistance (Medicaid) program in Texas.

The new sections affect Texas Government Code, Chapter 531. No other statutes, articles, or codes are affected by this proposal.

§358.321. General Treatment of Resources.

(a) The Texas Health and Human Services Commission (HHSC) follows §1613 of the Social Security Act (42 U.S.C. §1382b) and 20 CFR §416.1201 regarding the general treatment of resources.

(b) HHSC follows 20 CFR §416.1207 regarding the determination of resources. Resource determinations are made as of 12:01 a.m. on the first day of the month.

(c) If a person's countable resources exceed the resource limit as of 12:01 a.m. on the first day of the month, the person is not eligible for the entire month. Eligibility may be reestablished no sooner than the first day of the next month.

§358.322. Conversion of Resources.

If a person converts one type of resource to another, the new resource is counted according to the policy governing that type of resource. Cash received from the sale of a resource is counted as a resource, not as income. This includes proceeds from the sale of a natural resource, such as cutting timber from the person's home property and selling it as firewood, except as follows:

(1) If the owner leases the land or resource rights, the income received from the lease is unearned income.

(2) If the sale of the natural resource is part of the person's trade or business, the income received is self-employment income.

§358.323. Resource Limits.

A person or a couple meets resources eligibility criteria if the value of all countable resources does not exceed the resource limits in 20 CFR §416.1205.

(1) Individual resource limit. The individual resource limit applies to:

(A) an adult who is single, even if he or she lives with relatives;

(B) a child; and

(C) a person whose spouse lives in a different household.

(2) Couple resource limit. The couple resource limit applies to married adults who live in the same household.

§358.324. Deeming of Resources.

(a) The Texas Health and Human Services Commission (HHSC) follows deeming of countable resources in accordance with 20 CFR §416.1202.

(b) If a parent is a caretaker or a recipient in the Temporary Assistance for Needy Families Program, the parent's resources are not counted when considering deeming to a child.

(c) If a member of a household is temporarily absent as defined in 20 CFR §416.1167, HHSC continues to consider the absent person a member of the household for the purposes of deeming during a temporary absence, in accordance with 20 CFR §416.1167.

§358.325. Ownership Interest and Legal Right to Access a Resource.

The Texas Health and Human Services Commission (HHSC) follows 20 CFR §416.1201(a)(1) when considering whether a person has the right, authority, or power to liquidate a property or the person's share of the property.

§358.326. Unknown Assets.

If a person is unaware of the ownership of an asset, the asset is not counted as a resource for the period during which the person is unaware of the ownership. The asset is counted as income in the month that the person discovers the ownership. The asset is counted as a resource effective the first of the month after the month of discovery.

§358.327. Transactions Involving Agents.

(a) An action by a fiduciary agent is the same as an action by the person for whom the fiduciary agent acts.

(1) An asset held by a fiduciary agent for another person is not a countable asset to the fiduciary agent.

(2) An asset held by a fiduciary agent for another person is a countable asset to the person for whom the fiduciary agent acts, unless otherwise excludable.

(b) A person's resources are available if the resources are being managed by a legal guardian, representative payee, power of attorney, or fiduciary agent. If, however, a court denies a guardian or fiduciary agent access to the person's resources, the resources are not considered available to the person.

(1) If a person's guardianship papers do not show that a legal guardian is prohibited access, and if the court has not subsequently ruled a prohibition, the resources are considered available.

(2) A guardian's routine need to petition the court for permission to dispose of a person's resources is not a prohibition.

(3) When the court rules on a petition to dispose of a person's resources, resources are considered available only to the extent to which the court has made the resources available for the person's benefit.

§358.331. General Exclusions from Resources.

The Texas Health and Human Services Commission follows 20 CFR §416.1210 in determining what resources to exclude, and also excludes:

(1) patrimonial assets that are irrevocably turned over to a religious order following a vow of poverty, which are not considered a transfer of assets;

(2) reparation payments received under Sections 500 - 506 of the Austrian General Social Insurance Act;

(3) payments received under the Netherlands' Act on Benefits for Victims of Persecution 1940 - 1945; and

(4) payments made in the class settlement of the *Susan Walker v. Bayer Corporation* lawsuit.

§358.333. Treatment of Employment- and Retirement-Related Annuities.

(a) In this section:

(1) an employment-related annuity means an annuity that provides a return on prior services, as part of or in a similar manner to a pension or retirement plan; and

(2) a retirement-related annuity means an annuity purchased by or on behalf of an annuitant in an institutional setting.

(b) An employment-related annuity or a retirement-related annuity established before February 8, 2006, is not a countable resource. Income from such an annuity is treated in accordance with 20 CFR §§416.1120 - 416.1124.

(c) An employment-related annuity established or having a transaction on or after February 8, 2006, is not a countable resource. Income from such an annuity is treated in accordance with 20 CFR §§416.1120 - 416.1124.

(d) A retirement-related annuity with a purchase or transaction date on or after February 8, 2006, is not a countable resource, if the annuitant's income eligibility is determined under the special income limit. Income from such an annuity is treated in accordance with 20 CFR §§416.1120 - 416.1124, if the annuity:

(1) is an annuity described in subsection (b) or (q) of §408 of the Internal Revenue Code of 1986; or

(2) is purchased with proceeds from:

(A) an account or trust described in subsection (a), (c), or (p) of §408 of the Internal Revenue Code of 1986;

(B) a simplified employee pension (within the meaning of §408(k) of the Internal Revenue Code of 1986; or

(C) a Roth IRA described in §408A of the Internal Revenue Code of 1986.

§358.334. Treatment of a Nonemployment-Related Annuity with a Purchase or Transaction Date before February 8, 2006.

(a) This section describes the Texas Health and Human Services Commission's (HHSC's) treatment of nonemployment-related annuities purchased or having a transaction date before February 8, 2006. In this section, a nonemployment-related annuity means a revocable or irrevocable annuity a person may purchase to provide income.

(b) A nonemployment-related annuity is not a countable resource if the annuity:

(1) is irrevocable;

(2) pays out principal in equal monthly installments and pays out interest in either equal monthly installments or in amounts that result in increases of the monthly installments at least annually;

(3) is guaranteed to return within the person's life expectancy at least the person's principal investment plus a reasonable amount of interest (based on prevailing market interest rates at the time of the annuity purchase, as determined by HHSC);

(4) names the state of Texas or HHSC as the residual beneficiary of amounts payable under the annuity contract, not to exceed any Medicaid funds expended on the person during the person's lifetime, except as described in subsection (c) of this section; and

(5) is issued by an insurance company licensed and approved to do business in the state of Texas.

(c) If a person in an institutional setting is married and the spousal impoverishment provisions of §358.413 of this subchapter (relating to Spousal Impoverishment Treatment of Income and Resources) apply, the requirement in subsection (b)(4) of this section does not apply to a nonemployment-related annuity purchased by or for a community spouse.

(d) A nonemployment-related annuity that does not meet the requirements of subsection (b) or (c) of this section is a countable resource.

(1) HHSC applies transfer-of-assets provisions in Division 4 of this subchapter (relating to Transfer of Assets) to an annuity that is a countable resource and does not meet the criterion in subsection (b)(3) of this section. The date of the transfer of assets is the date of the annuity purchase or, if applicable, the date the annuity contract was last amended in exchange for consideration. HHSC determines the amount of the transfer by assessing the difference between the life expectancy of the person and the number of years remaining until the annuity is paid out. The amount payable during that period is the amount of the transfer of assets.

(2) If the annuity is a countable resource and is revocable, HHSC:

(A) counts the amount refundable upon revocation of the annuity as the value of the resource; and

(B) applies transfer-of-assets provisions in Division 4 of this subchapter if the person sells the annuity for less than the amount refundable upon revocation.

(3) If the annuity is a countable resource and is irrevocable, HHSC:

(A) counts fair market value as the value of the resource and presumes fair market value is 80% of the annuity's total remaining payout;

(B) applies transfer-of-assets provisions in Division 4 of this subchapter if the annuity is sold for less than the purchase price minus the amount of principal already paid; and

(C) if the terms of the annuity contract are non-negotiable, applies transfer-of-assets provisions in Division 4 of this subchapter to the total remaining payout.

(e) Income from a nonemployment-related annuity that is not a countable resource under subsection (c) of this section is treated in accordance with 20 CFR §§416.1120 - 416.1124.

§358.335. Treatment of Annuities with a Purchase or Transaction Date on or after February 8, 2006.

(a) This section describes the Texas Health and Human Services Commission's (HHSC's) treatment of nonemployment-related annuities purchased or having a transaction date on or after February 8, 2006. In this section, a nonemployment-related annuity means a revocable or irrevocable annuity a person may purchase to provide income.

(b) A nonemployment-related annuity is not a countable resource if the annuity:

(1) is irrevocable;

(2) is nonassignable;

(3) provides for payments in equal amounts during the term of the annuity, with no deferral and no balloon payments made;

(4) is guaranteed to return within the person's life expectancy at least the person's principal investment (that is, it is actuarially sound, as determined in accordance with actuarial publications of the Office of the Chief Actuary of the United States Department of Health and Human Services); and

(5) names the state of Texas as the remainder beneficiary in the first position for at least the total amount of Medicaid paid on behalf of a person in an institutionalized setting.

(c) If a person in an institutionalized setting is married and the spousal impoverishment provisions of §358.413 of this subchapter (relating to Spousal Impoverishment Treatment of Income and Resources) apply, a nonemployment-related annuity is not a countable resource if the annuity meets the requirements of subsection (b)(1) - (4) of this section and the annuity:

(1) names the state of Texas as the remainder beneficiary in the first position for at least the total amount of Medicaid paid on behalf of the person in an institutional setting; or

(2) names the state of Texas in the second position if the community spouse or a minor or disabled child is named in the first position.

(d) A nonemployment-related annuity that is revocable is a countable resource. For a revocable nonemployment-related annuity, HHSC:

(1) uses fair market value to determine the value of the resource; and

(2) applies transfer-of-assets provisions in Division 4 of this subchapter (relating to Transfer of Assets) based on the amount already paid out of the annuity.

(e) A nonemployment-related annuity that is irrevocable is not a countable resource. For an irrevocable nonemployment-related annuity, HHSC:

(1) applies transfer-of-assets provisions in Division 4 of this subchapter to the purchase price of the annuity; and

(2) for a transaction involving an existing annuity, applies transfer-of-assets provisions to the remaining payout value at the time of the transaction.

(f) Income from an annuity that is not a countable resource is treated in accordance with 20 CFR §§416.1120 - 416.1124.

§358.336. Treatment of Testamentary or Inter Vivos Trusts.

(a) In this section, the following words have the following meanings, unless the context clearly indicates otherwise.

(1) Testamentary trust--A trust established by will.

(2) Inter vivos trust--A trust established while the person creating the trust is still living.

(b) Resources in a testamentary or inter vivos trust are countable to a person if the person is the trustee and has the legal right to revoke the trust and use the money for the person's own benefit.

(1) If a person does not have access to the trust, then the trust is not counted as a resource.

(2) If a person's access to a trust is restricted (that is, only the trustee (other than the person) or the court may withdraw the principal), then the value of the trust as a resource is not counted, even if:

(A) the person's legal guardian is the trustee;

(B) the trust provides a regular, specified payment to the person; or

(C) the trust provides for discretionary withdrawals by the trustee.

(3) If a trust is not counted as a resource, payments from the trust made to or on behalf of the person are counted as income, except payments used to purchase medical or social services for the person.

§358.337. Treatment of a Medicaid-qualifying Trust.

(a) A Medicaid-qualifying trust (MQT) is a trust that a recipient, the recipient's spouse or guardian, or anyone holding the recipient's power of attorney establishes using the recipient's money. The recipient is the beneficiary of an MQT. A trust meeting this definition that was established between June 1, 1986, and August 10, 1993, is an MQT. A trust meeting this definition that was established before June 1, 1986, is treated as a standard inter vivos trust.

(b) Except as described in §358.338 of this division (relating to Treatment of a Trust Established with *Zebley v. Sullivan* Settlement Funds), the Texas Health and Human Services Commission (HHSC) counts potential distributions from an MQT as resources available to a person, whether or not distributions are actually made.

(1) The amount available to the person is the maximum amount the trustee could distribute under the terms of the trust.

(2) If distribution is not made, the maximum amount the trustee may distribute under terms of the trust is considered an available resource.

(3) If a trust does not specify an amount for distribution, and if the trustee has access to and use of the principal, then HHSC counts:

(A) the corpus of the trust as a resource; and

(B) payments from the trust to or for the benefit of the person as income.

§358.338. Treatment of a Trust Established with Zebley v. Sullivan Settlement Funds.

(a) The Texas Health and Human Services Commission excludes a Medicaid-qualifying trust established for a minor child using a lump sum payment received in the settlement of *Zebley v. Sullivan* from countable resources under undue hardship provisions. Undue hardship

exists because the minor child would otherwise be forced to spend the settlement funds on services now covered by Medicaid when the funds will be needed once the minor child reaches majority.

(b) A trust established using *Zebley v. Sullivan* settlement funds is excluded under undue hardship policy, even when the trust is set up on or after August 11, 1993.

§358.339. Treatment of Trusts on and after August 11, 1993.

(a) Introduction. The Texas Health and Human Services Commission (HHSC) follows §1917(d) of the Social Security Act (42 U.S.C. §1396p(d)) regarding the treatment of trusts established on or after August 11, 1993, using a person's assets. The trust provisions apply to a person receiving benefits under a Medicaid-funded program for the elderly and people with disabilities (MEPD), whether the person is in an institutional or a noninstitutional setting. However, transfer-of-assets provisions apply only to a person in an institutional setting.

(b) Limited partnerships.

(1) A limited partnership is a "similar legal device" to a trust. In accordance with the definition of a trust in §1917(d)(6) of the Social Security Act (42 U.S.C. §1396p(d)(6)), HHSC treats a limited partnership as a trust and applies the provisions of this section to a limited partnership. The general partners of a limited partnership act as trustee, and the limited partners are the equivalent of beneficiaries of an irrevocable trust. To the extent that the general partners can make each limited partner's ownership interest available to him, that interest is a countable resource and not a transfer of assets. However, a transfer of assets has occurred to the extent that:

(A) the value of the share of ownership purchased by the limited partner is less than the amount the limited partner invested; and

(B) the general partners cannot make the limited partner's share available to the limited partner.

(2) If transfer-of-assets provisions apply, a limited partnership is not considered a trust instrument when determining the look-back period.

(c) Qualified income trust (QIT).

(1) A QIT is an irrevocable trust established for the benefit of a person or the person's spouse, or both, the corpus of which is composed only of the person's or the couple's income (including accumulated income). The trust must include a provision that the State is designated as the residuary beneficiary to receive, at the person's death, funds remaining in the trust equal to the total amount of Medicaid paid on the person's behalf.

(2) Characteristics of a QIT are as follows:

(A) The trust must be irrevocable.

(B) The trust must contain only the person's income. If resources are placed in the trust, it is not a QIT. However, some banks may require nominal deposits to establish a financial account to fund the trust. Nominal amounts of the person's resources, or another party's funds, may be used to establish the account without invalidating the trust or being counted as gift income to the person. Once the trust account is established, however, only the person's income should be directed to the trust account.

(C) The person's income does not have to be directly deposited into the trust. However, the income for which the trust is established must be deposited into the trust during the month it is received by the person.

(D) A QIT may be established with any or all sources of a person's income, but the income source must be identified and the entire income source must be deposited. For example, the trust may be established for a person's private pension income, but not the person's Social Security income. If a trust is established with only half of the pension income, it is not a QIT.

(3) A QIT is not counted as a resource.

(4) Income directed to a QIT is not counted when testing eligibility for services in an institutional setting.

(A) Income must be directed to the trust account during the calendar month in which it is received. Any source of nonexempt or nonexcludable income that is not directed to the QIT account during the calendar month of receipt is countable income for that month. If countable income exceeds the income limit, the person is income-ineligible for the month. An applicant may not be certified for any calendar month in which the applicant is income-ineligible. For a recipient, HHSC requests restitution in the amount of the provider payment for any calendar month in which the person is income-ineligible.

(B) Income directed to the trust is counted in determining eligibility for a person in a noninstitutional setting and for a person applying for or receiving benefits from a Medicare Savings Program as described in Chapter 359 of this title (relating to Medicare Savings Program).

(C) Income paid from the trust for an institutional setting co-payment or to purchase other medical services for the person is not countable income for eligibility purposes. Income paid from the trust directly to the person or otherwise spent for the person's benefit is countable income for eligibility purposes.

(D) A person cannot use income from a QIT to purchase eligibility for a §1915(c) waiver program.

(E) If the trustee directs to the trust account different sources of income than those identified in the QIT, but directs entire sources and countable income remains within the special income limit, eligibility is not affected.

(5) If the trust instrument requires that the income placed in the trust must be paid out of the trust for the person's care in an institutional setting, transfer-of-assets provisions do not apply because the person receives fair market value for the income that was placed into the trust. However, if there is no such requirement or the income is not used for the person's care, transfer-of-assets provisions apply. The income must be paid out by the end of the month after the month funds were placed in the trust to avoid application of the transfer-of-assets provisions. Transfer-of-assets provisions do not apply when the QIT provisions allow payments to or for the benefit of the person's spouse.

(6) The institutional setting co-payment amount is based on the person's total income (income directed to the trust as well as income not directed to the trust), minus the standard co-payment deductions. Costs of trust administration are not budgeted in the co-payment calculation. Transfer-of-assets provisions do not apply when legal and accounting fees necessary to maintain the trust are paid from the trust.

(7) HHSC disregards the income placed in a QIT for eligibility purposes for the first month that the person has a valid signed trust and enough income is placed in the account to reduce the remaining income below the special income limit.

(d) Undue hardship.

(1) As provided under §1917(d) of the Social Security Act (42 U.S.C. §1396p(d)(5)), this section does not apply if application of the trust provisions in this section would work an undue hardship on

the person. Undue hardship exists if application of the trust provisions would:

(A) deprive the person of medical care so that the person's health or his life would be endangered; or

(B) deprive the person of food, shelter, or other necessities of life.

(2) Undue hardship does not exist if a person is inconvenienced or must restrict his or her lifestyle but is not at risk of serious deprivation. Undue hardship relates to hardship to the person, not to relatives or authorized representatives of the person.

(3) Before requesting a waiver of the trust provisions on the grounds of undue hardship, a person must make reasonable efforts to recover assets placed in a trust, such as petitioning the court to dissolve the trust. HHSC determines undue hardship after receiving a request for a waiver of the trust provisions on the grounds of undue hardship. The person has the right to appeal HHSC's determination on undue hardship.

§358.345. Entrance Fees for Continuous Care Retirement Communities.

The Texas Health and Human Services Commission follows §1917(g) of the Social Security Act (42 U.S.C. §1396p(g)) regarding the treatment of entrance fees of a person residing in a continuous care retirement community.

§358.346. Funds Held in Financial Institution Accounts.

The Texas Health and Human Services Commission follows 20 CFR §416.1208 regarding the treatment of funds held in financial institution accounts, except the balance of funds in a financial institution account as of 12:01 a.m. on the first day of the month is reduced by the amount of any funds encumbered before that time, including any checks written, that have not yet been processed by the financial institution.

§358.347. Nonliquid Resources.

The Texas Health and Human Services Commission follows 20 CFR §416.1201(c) regarding the definition and treatment of nonliquid resources, except with regard to the treatment of an automobile as described in §358.354 of this division (relating to Automobiles).

§358.348. Exclusion of a Home.

(a) The Texas Health and Human Services Commission follows 20 CFR §416.1212 regarding the treatment of a home, except HHSC does not count the equity value of a home that is the principal place of residence of an applicant or recipient or the applicant's or recipient's spouse:

(1) if the home is in Texas, and the applicant or recipient occupies or intends to return to the home; or

(2) if the home meets the criteria in §358.415(b) of this subchapter (relating to Calculation of the Spousal Protected Resource Amount).

(b) For a person or couple living in an institutional setting, if the person or couple transfers ownership of the home for less than market value while the home is excluded, the transfer automatically nullifies the exclusion.

§358.349. Exceptions to Treatment of Excess Real Property.

(a) The Texas Health and Human Services Commission (HHSC) follows 20 CFR §416.1245 regarding the treatment of excess real property, except the property continues to be excluded for as long as:

(1) the person continues to make reasonable efforts to sell it; and

(2) including the property as a countable resource would result in a determination of excess resources.

(b) Once the property is sold, the equity value received is a countable resource in the month following the month of sale. If the sale was for less than the fair market value or current market value, the sale of the property is subject to the transfer-of-assets provisions in Division 4 of this subchapter (relating to Transfer of Assets).

§358.350. Life Estates and Remainder Interest.

The Texas Health and Human Services Commission (HHSC) counts both a life estate and a remainder interest in property as resources, except as described in paragraph (3) of this section.

(1) Life estates. A life estate provides a person, for the person's lifetime, certain rights in a property, while transferring ownership of the property to another person. The duration of a life estate is measured by the lifetime of the owner of the life estate, or by the occurrence of some event. The contract establishing a life estate, however, may restrict one or more rights of the owner of the life estate. The owner of a life estate does not have fee simple title to the property nor the right to sell the entire property. In most situations, the owner of a life estate has the right to:

(A) possess the property;

(B) use the property;

(C) get profits from the property; and

(D) sell his or her life estate interest.

(2) Remainder interest. A remainder interest, which is created when a life estate is established, gives a person owning a remainder interest the right to ownership of the property upon the death of the owner of the life estate. A person owning a remainder interest in the property has the right to sell his or her remainder interest unless the person is prohibited from doing so by a legal restriction.

(3) Exclusion for life estates and remainder interests. Life estates and remainder interests are not counted as resources if:

(A) the property is the person's home and can be excluded under §358.348 of this division (relating to Exclusion of a Home);

(B) a contract restriction prevents the person from disposing of the person's interest;

(C) the property is producing income and may be excluded under 20 CFR §§416.1220, 416.1222, and 416.1224; or

(D) the property is placed for sale and the person is in an institutional setting.

(4) Determination of value. If a person has a life estate or remainder interest that is not excludable under paragraph (3) of this section, HHSC determines the value of the resource according to the age of the owner of the life estate and the equity value of the property. The person has the right to rebut HHSC's determination of the value of the resource. To do so, the person must present a statement from a knowledgeable source.

(5) A purchase of a life estate before April 1, 2006, is not considered a transfer of assets, unless the purchase price of the life estate exceeds the fair market value (FMV) of the life estate. If the purchase price of the life estate exceeds the FMV of the life estate, the

transfer-of-assets provisions in Division 4 of this subchapter (relating to Transfer of Assets) apply.

(6) A purchase of a life estate on or after April 1, 2006, is a transfer of assets, subject to the transfer-of-assets provisions in Division 4 of this subchapter, unless the person purchasing a life estate in another person's home resides in the home and continues to reside in the home for at least one year after the date of purchase.

§358.351. Mineral Rights.

(a) The Texas Health and Human Services Commission counts the equity value of a person's ownership of or interest in mineral rights as a resource, unless the mineral rights are:

(1) connected with property excluded as a home; or

(2) excluded as property essential to self-support under 20 CFR §§416.1220, 416.1222, and 416.1224.

(b) Ownership of mineral rights may or may not be associated with ownership of land. Surface rights are ownership interests in the exterior or upper boundary of land. Ownership of mineral rights does not automatically indicate ownership of surface rights.

§358.352. Burial Spaces.

The Texas Health and Human Services Commission follows 20 CFR §416.1231 regarding the definition, treatment, and exclusion of burial spaces, except that a burial space purchased by a person is:

(1) excluded from countable resources if it is held for the person, the person's spouse, or anyone of the person's choosing; and

(2) counted as a resource if the purchase was made for investment purposes.

§358.353. Term and Burial Insurance.

The Texas Health and Human Services Commission does not count term insurance or burial insurance as a resource, except as described in paragraphs (3) and (4) of this section.

(1) Term insurance is a contract of temporary protection. The insured pays relatively small premiums for a limited number of years, and the company agrees to pay the face amount of the policy only if the insured dies within the time specified in the policy. It has no cash surrender value.

(2) Burial insurance is a form of term insurance. By its terms, burial insurance can only be used to pay the burial expenses of the insured.

(3) If a term insurance policy has been purchased by a life insurance company and premiums are used to purchase separate whole life coverage, the whole life coverage is subject to the provisions of 20 CFR §416.1230.

(4) If a term insurance policy is a participating life insurance policy, any dividend accumulation at interest is a countable resource.

§358.354. Automobiles.

(a) The Texas Health and Human Services Commission (HHSC) follows 20 CFR §416.1218 regarding the definition, treatment, and exclusion of automobiles.

(b) In addition to the one automobile HHSC excludes regardless of value, HHSC excludes a second automobile, in accordance with 20 CFR §416.1218(b)(1), if:

(1) the automobile has been modified to accommodate a person with a disability, and there is a household member (other than the applicant or recipient) who has a disability and must use the automobile; or

(2) the household is made up of more than one person and:

(A) a household member (other than the applicant or recipient) requires an additional automobile for transportation to and from work; and

(B) the applicant or recipient requires one automobile available for medical use at all times.

§358.355. Qualified Long-Term Care Partnership Program Insurance Policies.

(a) This section describes the Long-Term Care Partnership Program under which a person's resources are disregarded in the eligibility determination equal to the amount of benefits paid to or on behalf of a person by a Long-Term Care Partnership policy.

(b) The Texas Health and Human Services Commission (HHSC) administers the Long-Term Care Partnership Program.

(c) In this section, the following words and terms have the following meanings, unless the context clearly indicates otherwise:

(1) "Long-Term Care Partnership Program" means the program established under the Texas Human Resources Code, Chapter 32, Subchapter C.

(2) "Qualified plan holder" means the beneficiary of a qualified long-term care benefit plan that meets the requirements set forth in subsection (d) of this section.

(3) "Resource disregard" means the total equity value of resources not exempt under rules governing Medicaid eligibility that are disregarded in determining eligibility for Medicaid.

(4) "Resource protection" means the extension to a plan holder of an approved plan of a dollar-for-dollar resource disregard in determining Medicaid eligibility.

(5) "Dollar-for-dollar resource disregard" means a resource disregard in which the amount of the disregard is equal to the sum of benefit payments made on behalf of the approved plan holder.

(d) A Long-Term Care Partnership Program policy is one that meets all of the following requirements:

(1) On the date the policy was issued, the state in which the insured resided had in place an approved Medicaid state plan amendment under 42 U.S.C. §1396p(b).

(2) The policy meets the requirements set forth by the Texas Department of Insurance under Title 28, Part 1, Chapter 3 of the Texas Administrative Code (relating to Life, Accident and Health Insurance and Annuities).

(e) At application for long-term care services, the qualified plan holder receives a dollar-for-dollar disregard of his or her resources.

(1) HHSC determines Medicaid eligibility in accordance with this chapter.

(2) A person may apply for Medicaid before exhausting the benefits of a Long-Term Care Partnership Program policy. If a person applies for and is eligible to receive Medicaid before the Long-Term Care Partnership Program policy is exhausted, the Long-Term Care Partnership Program insurer must make payment for medical assistance to the maximum extent of its liability before Medicaid funds may be used to pay providers for covered services as established in this chapter.

(3) If a person has applied for and been found eligible to receive Medicaid and subsequently receives additional resources, the person continues to be eligible for Medicaid if the total resources do not exceed the individual resource limit after applying the dollar-for-dollar resource disregard.

(f) If the Long-Term Care Partnership Program is discontinued, a person who purchased a Long-Term Care Partnership Program policy before the date the program is discontinued remains eligible to receive the dollar-for-dollar resource exclusion.

§358.371. Treatment of Other Resources.

The Texas Health and Human Services Commission follows the federal regulations indicated in the table in this section regarding the treatment of resources not otherwise described in this division:
Figure: 1 TAC §358.371

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 11, 2009.

TRD-200901770
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 424-6900

DIVISION 3. INCOME

1 TAC §§358.381 - 358.387, 358.391

Statutory Authority

The new sections are proposed under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; and §531.021, which authorizes HHSC to administer the federal medical assistance (Medicaid) program in Texas.

The new sections affect Texas Government Code, Chapter 531. No other statutes, articles, or codes are affected by this proposal.

§358.381. General Treatment of Income.

(a) The Texas Health and Human Services Commission (HHSC) follows §1612 of the Social Security Act (42 U.S.C. §1382a) and 20 CFR §§416.1101 - 416.1104 regarding the definition and general treatment of income for the purpose of determining financial eligibility and calculating a co-payment.

(b) A lump sum payment is countable income in the month of receipt and is a resource thereafter.

(c) A person in an institutional setting may retain a personal needs allowance (PNA) in an amount set by the HHSC executive commissioner in accordance with Chapter 32 of the Texas Human Resources Code.

(1) The PNA is not applied toward the cost of medical assistance furnished in an institutional setting.

(2) For a person receiving the reduced SSI benefit rate, HHSC issues a supplement to give the person a PNA at the minimum level set by the HHSC executive commissioner.

(d) An action by a fiduciary agent is the same as an action by the person for whom the fiduciary agent acts.

(1) Monies received by a fiduciary agent for another person are not income to the fiduciary agent. If the fiduciary agent is authorized to keep part of the money as compensation for services rendered, the compensation for services rendered is unearned income to the fiduciary agent.

(2) Monies received by a fiduciary agent for another person are charged as income to the person when the monies are received by the fiduciary agent.

§358.382. Variable Monthly Income.

The Texas Health and Human Services Commission averages monthly countable income that is predictable but varies in amount from month to month.

§358.383. Deeming of Income.

The Texas Health and Human Services Commission follows 20 CFR §§416.1160 - 416.1166 regarding the definition and treatment of deemed income for a person in a noninstitutional setting.

§358.384. Temporary Absence.

The Texas Health and Human Services Commission follows 20 CFR §416.1149 and §416.1167 regarding the definition and treatment of a temporary absence from a person's living arrangement for deeming purposes for a person in a noninstitutional setting.

§358.385. Cafeteria Plan Benefits.

The Texas Health and Human Services Commission exempts cafeteria plan benefits as defined in and based on §125 of the Internal Revenue Code (IRC), except that:

(1) cash received under a cafeteria plan in lieu of benefits is not exempt, but is counted as earned income; and

(2) payroll deductions used to purchase cafeteria plan benefits in addition to or instead of those purchased under a salary reduction agreement are not exempt, but are part of the employee's wages and are counted as earned income.

§358.386. Reduction of Pension and Benefit Checks for Recoupment of Overpayments.

If a person's pension or benefit checks are reduced because of recovery of overpayments, the following apply:

(1) All overpayments except Retirement, Survivors, and Disability Insurance (RSDI).

(A) If a person was receiving Supplemental Security Income (SSI) or assistance under a Medicaid-funded program for the elderly and people with disabilities (MEPD) at the time of overpayment, the Texas Health and Human Services Commission (HHSC) disregards as income the amount being recovered. HHSC counts the net amount of the benefit (for example, the gross benefit minus the amount being recouped) for the purpose of determining eligibility and calculating a co-payment.

(B) If a person was not receiving SSI or assistance under MEPD at the time of overpayment, HHSC counts the recovered amount as income. HHSC counts the gross amount of the benefit for the purpose of determining eligibility and calculating a co-payment.

(2) RSDI overpayments.

(A) If a person receives an overpayment of Social Security (RSDI or Title II) benefits, recoupment is not voluntary. HHSC counts the net amount of the RSDI benefit (for example, the gross RSDI minus the amount being recouped) for the purpose of determining eligibility and calculating a co-payment.

(B) If a person receives an overpayment of SSI benefits and the person is still eligible for SSI, the recoupment is voluntary. HHSC determines if the person signed a voluntary agreement for recoupment. If there is a signed agreement, HHSC counts the gross RSDI for the purpose of determining eligibility and calculating a co-payment. If there is no signed agreement, there should be no recoupment from RSDI benefits.

(C) If a person receives an overpayment of SSI benefits and the person is no longer eligible for SSI, recoupment of any RSDI or Title II benefits is not voluntary. HHSC counts the net amount of the RSDI benefit (that is, the gross RSDI minus the amount being recouped) for eligibility and applied income purposes.

§358.387. Income Exclusions.

(a) The Texas Health and Human Services Commission (HHSC) follows 20 CFR §416.1112 and §416.1124 regarding income exclusions, except when testing income eligibility under the special income limit HHSC does not allow the exclusions:

(1) in 20 CFR §416.1112(c)(4), (5), and (7); or

(2) in 20 CFR §416.1124(c)(12), unless:

(A) the person meets the criteria under §1929(b)(2)(B) of the Social Security Act (42 U.S.C. §1396t(b)(2)(B)); and

(B) the Centers for Medicare and Medicaid Services has authorized HHSC to allow the exclusion.

(b) HHSC also excludes income described in the appendix to Subpart K in 20 CFR Part 416.

§358.391. Treatment of Other Income.

The Texas Health and Human Services Commission follows the federal regulations indicated in the table in this section regarding the treatment of income not otherwise described in this division:

Figure: 1 TAC §358.391

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 11, 2009.

TRD-200901771
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 424-6900

♦ ♦ ♦

DIVISION 4. TRANSFER OF ASSESTS

1 TAC §358.401, §358.402

Statutory Authority

The new sections are proposed under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; and §531.021, which authorizes HHSC to administer the federal medical assistance (Medicaid) program in Texas.

The new sections affect Texas Government Code, Chapter 531. No other statutes, articles, or codes are affected by this proposal.

§358.401. Transfer of Assets on or after February 8, 2006.

(a) This section applies to a person in an institutional setting whose date of application or program transfer request date is on or after October 1, 2006, and who takes an action defined by this section to be a transfer of assets on or after February 8, 2006.

(b) The Texas Health and Human Services Commission (HHSC) uses the definitions under the provisions of §1917(e) of the Social Security Act (42 U.S.C. §1396p(h)).

(1) Assets include all income and resources of a person and of the person's spouse, including any income or resources that the person or the person's spouse is entitled to but does not receive because of action:

(A) by the person or the person's spouse;

(B) by an individual, including a court or administrative body, with legal authority to act in place of or on behalf of the person or the person's spouse; or

(C) by any individual, including any court or administrative body, acting at the direction or upon the request of the person or the person's spouse.

(2) The term "income" has the meaning given such term in §1612 of the Social Security Act (42 U.S.C. §1382a).

(3) The term "resources" has the meaning given such term in §1613 of the Social Security Act (42 U.S.C. §1382b), without regard (in the case of a person in an institutional setting) to the exclusion of the home.

(c) In this section, "person" includes the applicant or recipient as well as:

(1) the person's spouse;

(2) an individual, including a court or administrative body, with legal authority to act in place of or on behalf of the person or person's spouse; and

(3) any individual, including a court or administrative body, acting at the direction or upon the request of the person or the person's spouse.

(d) HHSC applies the penalty for transfers of assets under the provisions of §1917(c)(1) of the Social Security Act (42 U.S.C. §1396p(c)(1)). The provisions of §358.402 of this division (relating to Transfer of Assets before February 8, 2006) continue in effect for transfers on or after February 8, 2006, except to the extent that they are inconsistent with this section.

(1) This paragraph establishes HHSC's treatment of transfers made on or after February 8, 2006, the date of enactment of the Deficit Reduction Act of 2005.

(A) Disposing of assets. If a person in an institutional setting or the spouse of such a person disposes of assets for less than fair market value on or after the look-back date specified in subparagraph (B) of this paragraph, the person is ineligible for medical assistance for services described in subparagraph (C) of this paragraph during the period beginning on the date specified in subparagraph (D) of this paragraph and equal to the number of months specified in subparagraph (E) of this paragraph.

(B) Look-back period.

(i) The look-back date specified in this subparagraph is a date that is 36 months (or, in the case of payments involving a trust or portions of a trust that are treated as assets disposed of by the person pursuant to §358.402(e)(2) of this division or in the case of any other disposal of assets made on or after February 8, 2006, the date of enactment of the Deficit Reduction Act of 2005, 60 months) before the date specified in clause (ii) of this subparagraph.

(ii) The date specified in this clause, with respect to:

(I) a person in an institutional setting, except a person receiving services under a §1915(c) waiver program, is the first date as of which the person both is in an institutional setting and has applied for medical assistance under the Texas State Plan for Medical Assistance; or

(II) a person receiving services under a §1915(c) waiver program, is the date on which the person applies for medical assistance under the Texas State Plan for Medical Assistance or, if later, the date on which the person disposes of assets for less than fair market value.

(C) Ineligible for medical assistance for services. A person in an institutional setting who disposes of assets as described in subparagraph (A) of this paragraph is ineligible for the following services:

(i) nursing facility services;

(ii) a level of care in any institution equivalent to that of nursing facility services; and

(iii) Section 1915(c) waiver program services.

(D) Beginning date of penalty.

(i) In the case of a transfer of asset made before February 8, 2006, the date of enactment of the Deficit Reduction Act of 2005, the beginning date of penalty, specified in this subparagraph, is the first day of the first month during or after which assets have been transferred for less than fair market value and which does not occur in any other periods of ineligibility under this subsection.

(ii) In the case of a transfer of asset made on or after February 8, 2006, the date of enactment of the Deficit Reduction Act of 2005, the beginning date of penalty, specified in this subparagraph, is the first day of a month during or after which assets have been transferred for less than fair market value, or the date on which the person is eligible for medical assistance under the Texas State Plan for Medical Assistance and would otherwise be receiving institutional level of care described in subparagraph (C) of this paragraph based on an approved application for such care but for the application of the penalty period, whichever is later, and which does not occur during any other period of ineligibility under this subsection.

(E) Length of ineligibility period.

(i) With respect to a person in an institutional setting, except a person receiving services under a §1915(c) waiver program, the number of months of ineligibility under this subparagraph for such person is equal to the total, cumulative uncompensated value of all assets transferred by the person (or person's spouse) on or after the look-back date specified in subparagraph (B)(i) of this paragraph, divided by the average monthly cost to a private patient of nursing facility services in the state at the time of application.

(ii) With respect to a person receiving services under a §1915(c) waiver program, the number of months of ineligibility under this subparagraph for such person must not be greater than a number equal to the total, cumulative uncompensated value of all assets transferred by the person (or person's spouse) on or after the look-back date specified in subparagraph (B)(i) of this paragraph, divided by the average monthly cost to a private patient of nursing facility services in the state at the time of application.

(iii) The number of months of ineligibility otherwise determined under clause (i) of this subparagraph with respect to the disposal of an asset shall be reduced:

(I) in the case of periods of ineligibility determined under clause (i) of this subparagraph, by the number of months of ineligibility applicable to the person under clause (ii) of this subparagraph has a result of such disposal; and

(II) in the case of periods of ineligibility determined under clause (ii) of this subparagraph, by the number of months of ineligibility applicable to the person under clause (i) of this subparagraph as a result of such disposal.

(iv) HHSC does not round down, or otherwise disregard any fractional period of ineligibility determined under clause (i) or (ii) of this subparagraph with respect to the disposal of assets.

(F) Annuity. The purchase of an annuity made on or after February 8, 2006, the date of enactment of the Deficit Reduction Act of 2005, is treated as the disposal of an asset for less than fair market value unless:

(i) the State is named as the remainder beneficiary in the first position for at least the total amount of medical assistance paid on behalf of the annuitant under this title; or

(ii) the State is named as such a beneficiary in the second position after the community spouse or minor or disabled child and is named in the first position if such spouse or a representative of such child disposes of any such remainder for less than fair market value.

(G) Annuity exceptions. With respect to a transfer of assets, the term "assets" includes an annuity purchased on or after February 8, 2006, the date of enactment of the Deficit Reduction Act of 2005, by or on behalf of an annuitant who has applied for medical assistance with respect to services in an institutional setting unless:

(i) the annuity is:

(I) an annuity described in subsection (b) or (q) of section 408 of the Internal Revenue Code of 1986; or

(II) purchased with proceeds from:

(-a-) an account or trust described in subsection (a), (c), or (p) of section 408 of such Code;

(-b-) a simplified employee pension (within the meaning of section 408(k) of such Code); or

(-c-) a Roth IRA described in section 408A of such Code; or

(ii) the annuity:

(I) is irrevocable and nonassignable;

(II) is actuarially sound (as determined in accordance with actuarial publications of the Office of the Chief Actuary of the United States Department of Health and Human Services); and

(III) provides for payments in equal amounts during the term of the annuity, with no deferral and no balloon payments made.

(H) Promissory note, loan, or mortgage. In the case of a promissory note, loan, or mortgage that does not satisfy the requirements of clauses (i) through (iii) of this subparagraph, the value of such note, loan, or mortgage is the outstanding balance due as of the date of the person's application for medical assistance for services described in subparagraph (C) of this paragraph and this amount would be used to determine the length of ineligibility. For purposes of this paragraph with respect to a transfer of assets, the term "assets" includes funds used to purchase, on or after April 1, 2006, a promissory note, loan, or mortgage unless such note, loan, or mortgage:

(i) has a repayment term that is actuarially sound (as determined in accordance with actuarial publications of the Office of the Chief Actuary of the Social Security Administration);

(ii) provides for payments to be made in equal amounts during the term of the loan, with no deferral and no balloon payments made; and

(iii) prohibits the cancellation of the balance upon the death of the lender.

(I) Life estate. For purposes of this paragraph with respect to a transfer of assets, the term "assets" includes the purchase of a life estate interest in another individual's home made on or after April 1, 2006, unless the purchaser resides in the home for a period of at least one year after the date of the purchase.

(2) HHSC allows exceptions to transfers of assets under the provisions of §1917(c)(2) of the Social Security Act (42 U.S.C. §1396p(c)(2), if:

(A) the assets transferred were a home, and title to the home was transferred to:

(i) the spouse of such person;

(ii) a child of such person who:

(I) is under 21 years of age; or

(II) is blind or disabled as defined in §1614 of the Social Security Act (42 U.S.C. §1382c);

(iii) a sibling of such person who has an equity interest in such home and who was residing in such person's home for at least one year immediately before the date the person transferred to an institutional setting; or

(iv) a son or daughter of such person (other than a child described in clause (ii) of this subparagraph) who was residing in such person's home for a period of at least two years immediately before the date the person transferred to an institutional setting and who, as determined by the State, provided care to such person which permitted such person to reside at home rather than in such an institution or facility;

(B) the assets:

(i) were transferred to the person's spouse or to another for the sole benefit of the person's spouse;

(ii) were transferred from the person's spouse to another for the sole benefit of the person's spouse;

(iii) were transferred to a trust (including a trust described in §358.452(e)(2) of this division) established solely for the benefit of the person's child described in subparagraph (A)(ii)(II) of this paragraph; or

(iv) were transferred to a trust (including a trust described in §358.452(e)(2) of this division) established solely for the benefit of a person under 65 years of age who is disabled as defined in §1614(a)(3) of the Social Security Act (42 U.S.C. §1382c(a)(3));

(C) a satisfactory showing is made to the State that:

(i) the person intended to dispose of the assets either at fair market value, or for other valuable consideration;

(ii) the assets were transferred exclusively for a purpose other than to qualify for medical assistance; or

(iii) all assets transferred for less than fair market value have been returned to the person; or

(D) HHSC:

(i) determines that the denial of eligibility would work an undue hardship when application of the transfer of assets provision would deprive the person:

(I) of medical care such that the person's health or life would be endangered; or

(II) of food, clothing, shelter, or other necessities of life; and

(ii) provides for:

(I) notice to recipients that an undue hardship exception exists;

(II) a timely process for determining whether an undue hardship waiver will be granted; and

(III) a process under which an adverse determination can be appealed.

(3) Under paragraph (2)(D) of this subsection, a facility in which the person in an institutional setting is residing may file an undue hardship waiver application on behalf of the person with the consent of the person or the person's authorized representative.

(4) For purposes of this subsection effective on or after February 8, 2006, the date of enactment of the Deficit Reduction Act of 2005, in the case of an asset held by a person in common with another individual or individuals in a joint tenancy, tenancy in common, or similar arrangement, the asset (or the affected portion of such asset) is considered to be transferred by such person when any action is taken, either by such person or by any other individual, that reduces or eliminates such person's ownership or control of such asset.

(5) HHSC does not provide for any period of ineligibility for a person due to transfer of resources for less than fair market value except in accordance with this subsection. In the case of a transfer by the spouse of a person which results in a period of ineligibility for medical assistance for such person, HHSC apportions such period of ineligibility (or any portion of such period) among the person and the person's spouse if the spouse otherwise becomes eligible for medical assistance.

(6) In this subsection, the term "resources" has the meaning given such term in §1613 of the Social Security Act (42 U.S.C. §1382b), without regard (in the case of a person in an institutional setting) to the exclusion of the home.

(e) Impact on spousal protected resource amount. In spousal situations, if assets are transferred to a third party before institutionalization or by the community spouse, HHSC does not include the uncompensated amount of the transfer in calculating the spousal protected resource amount or countable resources upon application for Medicaid.

(f) Transfer of income.

(1) A person may incur a transfer penalty by transferring income. Transfers of income include:

(A) waiving the right to receive an inheritance even in the month of receipt;

(B) giving away a lump sum payment even in the month of receipt; or

(C) irrevocably waiving all or part of federal, state, or private pensions or annuities.

(2) The date of transfer is the date of the actual change in income. Interspousal transfers of income are permitted (for example,

obtaining a court order to have community property pension income paid to a community spouse).

(3) Because revocable waivers of pension benefits can be revoked and the benefits reinstated, no uncompensated value is developed, and no transfer-of-assets penalty is incurred. Such waivers are subject to the utilization-of-benefits policy, and the person must apply for reinstatement of the full pension amount or the person is ineligible for all Medicaid benefits.

(g) Disclosure and treatment of annuities. HHSC, under the provisions of §1902(a)(18) of the Social Security Act (42 U.S.C. §1396a(18)), requires the following as a condition for the provision of medical assistance for services described in subsection (d)(1)(C) of this section:

(1) An application for assistance (including any recertification of eligibility for such assistance) must disclose a description of any interest the person or community spouse has in an annuity (or similar financial instrument as directed by the United States Department of Health and Human Services), regardless of whether the annuity is irrevocable or is treated as an asset. Such application or recertification form must include a statement that under paragraph (2) of this subsection the State becomes a remainder beneficiary under such an annuity or similar financial instrument by virtue of the provision of such medical assistance.

(2) In the case of disclosure concerning an annuity under subsection (d)(1)(F) of this section, HHSC notifies the issuer of the annuity of the right of the State under such subsection as a preferred remainder beneficiary in the annuity for medical assistance furnished to the person. Nothing in this paragraph shall be construed as preventing such an issuer from notifying persons with any other remainder interest of the State's remainder interest under such subsection.

(3) HHSC establishes categories of transactions that may be treated as a transfer of asset for less than fair market value as the United States Department of Health and Human Services provides guidance.

(4) Nothing in this subsection shall be construed as preventing HHSC from denying eligibility for medical assistance for a person based on the income or resources derived from an annuity described in paragraph (1) of this subsection.

§358.402. Transfer of Assets before February 8, 2006.

(a) Introduction.

(1) The Omnibus Budget Reconciliation Act of 1993 (OBRA 1993) (P.L. 103-66) revised policy for transfers of assets that occur on or after August 11, 1993, when an uncompensated value remains.

(2) The penalty for transfers of assets affects payments for institutional facility services (nursing facility (NF) care, intermediate care facility for persons with mental retardation or related conditions (ICF/MR) provider services, care in state mental retardation facilities, and care in institutions for mental diseases (IMD)) and eligibility for §1915(c) waiver program services. Both the recipient and the service provider are notified of the penalty period.

(3) Except for residents of state mental retardation facilities, persons in an institutional setting remain eligible for all other Medicaid benefits and continue to receive monthly identification forms for the length of the penalty period. For residents of state mental retardation facilities, Medicaid eligibility is denied for any penalty period resulting from an uncompensated transfer of assets. This is because the only Medicaid benefit a resident of a state mental retardation facility receives is provider payments.

(4) If the Medicaid eligibility of a person receiving services under a §1915(c) waiver program requires receipt of waiver services, then the person is ineligible for all Medicaid benefits for the length of the penalty period. Denial of §1915(c) waiver program services based on an uncompensated transfer of assets does not disqualify the person for pure Qualified Medicare Beneficiary (QMB) or Specified Low-Income Medicare Beneficiary (SLMB) benefits, as described in Chapter 359 of this title (relating to Medicare Savings Program).

(5) A person in a noninstitutional setting who is eligible for Medicaid may transfer assets without penalty, provided the person does not become institutionalized or apply for §1915(c) waiver program services. A transfer of assets does not affect eligibility for QMB or SLMB benefits.

(6) In spousal situations, if assets are transferred to a third party before institutionalization or by the community spouse, the Texas Health and Human Services Commission (HHSC) does not include the uncompensated amount of the transfer in calculating the spousal protected resource amount or countable resources upon application for Medicaid.

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

(1) Person--"Person" includes the applicant or recipient, as well as:

(A) the person's spouse;

(B) an individual, including a court or administrative body, with legal authority to act in place of or on behalf of the person or person's spouse; and

(C) any individual, including a court or administrative body, acting at the direction or upon the request of the person or the person's spouse.

(2) Assets--

(A) Assets include all income and resources of a person and of the person's spouse, including any income or resources that the person or the person's spouse is entitled to but does not receive because of action:

(i) by the person or the person's spouse;

(ii) by an individual, including a court or administrative body, with legal authority to act in place of or on behalf of the person or the person's spouse; or

(iii) by any individual, including a court or administrative body, acting at the direction or upon the request of the person or the person's spouse.

(B) Actions that would cause income or resources not to be received include:

(i) irrevocably waiving pension income;

(ii) waiving the right to receive an inheritance;

(iii) not accepting or accessing injury settlements; and

(iv) a defendant diverting tort settlements into a trust or similar device to be held for the benefit of the plaintiff.

(c) Transfer of income.

(1) A person may incur a transfer penalty by transferring income on or after August 11, 1993. Transfers of income include:

(A) waiving the right to receive an inheritance even in the month of receipt;

(B) giving away a lump sum payment even in the month of receipt; or

(C) irrevocably waiving all or part of federal, state, or private pensions or annuities.

(2) The date of transfer is the date of the actual change in income, if on or after August 11, 1993. Interspousal transfers of income are permitted (for example, obtaining a court order to have community property pension income paid to a community spouse).

(3) Because revocable waivers of pension benefits can be revoked and the benefits reinstated, no uncompensated value is developed, and no transfer-of-assets penalty is incurred. Such waivers are subject to the utilization-of-benefits policy, and the person must apply for reinstatement of the full pension amount or the person is ineligible for all Medicaid benefits.

(d) Exceptions to transfers of assets.

(1) Transfer of the person's home does not result in a penalty when the title is transferred to the person's:

(A) spouse, who lives in the home (the transfer penalty applies when the community spouse transfers the home without full compensation);

(B) minor or disabled child (a disabled child must meet Social Security Administration disability criteria; there is no age limit for a disabled child for transfer of assets purposes);

(C) sibling who has equity interest in the home and has lived there for at least one year before the person transferred to an institutional setting; or

(D) son or daughter (other than a disabled or minor child) who lived in the home for at least two years before the person transferred to an institutional setting and provided care that prevented institutionalization. To substantiate this claim, there must be a written statement from the person's attending physician or a professional social worker familiar with the case documenting the care provided by the son or daughter.

(2) Assets, including the person's home, may be transferred without resulting in a penalty when:

(A) transferred to the person's spouse or to another for the sole benefit of that spouse, or from the person's spouse to another for the sole benefit of that spouse;

(B) transferred to the person's child or to a trust, including an exception trust described in §1917(d)(4) of the Social Security Act (42 U.S.C. §1396p(d)(4)), established solely for the benefit of the person's child. The child must meet Social Security Administration disability criteria. There is no age limit for a disabled child for transfer of assets purposes;

(C) transferred to a trust, including an exception trust as specified in §1917(d)(4) of the Social Security Act (42 U.S.C. §1396p(d)(4)), established for the sole benefit of a person under 65 years of age who meets Social Security Administration disability criteria;

(D) satisfactory evidence exists that the person intended to dispose of the resource at fair market value;

(E) satisfactory evidence exists that the transfer was exclusively for some purpose other than to qualify for Medicaid;

(F) imposition of a penalty would cause undue hardship;

(G) a person changes a joint bank account to establish separate accounts to reflect correct ownership of and access to funds; or

(H) a person purchases an irrevocable funeral arrangement or assigns ownership of an irrevocable funeral arrangement to a third party.

(3) In determining whether an asset was transferred for the sole benefit of a spouse, child, or person with a disability, there must be a written instrument of transfer, such as a trust document, which legally binds the parties to a specified course of action and which clearly sets out the conditions under which the transfer was made, as well as who can benefit from the transfer. The instrument or document must provide for the spending of the funds involved for the benefit of the person on a basis that is actuarially sound based on the life expectancy of the person involved. When the instrument or document does not so provide, there can be no exemption from the penalty. Exception trusts created under §1917(d)(4) of the Social Security Act (42 U.S.C. §1396p(d)(4)) are exempt from the actuarially sound distribution provisions of this section.

(4) The situations in paragraphs (1) - (3) of this subsection are the only situations in which an uncompensated transfer does not result in a penalty for care in an institutional setting. Under the transfer provisions of OBRA 1993, the home is not an excluded resource for a person in an institutional setting. Therefore, if the home of a person in an institutional setting is transferred, unless the transfer meets one of the criteria in paragraphs (1) - (3) of this subsection, it could affect payment for the person's care in an institutional setting.

(e) Look-back period.

(1) Penalties may be assessed for transfers occurring on or after the look-back date. Penalties cannot be assessed for time frames prior to the look-back period.

(2) The law prescribes a 36-month look-back period for most uncompensated transfers. However, there is a 60-month look-back period for certain transfers involving trusts. The look-back periods for trusts and distributions from trusts are defined in subparagraphs (A) and (B) of this paragraph.

(A) Revocable trusts.

(i) Payments from a revocable trust to or for the benefit of someone other than an applicant or recipient have a 60-month look-back period.

(ii) Making a revocable trust irrevocable with payments from corpus/income foreclosed to the applicant or recipient is a transfer of assets and has a 60-month look-back period.

(B) Irrevocable trusts.

(i) Payments from an irrevocable trust (where trustee distributions are not foreclosed to the applicant or recipient) which are made to (or for the benefit of) someone other than the applicant or recipient have a 36-month look-back period.

(ii) Creating an irrevocable trust where trustee payments are foreclosed to the applicant or recipient is a transfer of assets with a 60-month look-back period.

(iii) Creating an irrevocable trust where the trustee initially has discretion to make payments to the applicant or recipient (or for the applicant's or recipient's benefit), but where payments are foreclosed to the applicant or recipient at a later date is a transfer of as-

sets as of the date payments are foreclosed to the applicant or recipient. The look-back period is 60 months.

(3) The look-back period is 36 months (or 60 months) from the later of the date of:

(A) institutionalization; or

(B) Medicaid application.

(4) When a person is already a Medicaid recipient before entering an NF, ICF/MR, state mental retardation facility, or IMD, the look-back period begins with institutional entry.

(5) When a person applies and is certified for Medicaid more than once because of multiple institutional stays or periods of ineligibility, the look-back date is based on the later of the earliest application for Medicaid or the initial entry into the facility.

(6) When a person applies for a §1915(c) waiver program, the look-back period is 36 months or 60 months from the later of the date:

(A) of application for waiver services (completed, signed application form is received in HHSC office); or

(B) after application that the person transfers assets.

(7) When a person applies for services in an institutional setting but is not certified and then reapplies, a new look-back period is based on the latest application.

(8) When a person applies and is certified for a §1915(c) waiver program, subsequently is denied, and reapplies for waiver services, the initial look-back period is still in effect.

(9) When a look-back period is established, the person is certified, and then moves from a Medicaid-certified long-term care facility to a §1915(c) waiver program or vice versa, the initial look-back period is still in effect. This is true even when there is a gap in eligibility periods.

(10) Any additional transfers of assets that occur after the person is certified for Medicaid may be assessed a penalty.

(f) Calculation of penalty period.

(1) There is no limit to the penalty period under OBRA 1993. The penalty period is determined by dividing the uncompensated value of all assets transferred by the average monthly cost of nursing facility care for a private-pay patient.

(2) The penalty period calculation applies to the transfer of both income and resources.

(3) The same penalty period calculation is used for a person who applies for a §1915(c) waiver program. Penalty periods continue to run if a person moves from a Medicaid-certified long-term care facility to a §1915(c) waiver program or vice versa.

(4) The penalty period begins the month of transfer. However, a new penalty period cannot be imposed while a previous penalty period is still in effect. Therefore, the penalty periods assessed under OBRA 1993 rules for multiple transfers that overlap run separately but consecutively.

(5) If a penalty period ends and a subsequent transfer occurs, a new penalty period is established effective the month of the subsequent transfer. This means there may be a gap between penalty periods.

(6) When multiple transfers occur during the look-back period in such a way that the penalty periods for each overlap, the transfers are treated as a single event. The uncompensated values are lumped together and divided by the average monthly rate for a private-pay patient in a nursing facility. If multiple transfers occur in such a way that the penalty periods do not overlap, then the transfers are treated as separate events and the penalty periods are calculated separately.

(g) Apportioning penalty periods between spouses.

(1) When a person's spouse transfers an asset that results in a penalty for the person, the penalty period must, in certain instances, be apportioned between the spouses. Both spouses must be eligible for Medicaid in an institutional setting during the same time period for apportionment to occur. Apportionment occurs when:

(A) the spouse:

(i) is institutionalized and is Medicaid eligible; or

(ii) would be eligible for a §1915(c) waiver program; and

(B) some portion of the penalty against the person remains at the time the conditions in this paragraph are met.

(2) When one spouse is no longer subject to a penalty (for example, the spouse is no longer in an institutional setting, or the spouse dies), the remaining penalty period applicable to both spouses must be served by the remaining spouse.

(h) Return of transferred asset.

(1) For transfers occurring on or after August 11, 1993, if the transferred asset is subsequently returned to the person, the transfer is nullified and the penalty period is erased retroactive to the month of transfer. The asset is treated as though never transferred, and is excluded or counted, as appropriate, in determining the person's eligibility for those months in which the asset was in someone else's possession. In spousal cases, if the person or the person's spouse transferred an asset before the person entered the nursing facility and the asset is returned after institutionalization, the spousal protected resource amount must also be recalculated.

(2) For a penalty period to be nullified, all of the asset in question or its fair market value must be returned to the person. When only part of an asset or its equivalent value is returned, the penalty period can be reduced but not eliminated. For example, if only half the value of the asset is returned, the penalty period can be reduced by one-half. Payment on the principal of a note is the return of a transferred asset and reduces the penalty accordingly.

(i) Spouse-to-spouse transfers under spousal impoverishment provisions.

(1) There are no restrictions on interspousal transfers occurring from the date of institutionalization to the date of application; the reason is that at application and throughout the initial eligibility period (12 full months following the medical effective date), the combined countable resources of the couple are considered in determining eligibility. For the same reason, interspousal transfers are also permitted before institutionalization. A penalty can result when the community spouse transfers assets to a third party, not for the sole benefit of either spouse.

(2) To remain eligible at the end of the initial eligibility period, the person in an institutional setting must reduce resources to which the person has access at least to the resource limit. If the person chooses, the person may, during the initial eligibility period, transfer resources from his or her name to the community spouse's name with no penalty applied to the transfer. The transfer-of-assets policy applies only to transfer of assets for less than fair market value to someone other than the community spouse if not for the sole benefit of that spouse.

(3) Transfer penalties apply when the community spouse transfers his or her separate property before institutionalization, or after institutionalization but before certification. Transfer penalties apply when the community spouse transfers community property both before and after institutionalization, if not for the sole benefit of the spouse.

(j) Compensation. Compensation, in the form of funds, real property, or services, must actually have been provided to a person. Future compensation does not satisfy the compensation requirement except for annuities which are actuarially sound. Compensation, however, may be in the form of payment or assumption of a legal debt owed by the individual making the transfer. Compensation is not allowed for services that would be normally provided by a family member (such as house painting or repairs, mowing lawns, grocery shopping, cleaning, laundry, preparing meals, transportation to medical care). The person must provide valid receipts for financial expenditures or written statements from the individuals who were paid to provide the services. If the person receives additional cash compensation that was not a part of the transfer agreement from the party who received the transferred asset, the uncompensated value of the transferred asset must be reduced by the amount of the additional compensation and as of the date the compensation is received. Cash compensation includes direct payments to a third party to meet the person's food, shelter, or medical expenses, including nursing facility bills, incurred after the date of the transfer. Compensation for a transferred asset must be provided according to terms of an agreement established on or before the date of transfer. This agreement must have been established exclusively for purposes other than obtaining or retaining eligibility for Medicaid services.

(k) Participation in transfers. Any action by a person's co-owner(s) to eliminate the person's ownership interest or control of a joint asset, with or without the person's consent, is a transfer of assets. Placing another person's name on an account or other asset that results in limiting the person's control of an asset (right to dispose) is a transfer of assets.

(l) Rebuttal procedures.

(1) Notification of opportunity for rebuttal. If any amount of uncompensated value exists, HHSC advises the person or authorized representative of the amount of uncompensated value and the length of the penalty period. The penalty period applies unless the person provides convincing evidence that the disposal was solely for some purpose other than to obtain Medicaid services. If, within the periods specified in this paragraph, the person or authorized representative makes no effort to rebut the presumption that the transfer was solely to obtain Medicaid services, HHSC assumes that the presumption is valid. The rebuttal period is five working days after oral notification (by HHSC to the person) and seven working days after written notification.

(2) Rebuttal of the presumption. Transfer-of-assets statutes presume that all transfers for less than fair market value are to obtain Medicaid services. The person or authorized representative is responsible for providing convincing evidence that the transaction in question was exclusively for some other purpose. To rebut the presumption, the person or authorized representative must provide a written statement and any relevant documentation to substantiate his or her statement. The statement, oral or written, must include at least the following:

(A) purpose for transferring the asset;

(B) attempts to dispose of the asset at fair market value;

(C) reason for accepting less than fair market value for the asset;

(D) means of or plan for self-support after the transfer; and

(E) relationship to the person to whom the asset was transferred.

(m) Undue hardship.

(1) A person may claim undue hardship when imposition of a transfer penalty would result in discharge to the community and/or inability to obtain necessary medical services so that the person's life is endangered. Undue hardship also exists when imposition of a transfer penalty would deprive the person of food, clothing, shelter, or other necessities of life. Undue hardship relates to hardship to the person, not the relatives or responsible parties of the person. Undue hardship does not exist when imposition of the transfer penalty merely causes the person inconvenience or when imposition might restrict his lifestyle but would not put him at risk of serious deprivation.

(2) Undue hardship may exist when any one of the following conditions specified in subparagraphs (A) - (C) of this paragraph exists:

(A) location of the receiver of the asset is unknown to the person, or other family members, or other interested parties, and the person has no place to return in the community and/or receive the care required to meet his or her needs;

(B) the person can show that physical harm may come as a result of pursuing the return of the asset, and the person has no place to return in the community and/or receive the care required to meet his or her needs; or

(C) receiver of the asset is unwilling to cooperate with the person and HHSC, and the person has no place to return in the community and/or receive the care required to meet his or her needs.

(3) If a person claims undue hardship, HHSC makes a decision on the situation as soon as possible but within 30 days after receipt of the request for a waiver of the penalty. The person has the right to appeal an adverse decision on undue hardship.

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 11, 2009.

TRD-200901772
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 424-6900

DIVISION 5. SPOUSAL IMPOVERISHMENTS

1 TAC §§358.411 - 358.423

Statutory Authority

The new sections are proposed under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; and §531.021, which authorizes HHSC to administer the federal medical assistance (Medicaid) program in Texas.

The new sections affect Texas Government Code, Chapter 531. No other statutes, articles, or codes are affected by this proposal.

§358.411. Purpose and Application.

(a) This division establishes the criteria under which income and resources are protected for a community spouse, in accordance with 42 U.S.C. §1396r-5.

(b) This division applies to an institutionalized spouse whose continuous period in an institutional setting begins on or after September 30, 1989. For this division only, a reference to an institutional setting includes the receipt of services under the Program of All-Inclusive Care for the Elderly (PACE).

(c) This division applies to a person who is in an institutional setting and has a community spouse. It is not necessary for the community spouse to meet citizenship and residency requirements.

(d) This division does not apply to a couple with a void or annulled marriage.

(e) In the case of a divorce, the provisions of this division apply through the end of the calendar month of the court order granting the divorce.

§358.412. Definitions.

In this division, the following words and terms have the following meanings, unless the context clearly indicates otherwise.

(1) Community spouse--The spouse of an institutionalized spouse who is not living in a setting that provides medical care and services.

(2) Dependent family member--A minor or dependent child, dependent parent, or dependent sibling of an institutionalized spouse or a community spouse who resides with the community spouse.

(3) Institutional setting--In this division only, a living arrangement in which a person applying for or receiving Medicaid:

(A) lives in a Medicaid-certified long-term care facility;

(B) receives services under a §1915(c) waiver program; or

(C) receives services under the Program of All-Inclusive Care for the Elderly (PACE).

(4) Institutionalized spouse--A person who:

(A) receives care in an institutional setting;

(B) has met or is likely to meet the criterion in subparagraph (A) of this paragraph for at least 30 consecutive days; and

(C) is married to a spouse who does not meet the criterion in subparagraph (A) of this paragraph.

(5) Spousal protected resource amount (SPRA)--That portion of a couple's combined countable resources reserved for the community spouse and deducted from the couple's combined countable resources in determining eligibility.

§358.413. Spousal Impoverishment Treatment of Income and Resources.

The Texas Health and Human Services Commission follows §1924 of the Social Security Act (42 U.S.C. §1396r-5), regarding the treatment of income and resources for certain institutionalized spouses in institutional settings.

§358.414. Assessment of Resources to Determine a Spousal Protected Resource Amount.

(a) Assessment. Upon request of either the institutionalized spouse or the community spouse, or either spouse's authorized representative, the Texas Health and Human Services Commission (HHSC) assesses the couple's resources to determine the spousal protected resource amount (SPRA). The request and assessment may be made any time from the beginning of the continuous period in an institutional setting to the date of application for Medicaid.

(b) Assessment request. If the request described in subsection (a) of this section is not part of an application for Medicaid, the couple must provide information on their resources and verification as required by HHSC. If the couple does not provide the verification within the time frame requested by HHSC, HHSC does not complete the assessment and takes no further action.

(c) Assessment date. HHSC assesses the couple's combined countable resources as of 12:01 a.m. on the first day of the month in which the first continuous period in an institutional setting began. When determining the first day of the month in an institutional setting for the SPRA, HHSC may count days the person spent in a hospital if the person admits directly from the hospital to an institutional setting. After the continuous period begins, hospital stays and therapeutic home visits are not considered as breaks in the 30-consecutive-day period.

§358.415. Calculation of the Spousal Protected Resource Amount.

(a) The Texas Health and Human Services Commission (HHSC) calculates the spousal protected resource amount (SPRA) as of the assessment date described in §358.414(c) of this division (relating to Assessment of Resources to Determine a Spousal Protected Resource Amount).

(b) When determining the SPRA, HHSC excludes the following resources regardless of value:

(1) one automobile; and

(2) a home, if:

(A) the community spouse or dependent family member continues to live in the home while the person is in the institutional setting;

(B) the community spouse lives in another state on out-of-state property, whether or not the institutionalized spouse has ownership interest; or

(C) the community spouse had been living in the out-of-state property as a home but is not residing there during the assessment and initial eligibility period and the community spouse signs a statement of intent to return to the home.

(c) The SPRA is the greater of:

(1) one-half of the couple's combined countable resources, not to exceed the maximum resource amount set by federal law; or

(2) the minimum resource amount set by federal law.

(d) HHSC calculates the SPRA as described in this section whether the SPRA is calculated at the time of application for Medicaid or before an application for Medicaid is filed. After HHSC determines the SPRA, the SPRA does not change unless:

(1) the SPRA was based on incomplete or inaccurate information, as described in §358.416(f)(1) of this division (relating to Initial Application and the Spousal Protected Resource Amount); or

(2) the SPRA is expanded as described in §358.420 of this division (relating to Expanding the Spousal Protected Resource Amount).

(e) The couple may not appeal the SPRA at the time of the assessment. The couple may appeal the SPRA after an application for Medicaid is filed.

§358.416. Initial Application and the Spousal Protected Resource Amount.

(a) Upon receiving an application for Medicaid, the Texas Health and Human Services Commission (HHSC) calculates the couple's combined countable resources, without regard to community or separate property laws or the spouses' respective ownership interests, as of 12:01 a.m. on the first day of the month in which eligibility is being determined. HHSC follows the resource exclusions for an automobile and a home, regardless of value, as described in §358.415 of this division (relating to Calculation of the Spousal Protected Resource Amount).

(b) If an assessment of resources to determine the spousal protected resource amount (SPRA) has not previously been completed, HHSC determines the SPRA at initial application, in accordance with §358.415 of this division.

(c) HHSC deducts the SPRA from the couple's combined countable resources calculated in subsection (a) of this section. To be eligible for Medicaid, the institutionalized spouse must have countable resources that do not exceed the individual resource limit described in 20 CFR §416.1205 and meet all other eligibility criteria.

(d) If the SPRA determined at assessment is either the federal minimum or maximum resource amount, and the federal minimum or maximum resource amount increases before completion of the initial application for Medicaid, HHSC uses the federal minimum and maximum resource amounts in effect at the time of completion of the initial application.

(e) If the institutionalized spouse is found ineligible for Medicaid at the initial application and reapplies, HHSC deducts the same SPRA for subsequent applications.

(f) If an institutionalized spouse, after having been certified, is subsequently denied and reapplies for Medicaid:

(1) if the institutionalized spouse should never have been certified and was denied because of unreported resources, HHSC calculates a new SPRA at reapplication, taking into account the previously unreported resources; and

(2) if the institutionalized spouse was denied for any other reason, HHSC does not deduct the SPRA and counts only the institutionalized spouse's resources at reapplication.

§358.417. Treatment of Resources after the Initial Eligibility Period.

(a) After the initial eligibility period, the Texas Health and Human Services Commission (HHSC) does not apply the spousal protected resource amount and counts only the institutionalized spouse's resources for the purpose of eligibility redetermination, in accordance with Division 2 of this subchapter (relating to Resources).

(b) After the initial eligibility period, HHSC excludes:

(1) a home in accordance with §358.348 of this subchapter (relating to Exclusion of a Home); and

(2) an automobile in accordance with §358.354 of this subchapter (relating to Automobiles).

§358.418. Refusal of a Community Spouse to Cooperate.

(a) If a community spouse refuses to cooperate in providing information to establish a spousal protected resource amount (SPRA), the Texas Health and Human Services Commission (HHSC) does not complete the assessment and takes no further action.

(b) If an assessment is undertaken in conjunction with an eligibility determination at the initial application, and a community spouse refuses to furnish information, HHSC determines the living arrangement before the continuous period in an institutional setting began.

(1) If the couple was living in the same household, HHSC denies the application based on the couple's failure to furnish information. Living in the same household includes temporary separations.

(2) If the couple was not living in the same household, HHSC determines the purpose of separation, the length of separation, and resources or income commingled or managed jointly by one spouse or a third party.

(c) If the community spouse refuses to cooperate in providing information, and circumstances indicate possible abuse or neglect by the community spouse, HSHC considers the institutionalized spouse as an individual for purposes of determining eligibility and calculating the co-payment.

§358.419. Separation to Circumvent Medicaid Policy.

(a) The Texas Health and Human Services Commission (HHSC) evaluates the information provided by a couple to determine if a couple separated before the continuous period in an institutional setting began to avoid the pooling of resources under Medicaid spousal impoverishment provisions, if:

(1) the separation occurred after a change in the health of the institutionalized spouse;

(2) the community spouse potentially owns separate resources; or

(3) the ownership of commingled resources was changed recently.

(b) A couple has the right to rebut HHSC's determination that a separation occurred to circumvent Medicaid policy. To rebut HHSC's determination, either spouse or either spouse's authorized representative must provide a written statement or evidence to HHSC to substantiate the separation as directed on the written notification of HHSC's determination that a separation occurred to circumvent Medicaid policy.

(c) If HHSC determines that circumstances indicate there was no intent to circumvent Medicaid policy, HHSC treats the institutionalized spouse as an individual for purposes of determining Medicaid eligibility and calculating the co-payment.

§358.420. Expanding the Spousal Protected Resource Amount.

(a) This section applies to an institutionalized spouse whose continuous period in an institutional setting begins on or after September 1, 2004.

(b) An institutionalized spouse may request that HHSC expand the spousal protected resource amount (SPRA) to produce additional income for the community spouse. To determine whether to expand the SPRA, HHSC considers the countable amount of non-resource-produced and non-investment income of the community spouse and compares the countable amount of non-resource-produced and non-investment income to the minimum monthly maintenance needs allowance (MMMNA). The MMMNA is the minimum income level for a community spouse set by the Centers for Medicare and Medicaid Services.

(1) If the community spouse's countable non-resource-produced and non-investment income is less than the MMMNA, HHSC considers the available income (countable non-resource-produced income minus the personal needs allowance) of the institutionalized spouse and adds the institutional spouse's available income to the community spouse's countable non-resource-produced and non-investment income and compares the combined incomes to the MMMNA.

(2) If the total amount of the community spouse's own income plus the amount of available income diverted from the institu-

tionalized spouse is equal to or greater than the MMMNA, then HHSC does not expand the SPRA.

(3) If the total amount of the community spouse's own income plus the amount of available income diverted from the institutionalized spouse is less than the MMMNA, then HHSC determines an expanded SPRA as described in subsections (c) - (e) of this section.

(c) If, after the diversion of the institutionalized spouse's available income, the community spouse's total income is less than the MMMNA, the couple can protect an amount of resources equal to the dollar amount that must be deposited in a one-year certificate of deposit (CD), at current interest rates, to produce interest income equal to the difference between the MMMNA in effect at the time of the request and other countable income not generated by either spouse's countable resources. The couple is not required to invest in the CD as a condition of eligibility.

(d) To determine the amount of the expanded SPRA, HHSC determines the current interest rate of a one-year CD as published in the local newspaper or provided by a local bank. HHSC then determines the amount of resources required to produce income, at the specified interest rate, that would increase the community spouse's income to the MMMNA.

(e) The amount of resources to be protected is determined by using the methodology described in paragraphs (1) - (4) of this subsection. This methodology is to be used to determine the maximum amount of resources to be protected regardless of the actual income the couple's resource may or may not be producing.

(1) Subtract from the amount of the MMMNA the community spouse's monthly income from all sources other than resources of the couple (including any income that must first be diverted by the institutionalized spouse as required by subsection (b) of this section). The result is the additional monthly income needed by the community spouse.

(2) Multiply by 12 the additional monthly income needed by the community spouse (from paragraph (1) of this subsection). The product equals the annual income needed by the community spouse.

(3) Divide the product from paragraph (2) of this subsection by the interest rate described in subsection (d) of this section. The result is the expanded SPRA, subject to paragraph (4) of this subsection.

(4) The expanded SPRA must not exceed the value of the couple's combined countable resources as of the first month of the continuous period in an institutional setting.

§358.421. Treatment of Income for Eligibility and Co-payment.

(a) To be eligible for Medicaid, an institutionalized spouse must have countable income that does not exceed the special income limit for an individual and meet all other eligibility criteria.

(b) In determining the income of an institutionalized spouse or community spouse for purposes of determining a co-payment, the Texas Health and Human Services Commission (HHSC) follows §1924(b)(2) and (d) of the Social Security Act (42 U.S.C. §1396r-5(b)(2) and (d)). See also Division 6 of this subchapter (relating to Budgeting for Eligibility and Co-payment).

§358.422. Notice and Fair Hearing.

The Texas Health and Human Services Commission (HHSC) follows §1924(e) of the Social Security Act (42 U.S.C. §1396r-5(e)) concerning notices and fair hearings for matters relating to spousal impoverishment.

§358.423. Transfer of Assets and Spousal Impoverishment.

See Division 4 of this subchapter (relating to Transfer of Assets) for requirements governing a transfer of assets under spousal impoverishment circumstances.

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 11, 2009.

TRD-200901773
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 424-6900

♦ ♦ ♦

DIVISION 6. BUDGETING FOR ELIGIBILITY AND CO-PAYMENT

1 TAC §§358.431 - 358.441

Statutory Authority

The new sections are proposed under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; and §531.021, which authorizes HHSC to administer the federal medical assistance (Medicaid) program in Texas.

The new sections affect Texas Government Code, Chapter 531. No other statutes, articles, or codes are affected by this proposal.

§358.431. Definitions.

In this division, the following words and terms have the following meanings, unless the context clearly indicates otherwise.

(1) Child--Has the meaning given in 20 CFR §416.1856.

(2) Couple--Two persons who live together and:

(A) present themselves to the community as husband and wife, intend to be married, and are considered to be married under state law;

(B) are determined to be husband and wife for purposes of receiving Social Security benefits; or

(C) are recognized as husband and wife under state law.

(3) Dependent relative--A relative who was living in the home of an applicant or recipient before the applicant's or recipient's absence and who is unable to support himself or herself outside of the person's home due to medical, social, or other reasons.

(4) Parent--Has the meaning given in 20 CFR §416.1881.

§358.432. Eligibility Budgets.

The Texas Health and Human Services Commission (HHSC) prepares an eligibility budget to determine a person's financial eligibility for Medicaid. The type of eligibility budget HHSC prepares depends on:

(1) where the person lives and whether a person is married or not married at the beginning of each month;

(2) whether a person is considered a child; and

(3) whether a person is considered another person's parent.

§358.433. Special Income Limit.

The Texas Health and Human Services Commission uses a special income limit to determine income eligibility under circumstances established in this section. The special income limit for a person is equal to or less than 300 percent of the full individual Supplemental Security Income (SSI) benefit rate. The special income limit for a couple is twice the special income limit for an individual.

(1) To qualify for the special income limit, a person or couple must have countable income that exceeds the reduced SSI benefit rate; and:

(A) must:

(i) reside in:

(I) a Medicaid-certified long-term care facility for 30 consecutive days; or

(II) a Medicaid-certified institution for mental diseases for 30 consecutive days, if the person is 65 years of age or older; and

(ii) receive a level of care or medical necessity determination that qualifies the person or couple for Medicaid; or

(B) must be approved by the Texas Department of Aging and Disability Services to receive services under a §1915(c) waiver program and receive the services within one month after approval.

(2) The 30 consecutive days described in paragraph (1)(A) of this section are not disrupted if the person:

(A) makes a three-day therapeutic home visit with a planned return to the facility;

(B) is admitted to a hospital with a planned return to the facility; or

(C) moves from a facility described in paragraph (1)(A)(i) of this section:

(i) to a §1915(c) waiver program; or

(ii) to another Medicaid-certified facility.

(3) If a person dies before meeting the 30-consecutive-day requirement without moving to a noninstitutional setting, the person is considered to have met the requirement for application of the special income limit.

§358.434. Budget Types for a Noninstitutional Setting.

(a) Individual budget. The Texas Health and Human Services Commission (HHSC) prepares an individual budget for a person in a noninstitutional setting if the person is:

(1) single;

(2) widowed;

(3) divorced; or

(4) married and is:

(A) an applicant separated from his or her spouse at the time of application; or

(B) a recipient separated from his or her spouse during the previous month.

(b) Couple budget. HHSC prepares a couple budget for a couple in a noninstitutional setting if:

(1) the couple meets the definition of a couple in §358.431 of this division (relating to Definitions);

(2) each spouse is an applicant or a recipient; and

(3) both spouses are in the same coverage group.

(c) Companion budget. HHSC prepares a companion budget for a person in a noninstitutional setting who has an ineligible spouse if:

(1) the couple meets the definition of a couple in §358.431 of this division; and

(2) the person lives with the ineligible spouse during any part of a calendar month.

§358.435. Noninstitutional Eligibility Budgets.

(a) Scope. The Texas Health and Human Services Commission (HHSC) prepares a noninstitutional eligibility budget to determine financial eligibility for a person or couple in a noninstitutional setting, if the person or couple:

(1) applies for retroactive coverage;

(2) applies for or has eligibility redetermined under a federally mandated Medicaid-funded program for the elderly and people with disabilities as described in §358.107 of this chapter (relating to Coverage Groups); or

(3) applies for or has eligibility redetermined under §1929(b)(2)(B) of the Social Security Act.

(b) Individual budget. In preparing an eligibility budget for a person who meets the criteria in §358.434(a) of this division (relating to Budget Types for a Noninstitutional Setting), HHSC:

(1) counts the person's income in accordance with §1612 of the Social Security Act (42 U.S.C. §1382a);

(2) counts the person's resources in accordance with §1613 of the Social Security Act (42 U.S.C. §1382b);

(3) applies the individual resource limit in accordance with 20 CFR §416.1205; and

(4) applies the appropriate income limit, effective the month of eligibility determination, as follows:

(A) for a person who meets the criterion in subsection (a)(1) or (2) of this section, the income limit is the full individual Supplemental Security Income (SSI) benefit rate; and

(B) for a person who meets the criterion in subsection (a)(3) of this section, the income limit is the special income limit based on 300 percent of the full individual SSI benefit rate.

(c) Couple budget. In preparing an eligibility budget for a couple who meets the criteria in §358.434(b) of this division, HHSC:

(1) counts the income of both spouses in accordance with §1612 of the Social Security Act;

(2) counts the resources of both spouses in accordance with §1613 of the Social Security Act;

(3) applies the couple resource limit in accordance with 20 CFR §416.1205; and

(4) applies the appropriate income limit, effective the month of eligibility determination, as follows:

(A) for a couple who meets the criteria in subsection (a)(1) or (2) of this section, the income limit is the full couple SSI benefit rate; and

(B) for a couple who meets the criteria in subsection (a)(3) of this section, the income limit is twice the special income limit based on 300 percent of the full individual SSI benefit rate.

(d) Companion budget. In preparing an eligibility budget for a person who meets the criteria in §358.434(c) of this division, HHSC:

(1) counts the income of both spouses in accordance with §1612 of the Social Security Act;

(2) counts the resources of both spouses in accordance with §1613 of the Social Security Act;

(3) deems the ineligible spouse's income and resources;

(4) applies the couple resource limit in accordance with 20 CFR §416.1205; and

(5) applies the appropriate income limit, effective the month of eligibility determination, as follows:

(A) for a person who meets the criterion in subsection (a)(1) or (2) of this section, the income limit is the full individual SSI benefit rate; and

(B) for a person who meets the criterion in subsection (a)(3) of this section, the income limit is the special income limit based on 300 percent of the full individual SSI benefit rate.

§358.436. Budget Types for an Institutional Setting.

(a) Individual budget. The Texas Health and Human Services Commission (HHSC) prepares an individual budget for a person in an institutional setting if the person is:

(1) single;

(2) widowed;

(3) divorced; or

(4) married and meets the criteria in subsection (c) of this section, but the community spouse refuses to cooperate in providing information and circumstances indicate possible abuse or neglect by the community spouse.

(b) Couple budget. HHSC prepares a couple budget for a couple in an institutional setting if:

(1) the couple meets the definition of a couple in §358.431 of this division (relating to Definitions);

(2) each spouse is an applicant or a recipient; and

(3) both spouses are in the same coverage group.

(c) Institutional companion budget. HHSC prepares an institutional companion budget for a person in an institutional setting if:

(1) the person has a community spouse; and

(2) the couple meets the definition of a couple in §358.431 of this division, except the criterion that the couple live together does not apply.

§358.437. Institutional Eligibility Budgets.

(a) Scope. The Texas Health and Human Services Commission (HHSC) prepares an institutional eligibility budget to determine financial eligibility for a person or couple in an institutional setting, if the person or couple:

(1) applies for retroactive coverage; or

(2) applies for or has eligibility redetermined under a federally optional Medicaid-funded program for the elderly and people with disabilities as described in §358.107 of this chapter (relating to Coverage Groups).

(b) Individual budget. In preparing an eligibility budget for a person who meets the criteria in §358.433 of this division (relating to Special Income Limit) and §358.436(a) of this division (relating to Budget Types for an Institutional Setting), HHSC:

(1) counts the person's income in accordance with §1612 of the Social Security Act (42 U.S.C. §1382a);

(2) counts the person's resources in accordance with §1613 of the Social Security Act (42 U.S.C. §1382b);

(3) applies the individual resource limit in accordance with 20 CFR §416.1205; and

(4) applies the special income limit effective the month of eligibility determination.

(c) Couple budget. In preparing an eligibility budget for a couple who meets the criteria in §358.433 of this division and §358.436(b) of this division, HHSC:

(1) counts the income of both spouses in accordance with §1612 of the Social Security Act;

(2) counts the resources of both spouses in accordance with §1613 of the Social Security Act;

(3) applies the couple resource limit in accordance with 20 CFR §416.1205; and

(4) applies the special income limit, effective the month of eligibility determination.

(d) Institutional companion budget. In preparing an eligibility budget for a person who meets the criteria in §358.433 of this division and §358.436(c) of this division, HHSC:

(1) applies spousal impoverishment treatment of income and resources under 42 U.S.C. §1936r-5, counting income of both spouses in accordance with §1612 of the Social Security Act and resources of both spouses in accordance with §1613 of the Social Security Act;

(2) follows resource eligibility in accordance with 42 U.S.C. §1396r-5;

(3) bases income eligibility on the income of the person in the institutional setting; and

(4) applies the special income limit effective the month of determination.

(e) Less than 30 consecutive days. In preparing an eligibility budget for a person or couple in an institutional setting who does not meet the criteria in §358.433 of this division, HHSC applies the criteria in §358.435 of this division (relating to Noninstitutional Eligibility Budgets).

§358.438. Determination of Co-payment.

(a) After a person or couple in an institutional setting is determined eligible for a Medicaid-funded program for the elderly and people with disabilities, the Texas Health and Human Services Commission (HHSC) determines the person's or couple's co-payment in accordance with:

(1) Section 1902(a)(17) of the Social Security Act (42 U.S.C. §1396a(17)), relating to the general authority;

(2) Section 1902(a)(50) and (q) of the Social Security Act (42 U.S.C. §1396a(50) and (q)), relating to personal needs; and

(3) Section 1924 of the Social Security Act (42 U.S.C. §1396r-5), relating to institutionalized spouses with community spouses.

(b) To determine the co-payment for a person or couple in an institutional setting, HHSC follows 42 CFR §§435.725, 435.726, and 435.735, including the optional deduction for a home maintenance allowance for a person or couple described in 42 CFR §435.725(d).

(c) To determine the co-payment for a person or couple receiving services under the Program of All-Inclusive Care for the Elderly (PACE)in a PACE setting, HHSC follows §1934(i) of the Social Security Act (42 U.S.C. §1396u-4(i)).

(d) HHSC follows §1924(d) of the Social Security Act (42 U.S.C. §1396r-5(d)), concerning the protection of income for the community spouse, to determine the minimum monthly maintenance needs allowance, and to determine an institutionalized spouse's co-payment.

§358.439. Guardian Fee.

(a) The Texas Health and Human Services Commission (HHSC) may deduct a guardian fee, if any, in an amount set by the court, from a person's total countable income, in determining the person's co-payment.

(b) HHSC deducts the guardian fee from total countable income after deducting the personal needs allowance, but before deducting any other allowances.

§358.440. Dependent Allowance.

(a) In determining a person's co-payment, the Texas Health and Human Services Commission (HHSC) may deduct a dependent allowance from a person's total countable income.

(1) For a person with at least one dependent relative at home, HHSC allows the individual Social Security Income (SSI) benefit rate for each dependent relative and deducts the individual SSI benefit rate from the dependent relative's countable income.

(2) For a person with a spouse and a least one dependent relative at home, when spousal impoverishment provisions apply, HHSC determines the dependent allowance in accordance with 42 U.S.C. §1396r-5.

(b) The amount of the dependent allowance may be appealed based on undue hardship caused by financial duress as determined by HHSC, in accordance with HHSC's fair hearing rules in Chapter 357 of this title (relating to Hearings).

§358.441. Payroll Deductions.

(a) In determining a person's co-payment, the Texas Health and Human Services Commission (HHSC) calculates earned income each month by subtracting the following mandatory payroll deductions:

(1) income tax;

(2) social security tax;

(3) required retirement withholding; and

(4) required uniform expenses.

(b) After a person or couple in an institutional setting is determined eligible, HHSC applies the payroll deductions described in subsection (a) of this section to:

(1) an applicant or recipient;

(2) an applicant's or recipient's spouse; and

(3) a dependent relative of either spouse.

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 11, 2009.

TRD-200901774
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 424-6900

SUBCHAPTER D. APPLICATION AND ELIGIBILITY DETERMINATION

1 TAC §§358.501, 358.505, 358.510, 358.515, 358.520, 358.525, 358.530, 358.535, 358.540, 358.545

Statutory Authority

The new sections are proposed under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; and §531.021, which authorizes HHSC to administer the federal medical assistance (Medicaid) program in Texas.

The new sections affect Texas Government Code, Chapter 531. No other statutes, articles, or codes are affected by this proposal.

§358.501. Purpose and Scope.

(a) This subchapter establishes the application and eligibility determination processes for a person seeking health care benefits from a Medicaid-funded program for the elderly and people with disabilities (MEPD).

(b) This subchapter applies to both initial applications for assistance and eligibility redeterminations for MEPD, unless the context clearly indicates otherwise.

§358.505. Application Process Overview.

(a) The Texas Health and Human Services Commission (HHSC) gives anyone the opportunity to apply for a Medicaid-funded program for the elderly and people with disabilities (MEPD), in accordance with 42 CFR §435.906. A person can apply for MEPD by submitting:

(1) an application for assistance to HHSC; or

(2) an application for Supplemental Security Income (SSI) to the Social Security Administration.

(b) Under the application submittal process described in subsection (a)(1) of this section, a person must follow the requirements in §358.515 of this subchapter (relating to Application Requirements) to obtain an eligibility determination from HHSC.

(c) In accordance with 42 CFR §435.120 and §435.909(b)(1), an application for SSI as described in subsection (a)(2) of this section serves as an application for MEPD. A person receiving or deemed to be receiving SSI derives eligibility for MEPD from the person's SSI eligibility and does not require an eligibility determination from HHSC.

§358.510. Authorized Representative.

In accordance with 42 CFR §435.908, an authorized representative may accompany, assist, and represent an applicant or recipient in the application or eligibility redetermination process.

§358.515. Application Requirements.

(a) To apply for a Medicaid-funded program for the elderly and people with disabilities (MEPD) under the application submittal process described in §358.505(a)(1) and (b) of this subchapter (relating to Application Process Overview), and in accordance with 42 CFR

§435.907, an applicant, authorized representative, or someone acting responsibly for the applicant (if the applicant is incompetent or incapacitated) must:

(1) use the application prescribed by the Texas Health and Human Services Commission (HHSC) and complete it according to HHSC instructions:

(A) in writing, using a paper application obtained via telephone, Internet request, or other means;

(B) online, using the application process available over the Internet;

(C) over the telephone, through the State's toll-free telephone number; or

(D) in person, by visiting an HHSC benefits office;

(2) provide all requested information according to HHSC instructions; and

(3) sign the application for assistance under penalty of perjury.

(b) If someone helps an applicant or authorized representative complete the application for assistance, the name of the person completing the form must appear as requested on the application.

(c) If HHSC sends an applicant or authorized representative a request for missing information or verification documents, or both, the applicant or authorized representative must provide the requested information to HHSC by the due date given in the request, or eligibility may be denied.

§358.520. Date of Application.

(a) The date of application is the date on which:

(1) the Texas Health and Human Services Commission receives an application for assistance in accordance with subsection (c) of this section; or

(2) an application for Supplemental Security Income is filed with the Social Security Administration.

(b) If an application for assistance is received after the close of business, the date of application is the next working day.

(c) For purposes of determining the date of application for an application for assistance received under subsection (a)(1) of this section:

(1) an application received via fax or mail must contain, at a minimum, the applicant's name, address, and valid signature; and

(2) an application received via telephone or the Internet:

(A) must contain, at a minimum, the applicant's name and address; and

(B) the applicant must provide a valid signature within 45 days after the date of application.

§358.525. Previously Completed Application for Assistance.

An application for assistance remains valid for 90 days after a date of denial, if the Texas Health and Human Services Commission denies eligibility. An applicant may use his or her previously completed application to reapply during the 90-day period, in accordance with HHSC instructions.

§358.530. Eligibility Determination.

(a) Time frame for determination. After an applicant or authorized representative provides all information and verification documents requested, the Texas Health and Human Services Commission (HHSC) makes an eligibility determination within the following time frames, in accordance with 42 CFR §435.911:

(1) by the 90th day after the date of application if the applicant is applying on the basis of a disability;

(2) by the 45th day after the date of application for all other applicants; or

(3) beyond the time frames established in paragraphs (1) and (2) of this subsection under unusual circumstances, such as those set forth in 42 CFR §435.911.

(b) Basis for determination. HHSC decides whether an applicant meets the eligibility criteria for a Medicaid-funded program for the elderly and people with disabilities based on:

(1) a complete, signed, and dated application for assistance;

(2) information obtained from an interview, if an interview occurred; and

(3) required verification documents.

§358.535. Notice of Eligibility Determination.

(a) After making an initial eligibility determination, the Texas Health and Human Services Commission (HHSC) sends the applicant, in accordance with 42 CFR §435.912:

(1) a written notice of eligibility, including notice of any co-payment the person must pay and the medical effective date described in §358.540 of this subchapter (relating to Medical Effective Date); or

(2) a written notice of ineligibility, explaining the reason for the decision and the specific provision supporting the decision.

(b) After making an eligibility redetermination, HHSC sends the recipient a written notice of any change in eligibility or co-payment.

(c) The written notice informs the applicant or recipient of the right to request a hearing to appeal the eligibility determination. The hearing is held in accordance with 42 CFR Part 431, Subpart E and HHSC's fair hearing rules in Chapter 357 of this title (relating to Hearings).

§358.540. Medical Effective Date.

(a) If a person is eligible for a Medicaid-funded program for the elderly and people with disabilities (MEPD), the Texas Health and Human Services Commission (HHSC) includes in the notice of eligibility the date that the person's Medicaid benefits will begin, which is known as the medical effective date.

(b) HHSC determines the medical effective date:

(1) in accordance with 42 CFR §435.914, as the first day of the month in which a person meets all eligibility criteria, which may be up to three months before the date of application if:

(A) during the three months before the month of application, the person received MEPD services covered under the Texas State Plan for Medical Assistance; and

(B) would have been eligible for MEPD at the time the services were received if the person had applied (or someone had applied on behalf of the person), regardless of whether the person is alive when application for MEPD is made; or

(2) as approved by the Centers for Medicare and Medicaid Services for a §1915(c) waiver program.

§358.545. Eligibility Redetermination.

(a) In accordance with 42 CFR §435.916, the Texas Health and Human Services Commission (HHSC) redetermines a person's eligibility for a Medicaid-funded program for the elderly and people with disabilities (MEPD):

(1) at least every 12 months;

(2) after HHSC receives information about a change in the person's circumstances, such as living arrangement, income, or resources, that may affect MEPD eligibility; and

(3) at the appropriate time based on an anticipated change in the person's circumstances.

(b) If the result of an eligibility redetermination causes an adverse action, HHSC:

(1) gives timely and adequate notice of the proposed action to terminate, discontinue, or suspend MEPD eligibility;

(2) gives timely and adequate notice to reduce or discontinue MEPD services; and

(3) informs the person of the right to request a hearing to appeal the adverse action in accordance with 42 CFR Part 431, Subpart E and HHSC's fair hearing rules in Chapter 357 of this title (relating to Hearings).

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

Filed with the Office of the Secretary of State on May 11, 2009.

TRD-200901775
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 424-6900

SUBCHAPTER E. RIGHTS AND RESPONSIBILITIES OF APPLICANTS AND RECIPIENTS

1 TAC §§358.601 - 358.605

Statutory Authority

The new sections are proposed under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; and §531.021, which authorizes HHSC to administer the federal medical assistance (Medicaid) program in Texas.

The new sections affect Texas Government Code, Chapter 531. No other statutes, articles, or codes are affected by this proposal.

§358.601. Rights.

An applicant or recipient has the right to:

(1) be treated fairly and equally regardless of race, color, religion, national origin, gender, political beliefs, or disability;

(2) have information collected for determining his or her eligibility to be treated as confidential;

(3) request a review of an action;

(4) have his or her eligibility tested for other programs before HHSC denies eligibility;

(5) review all information that contributed to an eligibility decision; and

(6) request a fair hearing to appeal an action by HHSC.

§358.602. Disclosure of Official Records and Information.

The Texas Health and Human Services Commission follows 20 CFR §§401 - 403 concerning disclosure of information about a person, both with and without the person's consent; the maintenance of records; and the general guidelines in deciding whether to make a disclosure.

§358.603. Release of Medical Information.

A person requesting assistance on the basis of disability must complete a medical information release form.

§358.604. Responsibility To Provide Information and Report Changes.

(a) An applicant or recipient must provide the Texas Health and Human Services Commission (HHSC) the necessary documentation and information to determine eligibility for Medicaid.

(b) An applicant or recipient must report to HHSC certain events that affect benefits in accordance with 20 CFR Subpart G.

§358.605. Fraud Referral and Restitution.

(a) The Texas Health and Human Services Commission (HHSC) follows 42 CFR §§455.13 - 455.16 for issues governing fraud referral and restitution.

(b) HHSC evaluates a person's willful withholding of information for fraud, including:

(1) willful misstatements, oral or written, made by the person or the person's authorized representative in response to oral or written questions from HHSC concerning the person's income, resources, or other circumstances that may affect the amounts of benefits, including understatements or omission of information about income and resources; and

(2) willful failure by the person or the person's authorized representative to report changes in income, resources, or other circumstances that may affect the amount of benefits, if HHSC has clearly notified the person or the person's authorized representative of the person's obligation to report these changes.

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 11, 2009.

TRD-200901776
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 424-6900

CHAPTER 359. MEDICARE SAVINGS PROGRAM

1 TAC §§359.101, 359.103, 359.105, 359.107, 359.109

The Health and Human Services Commission (HHSC) proposes new Chapter 359, governing the Medicare Savings Program (MSP), consisting of §§359.101, 359.103, 359.105, 359.107,

and 359.109. The proposed new rules concern the legal basis and eligibility requirements for the coverage available under MSP, which uses Medicaid funds to help eligible persons pay for all or some of their out-of-pocket Medicare expenses, such as premiums, deductibles, or coinsurance.

Background and Justification

HHSC administers MSP in accordance with 42 United States Code (U.S.C.) §1396a(a)(10)(E). The administrative rules governing MSP are currently found in 1 TAC Chapter 358, Subchapter B, which HHSC is proposing for repeal elsewhere in this issue of the *Texas Register.* HHSC proposes placement of the MSP rules in their own chapter to give the program greater visibility and to provide the public with easier access to the rules.

HHSC is proposing no substantive changes to the rules governing MSP. The proposal primarily renumbers the existing rules, makes corresponding adjustments to the rule text as appropriate, and provides cites to the federal regulations.

Section-by-Section Summary

Proposed new §359.101 describes the legal basis and purpose of MSP. Section §359.101 also lists the current components of MSP, which are: (1) the Qualified Medicare Beneficiary Program (QMB), (2) the Specified Low-Income Medicare Beneficiary Program (SLMB), (3) the Qualifying Individual Program (QI), and (4) the Qualified Disabled and Working Individual Program (QDWI).

Proposed new §359.103 describes the scope, eligibility criteria, and eligibility effective date for QMB, which pays Medicare premiums, deductibles, and coinsurance for an eligible person.

Proposed new §359.105 describes the scope, eligibility criteria, and eligibility effective date for SLMB, which pays Medicare Part B premiums for an eligible person who has an income that is greater than 100% but less than 120% of the federal poverty level.

Proposed new §359.107 describes the scope, eligibility criteria, and eligibility effective date for QI, which pays Medicare Part B premiums for an eligible person who has an income that is at least 120% but less than 135% of the federal poverty level.

Proposed new §359.109 describes the scope, eligibility criteria, and eligibility effective date for QDWI, which pays Medicare Part A premiums for an eligible person who has a monthly income equal to or less than 200% of the federal poverty level.

Fiscal Note

Thomas M. Suehs, Deputy Executive Commissioner for Financial Services, has determined that, for the first five years the proposed new sections are in effect, enforcing or administering the new sections does not have foreseeable implications relating to costs or revenues of state or local governments.

Small Business and Micro-business Impact Analysis

Mr. Suehs has determined that there will be no effect on small businesses or micro-businesses to comply with the proposal, because the proposed rules will not require them to alter their business practices. There are no anticipated economic costs to persons who are required to comply with the proposed rules. There is no anticipated negative impact on local employment.

Public Benefit and Costs

Joanne Molina, Deputy Executive Commissioner for Social Services, has determined that, for each year of the first five years the new sections are in effect, the anticipated public benefit expected as a result of enforcing the new sections is rules governing the Medicare Savings Programs will be clearer and easier to find.

Regulatory Analysis

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

Takings Impact Assessment

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

Public Comment

Written comments on the proposal may be submitted to Mary Nan Haylor, Health and Human Services Commission, Office of Family Services, MC-2090, 909 West 45th Street, Austin, TX 78751, or by e-mail to marynan.haylor@hhsc.state.tx.us, within 30 days after publication of this proposal in the *Texas Register.*

Public Hearing

HHSC will hold a public hearing on June 22, 2009, at 9:00 a.m. (Central Time) to receive public comment on the proposal. The hearing will be held in the Lone Star Conference Room of the Health and Human Services Commission, Braker Center, Building H, 11209 Metric Boulevard, Austin, Texas. Entry is through Security at the main entrance of the building, which faces Metric Boulevard. Persons requiring Americans with Disabilities Act (ADA) accommodation or auxiliary aids or services should contact Graciela Reyna by calling (512) 206-4778, at least 72 hours prior to the hearing so appropriate arrangements can be made.

Statutory Authority

The new sections are proposed under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; and §531.021, which authorizes HHSC to administer the federal medical assistance (Medicaid) program in Texas.

The new sections affect Texas Government Code, Chapter 531. No other statutes, articles, or codes are affected by this proposal.

§359.101. Purpose and Scope.

(a) This chapter describes the assistance available and eligibility requirements for the Medicare Savings Program. Authorized under 42 U.S.C. §1396a(a)(10)(E), the Medicare Savings Program uses Medicaid funds to help eligible persons pay for all or some of their out-of-pocket Medicare expenses, such as premiums, deductibles, or coinsurance.

(b) The Texas Health and Human Services Commission (HHSC) manages the Medicare Savings Program, which consists of the following:

(1) the Qualified Medicare Beneficiary (QMB) Program;

(2) the Specified Low-Income Medicare Beneficiary (SLMB) Program;

(3) the Qualified Individual (QI) Program; and

(4) the Qualified Disabled and Working Individual (QDWI) Program.

(c) Nothing in these rules shall be construed to violate the maintenance of eligibility requirements of section 5001 of the American Recovery and Reinvestment Act of 2009 (Public Law 111-5) and make eligibility standards, methodologies, or procedures under the Texas State Plan for Medical Assistance (or any waiver under section 1115 of the Social Security Act (42 U.S.C. §1315)) more restrictive than the eligibility standards, methodologies, or procedures, respectively, under such plan (or waiver) that were in effect on July 1, 2008.

§359.103. Qualified Medicare Beneficiary Program.

(a) Authorized under 42 U.S.C. §1396a(a)(10)(E)(i), the Qualified Medicare Beneficiary (QMB) Program pays Medicare premiums, deductibles, and coinsurance for a person who meets the requirements of this section. A person receiving Medicaid may also receive QMB benefits if the person meets the requirements of this section.

(b) To be eligible for QMB coverage, a person must:

(1) be entitled to benefits under Medicare Part A; and

(2) meet income and resources requirements in 42 U.S.C. §1396d(p).

(c) A person is not eligible for QMB coverage if the person:

(1) is in the custody of penal authorities as defined in 42 C.F.R. §411.4(b); or

(2) is over 20 years of age and under 65 years of age and resides in an institution for mental diseases.

(d) A person's QMB eligibility begins on the first day of the month after the month the person is certified for QMB benefits.

(e) A person with QMB coverage is not eligible for three months prior medical coverage.

§359.105. Specified Low-Income Medicare Beneficiary Program.

(a) Authorized under 42 U.S.C. §1396a(a)(10)(E)(iii), the Specified Low-Income Medicare Beneficiary (SLMB) Program pays only Medicare Part B premiums for a person who meets the requirements of this section. A person receiving Medicaid may also receive SLMB benefits if the person meets the requirements of this section.

(b) To be eligible for SLMB coverage, a person must meet the eligibility criteria for QMB coverage in §359.103(b) of this chapter (relating to Qualified Medicare Beneficiary Program), except the person must have an income that is greater than 100% but less than 120% of the federal poverty level.

(c) A person is not eligible for SLMB coverage if the person:

(1) is in the custody of penal authorities as defined in 42 C.F.R. §411.4(b); or

(2) is over 20 years of age and under 65 years of age and resides in an institution for mental diseases.

(d) A person's SLMB eligibility may begin with the month of application.

(e) A person with SLMB coverage is eligible for three months prior medical coverage, if all criteria are met.

§359.107. Qualifying Individual Program.

(a) Authorized under 42 U.S.C. §1396a(a)(10)(E)(iv) the Qualifying Individual (QI) Program pays only Medicare Part B premiums to a person who meets the requirements of this section. A person cannot be eligible for regular Medicaid and QI coverage at the same time.

(b) To be eligible for QI coverage, a person must meet the eligibility criteria for Qualified Medicare Beneficiary coverage in §359.103(b) of this chapter (relating to Qualified Medicare Beneficiary Program), except the person must have income that is at least 120% but less than 135% of the federal poverty level.

(c) Eligibility for QI coverage is determined for each calendar year.

(d) A person's QI eligibility may begin with the month of application.

(e) A person with QI coverage is eligible for three months prior medical coverage if all criteria are met. The three-month prior period cannot extend back into the previous calendar year.

§359.109. Qualified Disabled and Working Individual Program.

(a) Authorized under 42 U.S.C. §1396a(a)(10)(E)(ii), the Qualified Disabled and Working Individual (QDWI) Program pays only Medicare Part A premiums for a person who meets the requirements of this section. A person cannot be eligible for regular Medicaid and QDWI coverage at the same time.

(b) To be eligible for QDWI coverage, a person must:

(1) be under 65 years of age;

(2) be entitled to benefits under Medicare Part A;

(3) not otherwise be eligible for Medicaid;

(4) have a monthly income equal to or less than 200% of the federal poverty level; and

(5) have no more than twice the countable resources allowed under the Supplemental Security Income (SSI) program, as described in §1611 of the Social Security Act (42 U.S.C. §1382).

(c) A person's QDWI eligibility begins in accordance with the coverage period described in §1818A of the Social Security Act (42 U.S.C. §1395i-2a(c)).

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 11, 2009.

TRD-200901777
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 424-6900

CHAPTER 360. MEDICAID BUY-IN PROGRAM

1 TAC §§360.101, 360.103, 360.105, 360.107, 360.109, 360.111, 360.113, 360.115, 360.117, 360.119

The Health and Human Services Commission (HHSC) proposes new Chapter 360, governing the Medicaid Buy-In Program (MBI), consisting of §§360.101, 360.103, 360.105, 360.107,

360.109, 360.111, 360.113, 360.115, 360.117, and 360.119. The proposed new rules concern the application process, eligibility requirements, and medical effective date for MBI, which provides Medicaid benefits to working persons with disabilities, regardless of age, who apply for Medicaid and meet the MBI eligibility criteria.

Background and Justification

HHSC administers MBI under §531.02444 of the Texas Government Code and provides Medicaid benefits under the option explained in §1902(a)(10)(A)(ii)(XIII) of the Social Security Act. The administrative rules governing MBI are currently found in 1 TAC Chapter 358, Subchapter I, which HHSC is proposing for repeal elsewhere in this issue of the *Texas Register.* HHSC proposes placement of the MBI rules in their own chapter to give the program greater visibility and to provide the public with easier access to the rules.

With the exception of proposed new §360.109, concerning work requirements, and proposed new §360.117, concerning cost sharing, HHSC is proposing no substantive changes to the rules governing MBI. The proposal primarily renumbers the existing rules and makes corresponding adjustments to the rule text as appropriate.

Section-by-Section Summary

Proposed new §360.101 explains the purpose of MBI and gives the legal basis for the program. in state and federal law.

Proposed new §360.103 establishes the application process and requirements for MBI, including the requirement that an applicant or recipient provide HHSC with all requested documentation and information that HHSC advises is necessary to determine or redetermine an applicant's or recipient's eligibility.

Proposed new §§360.105, 360.107, 360.111, and 360.113 require that, for a person to be eligible for MBI, the person must meet the criteria for citizenship, immigration status, and residency; disability; income; and resources as indicated in the proposed rules.

Proposed new §360.109 requires an MBI recipient to work and have earnings. Specific requirements in the existing rule for a recipient to earn income are replaced in the proposed rule with a requirement that the recipient must prove that he or she is working and earning income.

Proposed new §360.115 establishes the deeming requirements for income and resources for purposes of MBI eligibility.

Proposed new §360.117 requires an MBI recipient to pay monthly premiums based on the recipient's countable earned and countable unearned income. The proposal specifies the current amounts for monthly earned income premiums and the upper premium limit for the MBI program. Monthly earned income premiums range from $20 to $40 for individuals with earned income above 150 percent of the federal poverty level. The upper limit for total monthly premiums (earned income premiums plus unearned income premiums) is $500. These changes will help clarify the monthly premium amounts for the MBI program.

Proposed new §360.119 establishes the effective date on which an MBI recipient's coverage begins.

Fiscal Note

Thomas M. Suehs, Deputy Executive Commissioner for Financial Services, has determined that, for the first five years the proposed new sections are in effect, there will be no fiscal impact to state government. The proposed rules will not result in any fiscal implications for local health and human services agencies. Local governments will not incur additional costs.

Small Business and Micro-business Impact Analysis

Mr. Suehs has determined that there will be no effect on small businesses or micro-businesses to comply with the proposal, because they will not be required to alter their business practices as a result of the rule. There are no anticipated economic costs to persons who are required to comply with the proposed rules. There is no anticipated negative impact on local employment.

Public Benefit and Costs

Joanne Molina, Deputy Executive Commissioner for Social Services, has determined that, for each year of the first five years the new sections are in effect, the anticipated public benefit expected as a result of enforcing the new sections is that having MBI rules in their own chapter will lead to greater awareness of the program and the benefits it provides for working people with disabilities. The new sections will also help clarify the monthly premium amounts for the MBI program.

Regulatory Analysis

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

Takings Impact Assessment

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

Public Comment

Written comments on the proposal may be submitted to Mary Nan Haylor, Health and Human Services Commission, Office of Family Services, MC-2090, 909 West 45th Street, Austin, TX 78751, or by e-mail to marynan.haylor@hhsc.state.tx.us, within 30 days after publication of this proposal in the *Texas Register.*

Public Hearing

HHSC will hold a public hearing on June 22, 2009, at 9:00 a.m. (Central Time) to receive public comment on the proposal. The hearing will be held in the Lone Star Conference Room of the Health and Human Services Commission, Braker Center, Building H, 11209 Metric Boulevard, Austin, Texas. Entry is through Security at the main entrance of the building, which faces Metric Boulevard. Persons requiring Americans with Disabilities Act (ADA) accommodation or auxiliary aids or services should contact Graciela Reyna by calling (512) 206-4778, at least 72 hours prior to the hearing so appropriate arrangements can be made.

Statutory Authority

The new sections are proposed under Texas Government Code, §531.0055, which provides the Executive Commissioner of

HHSC with rulemaking authority; §531.021, which authorizes HHSC to administer the federal medical assistance (Medicaid) program in Texas; and §531.02444, which authorizes HHSC to administer a Medicaid Buy-In Program and to adopt rules to govern it.

The new sections affect Texas Government Code, Chapter 531. No other statutes, articles, or codes are affected by this proposal.

§360.101. Overview and Purpose.

(a) This chapter governs the eligibility requirements for the Medicaid Buy-In Program (MBI), which is authorized under §531.02444 of the Texas Government Code, and which provides Medicaid benefits under the option explained in §1902(a)(10)(A)(ii)(XIII) of the Social Security Act (42 U.S.C. §1396a(a)(10)(A)(ii)(XIII)). All references in this chapter to MBI mean the Medicaid Buy-In Program.

(b) MBI is administered by the Texas Health and Human Services Commission (HHSC). All references in this chapter to HHSC mean the Texas Health and Human Services Commission.

(c) MBI provides Medicaid benefits to working persons with disabilities, regardless of age, who apply for Medicaid and meet the requirements explained in this chapter.

(d) Nothing in these rules shall be construed to violate the maintenance of eligibility requirements of section 5001 of the American Recovery and Reinvestment Act of 2009 (Public Law 111-5) and make eligibility standards, methodologies, or procedures under the Texas State Plan for Medical Assistance (or any waiver under section 1115 of the Social Security Act (42 U.S.C. §1315)) more restrictive than the eligibility standards, methodologies, or procedures, respectively, under such plan (or waiver) that were in effect on July 1, 2008.

§360.103. Applying and Providing Information.

(a) A person applies for MBI by completing an application for MBI and submitting it to HHSC. The date of receipt of the signed application by HHSC is the application filing date, and thus establishes the application month explained in §360.119 of this chapter (relating to Medical Effective Date).

(b) HHSC notifies an MBI recipient in writing when it is time to redetermine the recipient's eligibility. This usually occurs once per year, although HHSC may require a person to reapply sooner if HHSC determines that a special review of the person's eligibility is appropriate. An MBI recipient must reapply when HHSC sends written notice of the requirement to the recipient's case address of record. The written notice explains the deadline to reapply. If an MBI recipient fails to reapply by the deadline stated in the written notice, HHSC may terminate the recipient's MBI eligibility.

(c) HHSC sends in writing to the person's case address of record the eligibility decision on an application, reapplication, or reported change. If the person disagrees, the person has the right to request a fair hearing to appeal HHSC's decision, as explained in HHSC's fair hearing rules in Chapter 357 of this title (relating to Hearings).

(d) An applicant for MBI must provide HHSC with all requested documentation and information that HHSC advises is necessary to determine the applicant's eligibility. If the applicant fails or refuses to provide requested information by the date specified in a written request from HHSC, HHSC may deny the application for failure to furnish information. When this occurs but the person later provides the requested information, the date that the requested information is provided to HHSC becomes the application filing date explained in subsection (a) of this section.

(e) A person who applies for or is receiving MBI must report to HHSC within 10 calendar days any information that may impact the person's eligibility. If a person fails to comply with the requirements of this subsection, HHSC may redetermine the person's eligibility as of the date the information should have been reported to HHSC.

§360.105. Citizenship, Immigration Status, and Residency.

To be eligible for MBI, a person must meet the citizenship, immigration status, and residency requirements in Chapter 358, Subchapter B, of this title (relating to Nonfinancial Requirements).

§360.107. Disability.

To be eligible for MBI, a person must be disabled as defined by the Social Security Administration for purposes of the federal Supplemental Security Income program, as explained in 20 CFR §416.905 and §416.906, except the requirement that the person be unable to engage in any substantial gainful activity does not apply.

§360.109. Work.

To be eligible for MBI, a person must be working and earning income. The person must provide evidence of earnings that is satisfactory to HHSC.

§360.111. Income.

(a) Earned income.

(1) To be eligible for MBI, a person's monthly countable earned income must be less than 250% of the federal poverty level.

(2) Countable earned income means earned income for purposes of the Supplemental Security Income (SSI) program minus all applicable exclusions and exemptions, as explained in 20 CFR §§416.1110 - 416.1112.

(b) Unearned income is entirely excluded under this section, but is considered in the determination of a person's monthly premium amount, as explained in §360.117 of this chapter (relating to Cost Sharing).

§360.113. Resources.

(a) To establish and maintain eligibility for MBI, a person's countable resources must be equal to or less than $3,000 plus the amount of the Supplemental Security Income (SSI) resource limit for an individual that is explained in 20 CFR §416.1205. Countable resources means resources for SSI purposes as defined in 20 CFR §416.1205, minus all applicable exemptions and exclusions explained in 20 CFR §§416.1207 - 416.1239.

(b) In addition to the exemptions and exclusions explained in subsection (a) of this section, the following are not countable resources under this section:

(1) Independence accounts.

(A) An independence account (IA) is a segregated account in a financial institution, the purpose of which is to save for future health care and work-related expenses to increase an individual's independence and employment potential.

(B) Only a person's own earned income may be deposited into an IA, and amounts deposited cannot exceed 50% of the person's gross earnings. If for any SSA Qualifying Quarter a person deposits more than 50% of the person's gross earnings into an account that is designated as an IA, the account loses its IA designation and the funds in the account become a countable resource for the 12-month period beginning with the first month after the SSA Qualifying Quarter. An SSA Qualifying Quarter is a three-month period that ends on March 31, June 30, September 30, and December 31 of each calendar year and

during which a person's reported earnings and FICA contributions are enough for SSA to give the person Social Security wage credits.

(C) Only health care or work-related expenses may be paid from an IA. For any SSA Qualifying Quarter, if funds in an IA account are used for any other purpose, the account loses its IA designation and the funds in the account become a countable resource for the 12-month period beginning with the first month after the SSA Qualifying Quarter.

(2) Retirement related tax-sheltered accounts. Retirement related tax-sheltered accounts include IRAs, 401(k)s, TSAs, and KEOUGHs that comply with IRS regulations.

§360.115. Deeming of Income and Resources.

(a) For purposes of MBI eligibility, each person is considered a household of one.

(b) If a person lives with a spouse, the person and spouse are each considered a household of one. The assets of each spouse are considered only with respect to that spouse. In the case of assets owned jointly by both spouses, one half is considered with respect to each spouse.

(c) If a person is a minor and lives with his or her parents, the assets of the parents are not considered with respect to the eligibility of the minor.

§360.117. Cost Sharing.

(a) Monthly premiums. As a condition of establishing initial MBI eligibility and to remain eligible, a person must pay monthly premiums, as explained in this section, based on the amount of the person's countable earned and countable unearned income.

(b) Countable earned income. For purposes of this section, countable earned income is as defined in 20 CFR §416.1110 and §416.1111, minus:

(1) earned income that is excluded by federal law, as explained in 20 CFR §416.1112(b); and

(2) mandatory payroll deductions for federal income tax, FICA, and retirement withholding.

(c) Countable unearned income. For purposes of this section, countable unearned income means unearned income, as defined in 20 CFR §§416.1120 - 416.1123, minus the exclusions and exemptions explained in 20 CFR §416.1124.

(d) Calculation of monthly premium. The monthly premium amount equals the amount of a person's countable unearned income for the month that exceeds the Supplemental Security Income (SSI) federal benefit rate for an individual, plus:

(1) $20 when monthly countable earned income is above 150% of the federal poverty level (FPL) up to and including 185% of the FPL;

(2) $25 when monthly countable earned income is above 185% of the FPL up to and including 200% of the FPL;

(3) $30 when monthly countable earned income is above 200% of the FPL up to and including 250% of the FPL; or

(4) $40 when monthly countable earned income is above 250% of the FPL.

(e) Upper limit on monthly premiums. The upper limit for the total monthly premium per person is $500. If the unearned income premium amount plus the earned income premium amount equals or exceeds $500, then the total monthly premium remains at $500.

(f) Payment of monthly premiums to establish initial eligibility. If the calculation explained in subsection (d) of this section results in an amount greater than $0, HHSC sends the person a written notice of the person's potential eligibility as described in this subsection. The initial eligibility period begins with the earliest benefit month and continues through the end of the latest benefit month identified on the written notice of the person's potential eligibility. This subsection explains the procedures that are followed and the requirements the person must meet to establish eligibility under this section for any or all of the months within the initial eligibility period. The steps are as follows:

(1) HHSC determines that the person is potentially eligible if the person meets all eligibility requirements for MBI other than the requirements of this section.

(2) HHSC sends the person a written notice (the notice) of the person's potential eligibility. The notice identifies the earliest month of potential eligibility and the amount of the monthly premiums due for each month in the initial eligibility period.

(3) The notice also includes:

(A) the total amount in monthly premiums that must be paid to obtain MBI coverage for the entire initial eligibility period; and

(B) the deadline by which payment must be submitted.

(4) The person chooses whether to pay the monthly premiums for either the entire initial eligibility period or for only a portion of the initial eligibility period (according to the months during which the person desires MBI coverage).

(5) The person submits to HHSC, by the deadline stated in the notice, either the total amount due as explained in the notice or a lesser amount if the person is not seeking coverage for the entire initial eligibility period.

(6) If the person submits payment of less than the total amount due to obtain MBI coverage for the entire initial eligibility period, HHSC applies the amount submitted first to satisfy the monthly premium for the month following the month of the notice, then to each prior month of potential eligibility, in reverse chronological order. After this, if any amount remaining is less than the premium for a full month's coverage, HHSC refunds that amount to the person.

(7) HHSC notifies the person of MBI eligibility and of the beginning date of MBI coverage, based on the amount submitted by the person under paragraph (5) of this subsection.

(8) If no amount is submitted by the deadline stated in the notice, or if the amount submitted is less than one month's premium such that it is refunded to the person as explained in paragraph (6) of this subsection, HHSC denies the person MBI eligibility. A person denied under this paragraph must file a new application for MBI before eligibility can be established.

(g) Payment of monthly premiums after initial eligibility. Monthly premiums after a person establishes initial eligibility under subsection (f) of this section are due and payable to HHSC no later than the last calendar day of each month, and are applied to the following month's eligibility and coverage of MBI benefits. If a monthly premium payment that is due is not received by HHSC by the end of the month, after written notice, HHSC may terminate the person's MBI eligibility.

§360.119. Medical Effective Date.

Beginning with the three months before the application month, the eligibility effective date for MBI coverage is the first day of the first month in which a person meets all eligibility criteria, including the timely pay-

ment of monthly premiums as explained in §360.117 of this chapter (relating to Cost Sharing).

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 11, 2009.

TRD-200901778

Steve Aragón

Chief Counsel

Texas Health and Human Services Commission

Earliest possible date of adoption: June 21, 2009

For further information, please call: (512) 424-6900

CHAPTER 372. TEXAS WORKS

The Health and Human Services Commission (HHSC) proposes the repeal of Chapter 372, Texas Works, consisting of Subchapter A, §§372.1 - 372.6, concerning overview and purpose; Subchapter B, Eligibility, consisting of Division 1, §§372.101 - 372.107, concerning TANF certified groups; Division 2, §§372.151 - 372.153, concerning food stamp households; Division 3, §§372.201 - 372.205, concerning citizenship; Division 4, §372.251 and §372.252, concerning residency; Division 5, §372.301, concerning domicile; Division 6, §§372.351 - 372.358, concerning resources; Division 7, §§372.401 - 372.410, concerning income; Division 8, §§372.451 - 372.459, concerning time limits; and Division 9, §372.501, concerning criminal activity; Subchapter C, Associated Programs, consisting of Division 1, §372.601, concerning food stamps in disaster situations; Division 2, §§372.651 - 372.656, concerning the Simplified Nutritional Assistance Program; Division 3, §372.701 and §372.702, concerning the TANF Non-Cash Program; Division 4, §§372.751 - 372.754, concerning the TANF State Program; and Division 5, §372.801 and §372.802, concerning One-Time TANF (OTTANF); Subchapter D, Application Process, consisting of Division 1, §§372.901 - 372.906, concerning application; Division 2, §§372.951 - 372.958, concerning interview; and Division 3, §§372.1001 - 372.1003, concerning case disposition; Subchapter E, Participation Requirements, consisting of Division 1, §372.1101, concerning social security numbers; Division 2, §§372.1151 - 372.1156, concerning the TANF Personal Responsibility Agreement (PRA); Division 3, §§372.1201 - 372.1204, concerning finger imaging; Division 4, §§372.1251 - 372.1253, concerning TANF workforce orientation; Division 5, §§372.1301 - 372.1304, concerning third-party resources; Division 6, §§372.1351 - 372.1353, concerning work; and Division 7, §§372.1401 - 372.1404, concerning reporting changes; Subchapter F, Benefits, consisting of Division 1, §§372.1501 - 372.1529, concerning benefits in general; Division 2, §§372.1551 - 372.1554, concerning overpayments; and Division 3, §§372.1601 - 372.1603, concerning restoration; and Subchapter G, §§372.1701 - 372.1720, concerning retailer requirements.

HHSC concurrently proposes new Chapter 372, Temporary Assistance for Needy Families and Supplemental Nutrition Assistance Programs, consisting of Subchapter A, §§372.1 - 372.6, concerning overview and purpose; Subchapter B, Eligibility, consisting of Division 1, §§372.101 - 372.108, concerning Temporary Assistance for Needy Families (TANF) certified groups; Division 2, §§372.151 - 372.153, concerning Supplemental Nutrition Assistance Program (SNAP) households; Division 3, §§372.201 - 372.205, concerning citizenship; Division 4, §372.251 and §372.252, concerning residency; Division 5, §372.301, concerning domicile requirements for TANF; Division 6, §§372.351 - 372.356, concerning resources; Division 7, §§372.401 - 372.411, concerning income; Division 8, §§372.451 - 372.457, concerning time limits; and Division 9, §372.501, concerning disqualifications due to criminal activity; Subchapter C, Associated Programs, consisting of Division 1, §372.601, concerning SNAP benefits for disaster victims; Division 2, §§372.651 - 372.655, concerning SNAP-Combined Application Project (SNAP-CAP); Division 3, §372.701 and §372.702, concerning the TANF Non-Cash Program; Division 4, §§372.751 - 372.753, concerning the TANF State Program (TANF-SP); and Division 5, §372.801 and §372.802, concerning One-Time TANF (OTTANF); Subchapter D, Application Process, consisting of Division 1, §§372.901 - 372.906, concerning applications; Division 2, §§372.951 - 372.958, concerning interviews; and Division 3, §§372.1001 - 372.1003, concerning case disposition; Subchapter E, Participation Requirements, consisting of Division 1, §372.1101, concerning social security number requirements; Division 2, §§372.1151 - 372.1156, concerning the TANF Personal Responsibility Agreement (PRA); Division 3, §§372.1201 - 372.1204, concerning finger imaging; Division 4, §§372.1251 - 372.1253, concerning TANF workforce orientation; Division 5, §§372.1301 - 372.1303, concerning third-party resources; Division 6, §§372.1351 - 372.1353, concerning work; and Division 7, §§372.1401 - 372.1404, concerning reporting changes; Subchapter F, Benefits, consisting of Division 1, §§372.1501 - 372.1521, concerning benefits in general; Division 2, §372.1551 and §372.1552, concerning overpayments; and Division 3, §372.1601, concerning restoration of benefits; and Subchapter G, §§372.1701 - 372.1716, concerning retailer requirements.

Background and Justification

The existing rules in Chapter 372 provide eligibility criteria HHSC uses to determine a person eligible for assistance through SNAP (formerly the Food Stamp Program) and TANF, as well as requirements that govern client and retailer participation in the programs.

The purpose of the repeals is to allow for a complete rewrite of Chapter 372. The proposed new rules replace the rules proposed for repeal in Chapter 372. The new rules are proposed to update agency names and rule cross-references made obsolete during the consolidation of health and human services agencies in 2004; to eliminate the question-and-answer format; to incorporate necessary updates, including changing the name of the Food Stamp Program to SNAP to reflect the new name established by Congress; and where possible, to cite the appropriate federal law or regulation and explain that HHSC follows the federal law or regulation. Unless otherwise indicated in this proposal, the new rules do not impose any new requirements that are not already in policy and in use. The rules primarily clarify existing policies and incorporate changes resulting from the federal Food, Conservation, and Energy Act of 2008.

Texas Government Code, §2001.039, requires that each state agency review and consider for re-adoption each rule adopted by that agency pursuant to the Texas Government Code, Chapter 2001 (the Administrative Procedure Act). HHSC has reviewed all sections in Chapter 372 and has determined that the reasons for adopting rules governing TANF and SNAP continue to exist;

however, the rules are in need of updating. As a result of this review, HHSC is proposing these repeals and new sections.

Section-by-Section Summary

New Subchapter A is entitled Overview and Purpose and contains §§372.1 - 372.6. These sections set out HHSC's rules concerning purpose and scope; definitions used in the chapter; and the legal basis, funding, and administration of TANF and SNAP.

New Subchapter B is entitled Eligibility and is further divided into nine divisions. Division 1 is entitled TANF Certified Groups and contains §§372.101 - 372.108. These sections set out HHSC's rules concerning the caretaker, composition of a certified group, required group members, and excluded group members.

Subchapter B, Division 2 is entitled SNAP Households and contains §§372.151 - 372.153. These sections set out HHSC's rules concerning the provision of SNAP benefits, required SNAP household members, and how HHSC determines a household's eligibility for SNAP benefits.

Subchapter B, Division 3 is entitled Citizenship and contains §§372.201 - 372.205. These sections set out HHSC's rules concerning TANF and SNAP citizenship requirements and HHSC's requirements for providing proof of citizenship.

Subchapter B, Division 4 is entitled Residency and contains §372.251 and §372.252. These sections set out HHSC's rules concerning residency requirements for TANF and SNAP.

Subchapter B, Division 5 is entitled Domicile and contains §372.301, which establishes who must live in the household to be included in a TANF case for benefits. Proposed new §372.301 adds a new provision that allows HHSC to make an exception to the domicile requirement, if HHSC determines that a person in the household is temporarily absent.

Subchapter B, Division 6 is entitled Resources and contains §§372.351 - 372.356. These sections set out HHSC's rules concerning the treatment of a household's resources for determining eligibility for TANF and SNAP, resource limits, and the consequences of transferring resources.

Subchapter B, Division 7 is entitled Income and contains §§372.401 - 372.411. These sections set out HHSC's rules concerning the treatment of a household's income for TANF and SNAP, income eligibility requirements, determining whose income counts, what income is countable what income is excluded, allowable deductions from countable income, and projecting future household income.

Subchapter B, Division 8 is entitled Time Limits and contains §§372.451 - 372.457. These sections set out HHSC's rules concerning the maximum amount of time a person is eligible to receive TANF and SNAP benefits and allowable exemptions to those time limits.

Subchapter B, Division 9 is entitled Criminal Activity and contains §372.501, which concerns the disqualification of a person from receiving TANF and SNAP benefits for certain criminal activities.

New Subchapter C is entitled Associated Programs and is further divided into five divisions. Division 1 is entitled SNAP Benefits for Disaster Victims and contains §372.601, which describes how HHSC administers SNAP benefits to people temporarily during and after a disaster.

Subchapter C, Division 2 is entitled SNAP-Combined Application Project (SNAP-CAP) and contains §§372.651 - 372.655. These sections set out HHSC's rules concerning SNAP-CAP, which provides SNAP benefits to recipients of Supplemental Security Income (SSI) under a simplified application and certification process. Proposed new §372.652 reflects the new minimum age requirement for SNAP-CAP, which was lowered from 65 to 50 years of age with the implementation of the federal Food, Conservation, and Energy Act of 2008 on October 1, 2008.

Subchapter C, Division 3 is entitled TANF Non-Cash Program and contains §372.701 and §372.702. These sections set out HHSC's rules concerning the TANF Non-Cash Program, which provides services but not cash assistance to eligible people.

Subchapter C, Division 4 is entitled TANF State Program (TANF-SP) and contains §§372.751 - 372.753. These sections set out HHSC's rules concerning TANF-SP, which is a state-created and state-funded program that is similar to TANF, except limited to certain Texas counties and two-parent households.

Subchapter C, Division 5 is entitled One-Time TANF (OTTANF) and contains §372.801 and §372.802. These sections set out HHSC's rules concerning OTTANF, which is an option within the TANF Program that provides an eligible person with a single lump-sum assistance payment, instead of monthly TANF benefits. Proposed new §372.802 clarifies that loss of employment does not include voluntary quit without good cause.

New Subchapter D is entitled Application Process and is further divided into three divisions. Division 1 is entitled Application and contains §§372.901 - 372.906. These sections set out HHSC's rules concerning the process and requirements for making application for benefits under TANF and SNAP, treatment of incomplete applications, setting the application file date, the application processing time frame, designation of an authorized representative, and choosing to apply for TANF.

Subchapter D, Division 2 is entitled Interview and contains §§372.951 - 372.958. These sections set out HHSC's rules concerning interview requirements for TANF and SNAP applicants and recipients, the expedited SNAP application process, periodic eligibility reviews, and renewal notifications. Proposed new §372.951 incorporates a new HHSC policy, allowed by the U.S. Department of Agriculture, Food and Nutrition Service (FNS), to conduct telephone interviews of SNAP applicants at initial application, if HHSC chooses to do so. Proposed new §372.957 establishes an eligibility period of 36 months for a categorically eligible SNAP household in which all members receive SSI, as approved by FNS.

Subchapter D, Division 3 is entitled Case Disposition and contains §§372.1001 - 372.1003. These sections set out HHSC's rules concerning HHSC's notification of its eligibility decision, a person's right to appeal HHSC's decision, and reopening a denied application.

New Subchapter E is entitled Participation Requirements and is further divided into seven divisions. Division 1 is entitled Social Security Numbers and contains §372.1101, which sets out HHSC's rule governing requirements for TANF and SNAP household members to provide their Social Security numbers.

Subchapter E, Division 2 is entitled The TANF Personal Responsibility Agreement (PRA) and contains §§372.1151 - 372.1156. These sections set out HHSC's rules governing the PRA, which is a written agreement that defines the responsibilities of TANF recipients and is a condition of participation in the TANF program. The sections concern the purpose and scope of the PRA, the consequences of not signing a PRA, the PRA requirements, how a person cooperates with PRA requirements, the conse-

quences of noncooperation with PRA requirements, and good cause for noncooperation with PRA requirements. Proposed new §372.1156 adds good cause for noncooperation with school attendance requirements of the PRA.

Subchapter E, Division 3 is entitled Finger Imaging and contains §§372.1201 - 372.1204. These sections set out HHSC's rules concerning the legal basis and purpose for taking a person's fingerprints, which allows HHSC to verify a person's identity to help prevent fraud; compliance with the finger-imaging requirement; exemptions from finger imaging; and the consequences of noncompliance with the finger-imaging requirement. Proposed new §372.1203 clarifies the reasons a person may be exempt from the finger-imaging requirement if the person is temporarily unable to travel to the finger-imaging site.

Subchapter E, Division 4 is entitled TANF Workforce Orientation and contains §§372.1251 - 372.1253. These sections set out HHSC's rules concerning requirements for a person to attend a workforce orientation as a condition of TANF eligibility, exemptions allowed for not attending a workforce orientation, and the consequence for noncompliance with the workforce orientation requirement.

Subchapter E, Division 5 is entitled Third-party Resources and contains §§372.1301 - 372.1303. These sections set out HHSC's rules concerning the requirement that a TANF recipient who receives Medicaid must cooperate in identifying and pursuing any third party that may be liable for medical expenses and reimburse the State for medical expenses paid by Medicaid that should have been paid by a third-party resource.

Subchapter E, Division 6 is entitled Work and contains §§372.1351 - 372.1353. These sections set out HHSC's rules concerning work requirements for SNAP and the consequences for a TANF parent who participates in a strike.

Subchapter E, Division 7 is entitled Reporting Changes and contains §§372.1401 - 372.1404. These sections set out HHSC's rules concerning which changes TANF and SNAP households must report to HHSC and the time frames for reporting those changes.

New Subchapter F is entitled Benefits and is further divided into three divisions. Division 1 is entitled Benefits in General and contains §§372.1501 - 372.1521. These sections set out the definitions used in the subchapter and rules concerning maximum and minimum benefit amounts; how HHSC determines monthly benefits; benefit time frames; appropriate use of benefits; issuance of access to benefits, including use of the electronic benefits transfer (EBT) card; cash back; transaction charges; using benefits after moving from Texas; lost or stolen EBT cards and benefits; account balance and transaction errors; and action taken on non-accessed benefits.

Subchapter F, Division 2 is entitled Overpayments and contains §372.1551 and §372.1552. These sections set out HHSC's rules concerning overpayment of benefits, including repayment of overpayments.

Subchapter F, Division 3 is entitled Restoration and contains §372.1601. This section sets out HHSC's rules concerning circumstances under which HHSC restores TANF and SNAP benefits to a household. Proposed new §372.1601 implements a new policy in which TANF benefits will be restored following the same requirements as restoration of SNAP benefits, except TANF households that do not receive benefits for the month of application due to proration are not eligible for restoration of benefits back to the application date, as they are with restoration of SNAP benefits.

New Subchapter G is entitled Retailer Requirements and contains §§372.1701 - 372.1716. These sections set out HHSC's rules concerning the requirements for a retailer to participate in the EBT system to accept SNAP or TANF benefits or both. These sections contain the definitions used in the subchapter, as well as rules concerning point-of-sale terminals, manual voucher transactions, electronic manual voucher transactions, liability implications, third-party processors, transaction disputes, and out-of-state transactions. Proposed new §372.1708 and §372.1709 add rules governing store-and-forward (an electronic back-up for a retailer's online system) as an alternative to manual voucher transactions, in accordance with 7 CFR §274.12(m).

Fiscal Note

Thomas M. Suehs, Deputy Executive Commissioner for Financial Services, has determined that, for the first five years the proposed repeals and new sections are in effect, enforcing or administering the repeals and new section does not have foreseeable implications relating to costs or revenues of state or local governments.

Small Business and Micro-business Impact Analysis

Mr. Suehs has determined that there will be no effect on small businesses or micro-businesses to comply with the proposal, because the rules do not require them to alter their business practices. There are no anticipated economic costs to persons who are required to comply with the proposed rules. There is no anticipated negative impact on local employment.

Public Benefit and Costs

Joanne Molina, Deputy Executive Commissioner for Social Services, has determined that, for each year of the first five years the repeals and new sections are in effect, the anticipated public benefit expected as a result of enforcing the repeals and new sections is that HHSC's rules governing TANF and SNAP will be up-to-date, consistent with policy, and easier to use.

Regulatory Analysis

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

Takings Impact Assessment

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

Public Comment

Written comments on the proposal may be submitted to Eric McDaniel, Texas Health and Human Services Commission, Office of Family Services, MC-2039, 909 West 45th Street, Austin, TX 78751, or by e-mail to eric.mcdaniel@hhsc.state.tx.us, within 30 days after publication of this proposal in the *Texas Register*.

Public Hearing

HHSC will hold a public hearing on June 22, 2009, at 1:00 p.m. (Central Time) to receive public comment on the proposal. The hearing will be held in the Lone Star Conference Room of the Health and Human Services Commission, Braker Center, Building H, 11209 Metric Boulevard, Austin, Texas. Entry is through Security at the main entrance of the building, which faces Metric Boulevard. Persons requiring Americans with Disabilities Act (ADA) accommodation or auxiliary aids or services should contact Graciela Reyna by calling (512) 206-4778, at least 72 hours prior to the hearing so appropriate arrangements can be made.

SUBCHAPTER A. OVERVIEW AND PURPOSE

1 TAC §§372.1 - 372.6

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

Statutory Authority

The repeals are proposed under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; Texas Human Resources Code, Chapter 31, which authorizes HHSC to administer financial assistance programs, and Chapter 33, which authorizes HHSC to administer nutritional assistance programs.

The repeals affect Texas Government Code, Chapter 531; and Texas Human Resources Code, Chapters 31 and 33. No other statutes, articles, or codes are affected by this proposal.

§372.1. What assistance programs does this chapter cover?

§372.2. What do certain words and terms in this chapter mean?

§372.3. What is the legal basis for this chapter's assistance programs?

§372.4. What are the purposes of this chapter's assistance programs?

§372.5. Who provides the money for this chapter's assistance programs?

§372.6. Who administers this chapter's assistance programs?

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

Filed with the Office of the Secretary of State on May 11, 2009.

TRD-200901812
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 424-6900

SUBCHAPTER B. ELIGIBILITY

DIVISION 1. TANF CERTIFIED GROUPS

1 TAC §§372.101 - 372.107

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

Statutory Authority

The repeals are proposed under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; Texas Human Resources Code, Chapter 31, which authorizes HHSC to administer financial assistance programs, and Chapter 33, which authorizes HHSC to administer nutritional assistance programs.

The repeals affect Texas Government Code, Chapter 531; and Texas Human Resources Code, Chapters 31 and 33. No other statutes, articles, or codes are affected by this proposal.

§372.101. Whom does the TANF Program benefit?

§372.102. Who is a caretaker under the TANF Program?

§372.103. Whom may DHS include in a certified group?

§372.104. Whom does DHS require be included in a certified group?

§372.105. When does DHS include a stepparent who lives in the household in the certified group?

§372.106. Does DHS include the spouse of a caretaker in the certified group?

§372.107. Whom does DHS exclude from the certified group?

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 11, 2009.

TRD-200901813
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 424-6900

DIVISION 2. FOOD STAMP HOUSEHOLDS

1 TAC §§372.151 - 372.153

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

Statutory Authority

The repeals are proposed under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; Texas Human Resources Code, Chapter 31, which authorizes HHSC to administer financial assistance programs, and Chapter 33, which authorizes HHSC to administer nutritional assistance programs.

The repeals affect Texas Government Code, Chapter 531; and Texas Human Resources Code, Chapters 31 and 33. No other statutes, articles, or codes are affected by this proposal.

§372.151. Whom does the Food Stamp Program benefit?

§372.152. Does DHS require people who live together to apply for food stamps together?

§372.153. How does DHS determine the food stamp eligibility of various other types of households?

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 11, 2009.

TRD-200901814
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 424-6900

DIVISION 3. CITIZENSHIP

1 TAC §§372.201 - 372.205

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

Statutory Authority

The repeals are proposed under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; Texas Human Resources Code, Chapter 31, which authorizes HHSC to administer financial assistance programs, and Chapter 33, which authorizes HHSC to administer nutritional assistance programs.

The repeals affect Texas Government Code, Chapter 531; and Texas Human Resources Code, Chapters 31 and 33. No other statutes, articles, or codes are affected by this proposal.

§372.201. What are the citizenship requirements for the TANF Program?

§372.202. Does DHS require TANF applicants to prove eligibility under §3.201 of this chapter?

§372.203. What are the citizenship requirements for the Food Stamp Program?

§372.204. Does DHS require Food Stamp Program applicants to prove eligibility under §3.203 of this chapter?

§372.205. Does DHS report to the Immigration and Naturalization Service (INS) undocumented aliens who apply for assistance?

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 11, 2009.

TRD-200901815
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 424-6900

DIVISION 4. RESIDENCY

1 TAC §372.251, §372.252

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

Statutory Authority

The repeals are proposed under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; Texas Human Resources Code, Chapter 31, which authorizes HHSC to administer financial assistance programs, and Chapter 33, which authorizes HHSC to administer nutritional assistance programs.

The repeals affect Texas Government Code, Chapter 531; and Texas Human Resources Code, Chapters 31 and 33. No other statutes, articles, or codes are affected by this proposal.

§372.251. What are the residency requirements for the TANF Program?

§372.252. What are the residency requirements for the Food Stamp 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 11, 2009.

TRD-200901816
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 424-6900

DIVISION 5. DOMICILE

1 TAC §372.301

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

Statutory Authority

The repeal is proposed under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; Texas Human Resources Code, Chapter 31, which authorizes HHSC to administer financial assistance programs, and Chapter 33, which authorizes HHSC to administer nutritional assistance programs.

The repeal affects Texas Government Code, Chapter 531; and Texas Human Resources Code, Chapters 31 and 33. No other statutes, articles, or codes are affected by this proposal.

§372.301. What are the domicile requirements for the TANF 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 11, 2009.

TRD-200901817
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 424-6900

DIVISION 6. RESOURCES

1 TAC §§372.351 - 372.358

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

Statutory Authority

The repeals are proposed under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; Texas Human Resources Code, Chapter 31, which authorizes HHSC to administer financial assistance programs, and Chapter 33, which authorizes HHSC to administer nutritional assistance programs.

The repeals affect Texas Government Code, Chapter 531; and Texas Human Resources Code, Chapters 31 and 33. No other statutes, articles, or codes are affected by this proposal.

§372.351. What are resources in the TANF and Food Stamp programs?

§372.352. How do resources affect eligibility in the TANF and Food Stamp programs?

§372.353. How does DHS determine the value of a non-cash resource?

§372.354. What are the countable resource limits of the TANF and Food Stamp programs?

§372.355. Whose resources does DHS count in determining TANF and Food Stamp program eligibility?

§372.356. What resources does DHS count in the TANF Program?

§372.357. What resources does DHS count in the Food Stamp Program?

§372.358. May members of a household transfer resources without affecting their eligibility for assistance under this chapter?

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

Filed with the Office of the Secretary of State on May 11, 2009.

TRD-200901818
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 424-6900

DIVISION 7. INCOME

1 TAC §§372.401 - 372.410

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

Statutory Authority

The repeals are proposed under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; Texas Human Resources Code, Chapter 31, which authorizes HHSC to administer financial assistance programs, and Chapter 33, which authorizes HHSC to administer nutritional assistance programs.

The repeals affect Texas Government Code, Chapter 531; and Texas Human Resources Code, Chapters 31 and 33. No other statutes, articles, or codes are affected by this proposal.

§372.401. What is income in the TANF and Food Stamp programs?

§372.402. How does income affect eligibility in the TANF and Food Stamp programs?

§372.403. Whose income does DHS count in the TANF Program?

§372.404. What income does HHSC count when determining TANF eligibility?

§372.405. Whose income does DHS count when determining food stamp eligibility?

§372.406. What income does DHS count when determining food stamp eligibility?

§372.407. May members of a TANF or food stamp household fail to pursue or accept income without affecting their eligibility for assistance?

§372.408. How does DHS determine income eligibility for the TANF and Food Stamp programs?

§372.409. What does DHS deduct from countable income in the TANF and Food Stamp programs?

§372.410. How does DHS estimate how much income a household will receive in the future?

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 11, 2009.

TRD-200901819
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 424-6900

DIVISION 8. TIME LIMITS

1 TAC §§372.451 - 372.459

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

Statutory Authority

The repeals are proposed under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; Texas Human Resources Code, Chapter 31, which authorizes HHSC to administer financial assistance programs, and Chapter 33, which authorizes HHSC to administer nutritional assistance programs.

The repeals affect Texas Government Code, Chapter 531; and Texas Human Resources Code, Chapters 31 and 33. No other statutes, articles, or codes are affected by this proposal.

§372.451. What are time limits in the TANF and Food Stamp programs?

§372.452. To whom does DHS apply time limits in the TANF and Food Stamp programs?
§372.453. What happens when a TANF recipient exhausts a time limit?
§372.454. What are the exemptions from the TANF time limit requirements?
§372.455. When must a TANF recipient request a time limit exemption?
§372.456. Who is subject to the 60-month lifetime limit for the receipt of TANF cash assistance?
§372.457. How may a TANF household remain eligible after reaching the 60-month lifetime limit?
§372.458. What are the exemptions from the Food Stamp Program's time limit requirements?
§372.459. How does a food stamp recipient who is disqualified because of time limits become eligible again?

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 11, 2009.

TRD-200901820
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 424-6900

DIVISION 9. CRIMINAL ACTIVITY

1 TAC §372.501

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

Statutory Authority

The repeal is proposed under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; Texas Human Resources Code, Chapter 31, which authorizes HHSC to administer financial assistance programs, and Chapter 33, which authorizes HHSC to administer nutritional assistance programs.

The repeal affects Texas Government Code, Chapter 531; and Texas Human Resources Code, Chapters 31 and 33. No other statutes, articles, or codes are affected by this proposal.

§372.501. What criminal activities disqualify a person from receiving TANF benefits?

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 11, 2009.

TRD-200901821
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 424-6900

SUBCHAPTER C. ASSOCIATED PROGRAMS
DIVISION 1. FOOD STAMPS IN DISASTER SITUATIONS

1 TAC §372.601

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

Statutory Authority

The repeal is proposed under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; Texas Human Resources Code, Chapter 31, which authorizes HHSC to administer financial assistance programs, and Chapter 33, which authorizes HHSC to administer nutritional assistance programs.

The repeal affects Texas Government Code, Chapter 531; and Texas Human Resources Code, Chapters 31 and 33. No other statutes, articles, or codes are affected by this proposal.

§372.601. Are food stamp benefits available to victims of disasters who might not otherwise be eligible?

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 11, 2009.

TRD-200901822
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 424-6900

DIVISION 2. SIMPLIFIED NUTRITIONAL ASSISTANCE PROGRAM (SNAP)

1 TAC §§372.651 - 372.656

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

Statutory Authority

The repeals are proposed under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; Texas Human Resources Code, Chapter 31, which authorizes HHSC to administer financial assistance programs, and Chapter 33, which authorizes HHSC to administer nutritional assistance programs.

The repeals affect Texas Government Code, Chapter 531; and Texas Human Resources Code, Chapters 31 and 33. No other statutes, articles, or codes are affected by this proposal.

§372.651. What is the Simplified Nutritional Assistance Program (SNAP)?

§372.652. Who is eligible for SNAP?

§372.653. What is the SNAP application process?

§372.654. What is the SNAP certification process?

§372.655. Does DHS require SNAP recipients to report changes?

§372.656. How does DHS determine the amount of SNAP benefits?

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 11, 2009.

TRD-200901823
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 424-6900

DIVISION 3. TANF NON-CASH PROGRAM

1 TAC §372.701, §372.702

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

Statutory Authority

The repeals are proposed under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; Texas Human Resources Code, Chapter 31, which authorizes HHSC to administer financial assistance programs, and Chapter 33, which authorizes HHSC to administer nutritional assistance programs.

The repeals affect Texas Government Code, Chapter 531; and Texas Human Resources Code, Chapters 31 and 33. No other statutes, articles, or codes are affected by this proposal.

§372.701. What is the TANF Non-Cash Program and what services does the program provide?

§372.702. What are the eligibility requirements for the TANF Non-Cash 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 11, 2009.

TRD-200901824
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 424-6900

DIVISION 4. TANF STATE PROGRAM

1 TAC §§372.751 - 372.754

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

Statutory Authority

The repeals are proposed under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; Texas Human Resources Code, Chapter 31, which authorizes HHSC to administer financial assistance programs; Chapter 33, which authorizes HHSC to administer nutritional assistance programs; and Chapter 34, which authorizes HHSC to administer a state temporary assistance and support services program.

The repeals affect Texas Government Code, Chapter 531; and Texas Human Resources Code, Chapters 31, 33, and 34. No other statutes, articles, or codes are affected by this proposal.

§372.751. What is the TANF State Program?

§372.752. What are the requirements of TANF-SP?

§372.753. Is there any difference in determining eligibility for TANF-SP as compared to the TANF Program?

§372.754. Is there any difference in determining the amount of benefits in TANF-SP as compared to the TANF 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 11, 2009.

TRD-200901825
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 424-6900

DIVISION 5. ONE-TIME TANF (OTTANF)

1 TAC §372.801, §372.802

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

Statutory Authority

The repeals are proposed under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; Texas Human Resources Code, Chapter 31, which authorizes HHSC to administer financial assistance programs, and Chapter 33, which authorizes HHSC to administer nutritional assistance programs.

The repeals affect Texas Government Code, Chapter 531; and Texas Human Resources Code, Chapters 31 and 33. No other statutes, articles, or codes are affected by this proposal.

§372.801. What is One-Time TANF (OTTANF)?

§372.802. What are the requirements for One-Time TANF (OTTANF)?

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 11, 2009.

TRD-200901826
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 424-6900

SUBCHAPTER D. APPLICATION PROCESS

DIVISION 1. APPLICATION

1 TAC §§372.901 - 372.906

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

Statutory Authority

The repeals are proposed under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; Texas Human Resources Code, Chapter 31, which authorizes HHSC to administer financial assistance programs, and Chapter 33, which authorizes HHSC to administer nutritional assistance programs.

The repeals affect Texas Government Code, Chapter 531; and Texas Human Resources Code, Chapters 31 and 33. No other statutes, articles, or codes are affected by this proposal.

§372.901. How does a person apply for TANF or food stamps?
§372.902. Does DHS accept incomplete applications?
§372.903. What is the application file date?
§372.904. What is the time frame for processing TANF or food stamp applications?
§372.905. When may TANF and food stamp applicants or clients designate an authorized representative?
§372.906. Is the TANF Program the best choice for families seeking assistance?

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 11, 2009.

TRD-200901827
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 424-6900

DIVISION 2. INTERVIEW

1 TAC §§372.951 - 372.958

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

Statutory Authority

The repeals are proposed under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; Texas Human Resources Code, Chapter 31, which authorizes HHSC to administer financial assistance programs, and Chapter 33, which authorizes HHSC to administer nutritional assistance programs.

The repeals affect Texas Government Code, Chapter 531; and Texas Human Resources Code, Chapters 31 and 33. No other statutes, articles, or codes are affected by this proposal.

§372.951. Where does DHS conduct TANF and food stamp eligibility interviews?

§372.952. How does DHS schedule and notify applicants of the date and location of an interview?

§372.953. What happens at the interview?

§372.954. What action does DHS take at the end of the interview?

§372.955. What procedure does DHS follow when delaying an eligibility decision?

§372.956. How does DHS process food stamp applications from applicants who need food immediately?

§372.957. How often does DHS review eligibility in TANF and food stamp cases?

§372.958. How do TANF or food stamp recipients know when it is time to reapply for benefits?

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 11, 2009.

TRD-200901828
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 424-6900

DIVISION 3. CASE DISPOSITION

1 TAC §§372.1001 - 372.1003

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

Statutory Authority

The repeals are proposed under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; Texas Human Resources Code, Chapter 31, which authorizes HHSC to administer financial assistance programs, and Chapter 33, which authorizes HHSC to administer nutritional assistance programs.

The repeals affect Texas Government Code, Chapter 531; and Texas Human Resources Code, Chapters 31 and 33. No other statutes, articles, or codes are affected by this proposal.

§372.1001. What types of eligibility notices does DHS provide to TANF and food stamp applicants?

§372.1002. May TANF and food stamp households appeal DHS's decisions affecting their benefits?

§372.1003. Does DHS reopen denied applications without requiring a household to file a new application?

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 11, 2009.

TRD-200901829
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 424-6900

SUBCHAPTER E. PARTICIPATION REQUIREMENTS

DIVISION 1. SOCIAL SECURITY NUMBERS

1 TAC §372.1101

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

Statutory Authority

The repeal is proposed under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; Texas Human Resources Code, Chapter 31, which authorizes HHSC to administer financial assistance programs, and Chapter 33, which authorizes HHSC to administer nutritional assistance programs.

The repeal affects Texas Government Code, Chapter 531; and Texas Human Resources Code, Chapters 31 and 33. No other statutes, articles, or codes are affected by this proposal.

§372.1101. Are TANF and food stamp applicants required to provide Social Security numbers?

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 11, 2009.

TRD-200901830
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 424-6900

DIVISION 2. THE TANF PERSONAL RESPONSIBILITY AGREEMENT (PRA)

1 TAC §§372.1151 - 372.1156

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

Statutory Authority

The repeals are proposed under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; Texas Human Resources Code, Chapter 31, which authorizes HHSC to administer financial assistance programs, and Chapter 33, which authorizes HHSC to administer nutritional assistance programs.

The repeals affect Texas Government Code, Chapter 531; and Texas Human Resources Code, Chapters 31 and 33. No other statutes, articles, or codes are affected by this proposal.

§372.1151. What is the TANF personal responsibility agreement (PRA) and to whom does it apply?

§372.1152. What happens if a person who is required to sign a PRA fails or refuses to do so?

§372.1153. What are the PRA requirements?

§372.1154. How does a person cooperate with each PRA requirement?

§372.1155. What happens when a person fails or refuses to cooperate with a requirement of a PRA that the person has signed?

§372.1156. What are good cause reasons for noncooperation with a PRA requirement?

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 11, 2009.

TRD-200901831
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 424-6900

DIVISION 3. FINGER IMAGING

1 TAC §§372.1201 - 372.1204

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

Statutory Authority

The repeals are proposed under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; Texas Human Resources Code, Chapter 31, which authorizes HHSC to administer financial assistance programs, and Chapter 33, which authorizes HHSC to administer nutritional assistance programs.

The repeals affect Texas Government Code, Chapter 531; and Texas Human Resources Code, Chapters 31 and 33. No other statutes, articles, or codes are affected by this proposal.

§372.1201. What is finger imaging and what is its purpose?

§372.1202. Who must comply with finger-imaging requirements?

§372.1203. Who is exempt from the finger-imaging requirement?

§372.1204. What happens if a household member fails to comply with the finger-imaging requirement?

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 11, 2009.

TRD-200901832
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 424-6900

DIVISION 4. TANF WORKFORCE ORIENTATION

1 TAC §§372.1251 - 372.1253

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

Statutory Authority

The repeals are proposed under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; Texas Human Resources Code, Chapter 31, which authorizes HHSC to administer financial assistance programs, and Chapter 33, which authorizes HHSC to administer nutritional assistance programs.

The repeals affect Texas Government Code, Chapter 531; and Texas Human Resources Code, Chapters 31 and 33. No other statutes, articles, or codes are affected by this proposal.

§372.1251. What is the TANF workforce orientation requirement and who must comply with it?

§372.1252. Does DHS exempt some TANF members from the workforce orientation requirement?

§372.1253. What penalty does DHS apply if a person fails to comply with the workforce orientation requirement?

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 11, 2009.

TRD-200901833
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 424-6900

DIVISION 5. THIRD-PARTY RESOURCES

1 TAC §§372.1301 - 372.1304

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

Statutory Authority

The repeals are proposed under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; Texas Human Resources Code, Chapter 31, which authorizes HHSC to administer financial assistance programs, and Chapter 33, which authorizes HHSC to administer nutritional assistance programs.

The repeals affect Texas Government Code, Chapter 531; and Texas Human Resources Code, Chapters 31 and 33. No other statutes, articles, or codes are affected by this proposal.

§372.1301. What is a third-party resource?

§372.1302. Who must comply with third-party resource requirements?

§372.1303. What are the third-party resource requirements?

§372.1304. What happens when an individual fails to comply with the third-party resource requirements?

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

Filed with the Office of the Secretary of State on May 11, 2009.

TRD-200901834
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 424-6900

DIVISION 6. WORK

1 TAC §§372.1351 - 372.1353

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

Statutory Authority

The repeals are proposed under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; Texas Human Resources Code, Chapter 31, which authorizes HHSC to administer financial assistance programs, and Chapter 33, which authorizes HHSC to administer nutritional assistance programs.

The repeals affect Texas Government Code, Chapter 531; and Texas Human Resources Code, Chapters 31 and 33. No other statutes, articles, or codes are affected by this proposal.

§372.1351. What are the food stamp work requirements?

§372.1352. What happens if a non-exempt household member fails to comply with food stamp work requirements?

§372.1353. What happens if a parent in a TANF household participates in a strike?

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 11, 2009.

TRD-200901835
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 424-6900

DIVISION 7. REPORTING CHANGES

1 TAC §§372.1401 - 372.1404

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

Statutory Authority

The repeals are proposed under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; Texas Human Resources Code, Chapter 31, which authorizes HHSC to administer financial assistance programs, and Chapter 33, which authorizes HHSC to administer nutritional assistance programs.

The repeals affect Texas Government Code, Chapter 531; and Texas Human Resources Code, Chapters 31 and 33. No other statutes, articles, or codes are affected by this proposal.

§372.1401. What changes must a TANF household report?
§372.1402. What changes must a food stamp household report?
§372.1403. How long does a household have to report a change?
§372.1404. How soon does DHS take action on a reported 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 May 11, 2009.

TRD-200901836
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 424-6900

SUBCHAPTER F. BENEFITS

DIVISION 1. BENEFITS IN GENERAL

1 TAC §§372.1501 - 372.1529

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

Statutory Authority

The repeals are proposed under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; Texas Human Resources Code, Chapter 31, which authorizes HHSC to administer financial assistance programs, and Chapter 33, which authorizes HHSC to administer nutritional assistance programs.

The repeals affect Texas Government Code, Chapter 531; and Texas Human Resources Code, Chapters 31 and 33. No other statutes, articles, or codes are affected by this proposal.

§372.1501. What do certain words and terms in this division mean?

§372.1502. What are the maximum benefit amounts in the TANF and Food Stamp programs?

§372.1503. What are the minimum benefit amounts in the TANF and Food Stamp Programs?

§372.1504. In what dollar amounts does DHS issue food stamp benefits?

§372.1505. How does DHS determine the monthly amount of benefits in the TANF and Food Stamp programs?

§372.1506. When do TANF and food stamp benefits begin?

§372.1507. How are benefits affected if a TANF recipient stops participating in the work subsidy program?

§372.1508. What is a TANF supplemental grandparent payment?

§372.1509. Does DHS require a TANF or food stamp household to repay benefits for a month a member dies or leaves the home?

§372.1510. What may recipients purchase with food stamp and TANF benefits?

§372.1511. May recipients use food stamp benefits to purchase prepared meals?

§372.1512. What is Electronic Benefit Transfer (EBT)?

§372.1513. What is an EBT card?

§372.1514. Who controls access to the EBT account?

§372.1515. How does a primary cardholder use the EBT card?

§372.1516. Which households must have authorized representatives?

§372.1517. Does DHS allow access to EBT benefits by anyone other than the primary cardholder?

§372.1518. How does DHS put TANF and food stamp benefits into a household's EBT account?

§372.1519. Where may TANF and food stamp households use their EBT benefits?

§372.1520. Do food retailers give change in cash to food stamp households purchasing food with EBT food account benefits?

§372.1521. Do businesses charge EBT accounts when the EBT card is used?

§372.1522. What happens to the benefits in an EBT food account if a food stamp household moves out of Texas?

§372.1523. What happens to the benefits in a TANF cash account if the TANF household moves out of Texas?

§372.1524. What is DHS's procedure if EBT benefits cannot be used because of a disaster like a hurricane or flood?

§372.1525. What happens if the EBT card is lost or stolen?

§372.1526. Does DHS replace lost or stolen TANF or food stamp benefits?

§372.1527. What happens to EBT benefits a TANF or food stamp household does not use?

§372.1528. Under what circumstances does DHS cancel and remove benefits from a TANF or food stamp household's EBT account?

§372.1529. Who answers questions about EBT cash and food balances for TANF and food stamp households?

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 11, 2009.

TRD-200901837
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 424-6900

DIVISION 2. OVERPAYMENTS

1 TAC §§372.1551 - 372.1554

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

Statutory Authority

The repeals are proposed under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; Texas Human Resources Code, Chapter 31, which authorizes HHSC to administer financial assistance programs, and Chapter 33, which authorizes HHSC to administer nutritional assistance programs.

The repeals affect Texas Government Code, Chapter 531; and Texas Human Resources Code, Chapters 31 and 33. No other statutes, articles, or codes are affected by this proposal.

§372.1551. What happens if a TANF household is overpaid?

§372.1552. What are the reasons a TANF household may be overpaid?

§372.1553. How do TANF households repay benefits?

§372.1554. What are the rules governing repayment of food stamp benefits?

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 11, 2009.

TRD-200901838
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 424-6900

DIVISION 3. RESTORATION

1 TAC §§372.1601 - 372.1603

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

Statutory Authority

The repeals are proposed under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; Texas Human Resources Code, Chapter 31, which authorizes HHSC to administer financial assistance programs, and Chapter 33, which authorizes HHSC to administer nutritional assistance programs.

The repeals affect Texas Government Code, Chapter 531; and Texas Human Resources Code, Chapters 31 and 33. No other statutes, articles, or codes are affected by this proposal.

§372.1601. When does DHS restore TANF benefits?

§372.1602. Does DHS restore TANF benefits to households that no longer receive benefits?

§372.1603. When does DHS restore food stamp benefits?

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 11, 2009.

TRD-200901839
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 424-6900

SUBCHAPTER G. RETAILER REQUIREMENTS

1 TAC §§372.1701 - 372.1720

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

Statutory Authority

The repeals are proposed under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; Texas Human Resources Code, Chapter 31, which authorizes HHSC to administer financial assistance programs, and Chapter 33, which authorizes HHSC to administer nutritional assistance programs.

The repeals affect Texas Government Code, Chapter 531; and Texas Human Resources Code, Chapters 31 and 33. No other statutes, articles, or codes are affected by this proposal.

§372.1701. What do certain words and terms in this subchapter mean?

§372.1702. What are DHS's requirements for retailers and third-party processors to participate in the EBT system?

§372.1703. What are the general conditions for retailers and third-party processors to participate in the EBT system?

§372.1704. What are POS requirements for retailers operating terminals supplied by the retailer management EBT contractor?

§372.1705. What are DHS's requirements for retailers that redeem food stamp benefits to deploy POS terminals?

§372.1706. What are the procedures for off-line (manual) transactions?

§372.1707. What process is followed for off-line (manual) vouchers with delayed telephone verification or preliminary telephone verification?

§372.1708. What are DHS's off-line (manual) procedures for retailers with electronic voucher transaction capacity?

§372.1709. What are the liability implications for off-line (manual) transactions?

§372.1710. How do retailers choose qualified third-party EBT processors?

§372.1711. How does DHS reimburse retailers and third-party processors for EBT transactions?

§372.1712. How are EBT account discrepancies of settlement totals and the corresponding adjustments handled?

§372.1713. What does a retailer or third-party processor do if it did not receive or disagrees with the amount of an individual EBT transaction reimbursement to its bank account?

§372.1714. What are some reasons that could lead to a dispute?

§372.1715. How long does a retailer or third-party processor have to dispute a transaction?

§372.1716. How are transaction disputes resolved?

§372.1717. When are transaction disputes resolved?

§372.1718. What action does a retailer or third-party processor take if it disagrees with the resolution of a transaction dispute?

§372.1719. What option does a retailer or third-party processor have if it is dissatisfied with the decision from Lone Star Technology Department's informal review?

§372.1720. How do retailers or third-party processors outside of Texas accept TANF and food stamp benefits issued by the state of Texas?

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

Filed with the Office of the Secretary of State on May 11, 2009.

TRD-200901840
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 424-6900

CHAPTER 372. TEMPORARY ASSISTANCE FOR NEEDY FAMILIES AND SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAMS
SUBCHAPTER A. OVERVIEW AND PURPOSE

1 TAC §§372.1 - 372.6

Statutory Authority

The new sections are proposed under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; and Texas Human Resources Code, Chapter 31, which authorizes HHSC to administer financial assistance programs, and Chapter 33, which authorizes HHSC to administer nutritional assistance programs.

The new sections affect Texas Government Code, Chapter 531; and Texas Human Resources Code, Chapters 31 and 33. No other statutes, articles, or codes are affected by this proposal.

§372.1. Purpose and Scope.

This chapter covers the following programs:

(1) the Temporary Assistance for Needy Families (TANF) Program; and

(2) the Supplemental Nutrition Assistance Program (SNAP), formerly known as the Food Stamp Program.

§372.2. Definitions.

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

(1) Authorized representative--In the TANF Program, a person whom the certified group authorizes to apply for or manage the TANF benefits on behalf of the certified group but who is not included in the certified group. In SNAP, a person whom the household authorizes to apply for or manage the SNAP benefits on behalf of the household. References in this chapter to a certified group, client, or household include an authorized representative, unless the context indicates otherwise.

(2) Budgetary needs amount--In the TANF Program, a set dollar amount that represents the monthly amount needed by the certified group to pay for food, clothing, housing, utilities, and incidental expenses (which include day-to-day transportation, telephone, laundry, unreimbursed medical expenses, recreation, and household supplies).

(3) Caretaker--In the TANF Program, a person who cares for a dependent child, who meets relationship requirements in §372.108 of this chapter (relating to Relationship Requirement), whom the Texas Health and Human Services Commission (HHSC) includes in the certified group, and who ordinarily receives and manages the TANF benefits for the certified group.

(4) Certified group--The person or group of relatives whose needs HHSC includes together in a TANF case.

(5) CFR--The Code of Federal Regulations.

(6) Child--A person under 18 years of age. In the TANF Program, a child also includes a person under 19 years of age as long as the person is a full-time student in a secondary school (or participant in an equivalent vocational or technical training program) and the person is reasonably expected to complete the school (or the training) before the person's 19th birthday.

(7) Choices--The TANF employment and training program administered by the Texas Workforce Commission.

(8) Client--In the TANF Program, the member of the certified group who receives benefits for the certified group. In SNAP, the member of the household who receives benefits for the household.

(9) Dependent child--In the TANF Program, a child as described in the Texas Human Resources Code, §31.002(b). The term also means a child who has been deprived of parental support because of the death, absence, or incapacity of a parent who does not have enough income or resources for a reasonable subsistence compatible with health and safety, and who is living with a caretaker.

(10) Fair market value--The amount of money an item would bring if sold in the current local market.

(11) Family--A group of relatives living together who meet the relationship requirements in §372.108 of this chapter.

(12) Federal Poverty Guidelines--The household income guidelines issued annually and published in the Federal Register by the U.S. Department of Health and Human Services. Percentages of these guidelines are used to determine income eligibility for TANF, SNAP, and certain other public assistance programs.

(13) Household--The person or persons whose needs HHSC includes in a SNAP case for benefits. In the TANF Program, the family members who live together.

(14) Parent--A mother or father, as established through biological relationship or legal process.

(15) Payee--In the TANF Program, a person who receives and manages the TANF benefits for a certified group and who otherwise qualifies as a caretaker, except HHSC does not include the person in the certified group. HHSC designates a payee when no one in the household qualifies or wants to be caretaker.

(16) Personal Responsibility Agreement (PRA)--In the TANF Program, a written agreement that defines the responsibilities of participants.

(17) Protective payee--In the TANF Program, a person whom HHSC selects to receive and manage benefits for the certified group instead of the caretaker. HHSC may designate a protective payee whenever HHSC determines that the caretaker has failed to comply with one or more program requirements.

(18) Recognizable needs amount--In the TANF Program, a set dollar amount that is 25% of the budgetary needs amount for the certified group.

(19) Representative payee--In the TANF Program, a person designated to receive and manage the household's benefits for a client who is incapacitated or incompetent.

(20) Sibling--A brother, sister, half brother, or half sister, as established by biological relationship or legal process. A sibling does not include a stepbrother or stepsister.

(21) SNAP--Supplemental Nutrition Assistance Program, formerly known as the Food Stamp Program.

(22) TANF--Temporary Assistance for Needy Families.

(23) TANF Non-Cash Program--A component of the TANF Program providing TANF-funded services relating to matters such as education, employment, and the prevention and treatment of substance abuse, but that does not provide benefits (for example, cash assistance).

(24) TANF Program--A program providing temporary benefits (cash assistance) and work opportunities to families with needy dependent children. References in this chapter to the TANF Program also include the TANF State Program (TANF-SP), unless the context clearly indicates otherwise.

(25) TANF State Program (TANF-SP)--The state-created and state-funded program that is the same as the TANF Program, except limited to certain Texas counties and two-parent households. References in this chapter to TANF include TANF-SP, unless the context clearly indicates otherwise.

(26) Texas Health and Human Services Commission (HHSC)--The state agency that administers the TANF Program and SNAP in Texas.

(27) U.S.--The United States of America.

(28) U.S.C.--United States Code.

§372.3. Legal Basis.

(a) For the TANF Program, the federal law basis is:

(1) Title IV of the Social Security Act (42 U.S.C. §601 et seq.); and

(2) the federal regulations in 45 CFR, Parts 260 through 265.

(b) To the extent the regulations described in subsection (a) of this section impose federal mandates that apply to Texas, Texas Health and Human Services Commission (HHSC) incorporates the regulations by reference for administration of TANF in Texas. If the regulations provide options from which Texas may choose, or if Texas is granted a waiver from a federal mandate, the rules of this chapter and other applicable state administrative rules and policy describe the options Texas has chosen and the waivers Texas has been granted.

(c) For the TANF Program, the state law basis is:

(1) the Texas Human Resources Code, Chapter 31, which authorizes the HHSC to administer the TANF Program in Texas;

(2) the Texas Human Resources Code, Chapter 34, which authorizes HHSC to administer the TANF State Program; and

(3) the rules of this chapter, as well as other applicable HHSC rules.

(d) For SNAP, the federal law basis is:

(1) 7 U.S.C. §2011 et seq.; and

(2) the federal regulations in 7 CFR, Parts 271 through 283.

(e) To the extent the regulations described in subsection (d) of this section impose federal mandates that apply to Texas, HHSC incorporates the regulations by reference for administration of SNAP in Texas. If the regulations provide options from which Texas may choose, or if Texas is granted a waiver from a federal mandate, the rules of this chapter and other applicable state administrative rules and policy describe the options Texas has chosen and the waivers Texas has been granted.

(f) For SNAP, the state law basis is:

(1) the Texas Human Resources Code, Chapter 33, which authorizes HHSC to administer SNAP in Texas; and

(2) the rules of this chapter, as well as other applicable HHSC rules.

(g) The Texas Workforce Commission provides TANF and SNAP employment and hiring activities and support services as described in Title 40 of the Texas Administrative Code, Chapter 811 (relating to Choices) and Chapter 813 (relating to Food Stamp Employment and Training).

§372.4. Purpose of TANF and SNAP.

(a) The TANF Program encourages self-sufficiency by providing temporary cash assistance and work opportunities to needy families with dependent children.

(b) SNAP encourages improved diets by providing nutrition assistance to low-income individuals or groups.

§372.5. Funding for TANF and SNAP.

(a) The federal government and the State of Texas provide the funding for the TANF Program. The State of Texas fully funds the TANF State Program.

(b) The federal government provides most of the funding for SNAP and the State of Texas funds the rest. Federal funds pay for SNAP benefits and for one-half of the administrative costs. The State of Texas pays the other half of the administrative costs.

§372.6. TANF and SNAP Administrator.

(a) The Texas Health and Human Services Commission (HHSC) administers the TANF Program in Texas under guidance from the U.S. Department of Health and Human Services.

(1) HHSC:

(A) develops the state plan, policies, and procedures;

(B) certifies eligible children and families for benefits and services; and

(C) provides the benefits and services.

(2) The U.S. Department of Health and Human Services:

(A) approves the state plan;

(B) provides funding, guidance, and regulations; and

(C) monitors the operation of the program.

(b) HHSC administers SNAP in Texas, under guidance from the U.S. Department of Agriculture, Food and Nutrition Service.

(1) HHSC:

(A) develops the state plan;

(B) certifies eligible individuals and groups for benefits; and

(C) provides the benefits.

(2) The U.S. Department of Agriculture, Food and Nutrition Service:

(A) approves the state plan;

(B) provides guidance and regulations;

(C) monitors the operation of the program; and

(D) authorizes and manages food retailers.

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 11, 2009.

TRD-200901841
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 424-6900

♦ ♦ ♦

SUBCHAPTER B. ELIGIBILITY
DIVISION 1. TANF CERTIFIED GROUPS

1 TAC §§372.101 - 372.108

Statutory Authority

The new sections are proposed under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; and Texas Human Resources Code, Chapter 31, which authorizes HHSC to administer financial assistance programs, and Chapter 33, which authorizes HHSC to administer nutritional assistance programs.

The new sections affect Texas Government Code, Chapter 531; and Texas Human Resources Code, Chapters 31 and 33. No other statutes, articles, or codes are affected by this proposal.

§372.101. Receiving TANF Benefits.

(a) The TANF Program provides benefits by certified group, meaning to an individual or group of relatives living together in a family setting whose needs the Texas Health and Human Services Commission includes together in the TANF case. A certified group must include at least one dependent child.

(b) A recipient of TANF benefits must use the benefits to provide for the needs of the children in the certified group.

§372.102. Caretaker.

(a) A caretaker is a person who cares for a dependent child, whom the Texas Health and Human Services Commission includes in the certified group, and who ordinarily receives and manages the TANF benefits for the certified group.

(b) To qualify as a caretaker, a person must:

(1) reside in a family setting with, supervise, and care for:

(A) a dependent child;

(B) a child who receives Supplemental Security Income (SSI), foster care, or adoption subsidy payments; or

(C) a child who receives Medicaid based on having received SSI; and

(2) by blood, marriage, or adoption, be related to the child as described in §372.108 of this division (relating to Relationship Requirement).

§372.103. Composition of a TANF Certified Group.

(a) The Texas Health and Human Services Commission (HHSC) may include together in a TANF certified group:

(1) each dependent child; and

(2) each relative of a dependent child:

(A) living with the child in a family setting being established or maintained as shown by the relative through continuing responsibility for the child's day-to-day care; and

(B) whose relationship to the child, by blood, marriage, or adoption extends up to the degree indicated in §372.108 of this division (relating to Relationship Requirement).

(b) HHSC may continue to include a person in a certified group after the person has entered a nursing facility, so long as HHSC determines the person's stay in the nursing facility is temporary.

§372.104. Required TANF Certified Group Members.

Unless a person is excluded under §372.107 of this division (relating to Excluded TANF Certified Group Members), the Texas Health and Human Services Commission requires the TANF certified group to include:

(1) the dependent child for whom application is made;

(2) each parent of a dependent child living in the household; and

(3) each sibling of a dependent child living in the household.

§372.105. Eligibility for a Stepparent.

The Texas Health and Human Services Commission includes in the TANF certified group a stepparent living in the household only if the parent is disabled or is not living in the household.

§372.106. Eligibility for the Spouse of a Caretaker.

If the caretaker is not the child's parent, the Texas Health and Human Services Commission does not include the spouse of the caretaker in the TANF certified group, except as described in §372.105 of this division (relating to Eligibility for a Stepparent).

§372.107. Excluded TANF Certified Group Members.

The Texas Health and Human Services Commission (HHSC) excludes from the TANF certified group:

(1) an authorized representative, payee, or protective payee;

(2) a recipient of Supplemental Security Income (SSI), foster care, or adoption subsidy payments; and

(3) a person disqualified from receiving TANF benefits or ineligible to receive TANF benefits, because HHSC determines the person:

(A) does not meet an eligibility requirement relating to the person's:

(i) age (because, for example, the person does not meet the definition of a child);

(ii) citizenship as explained in Division 3 of this subchapter (relating to Citizenship);

(iii) residency as explained in Division 4 of this subchapter (relating to Residency);

(iv) domicile as explained in Division 5 of this subchapter (relating to Domicile); or

(v) relationship status (because, for example, the person is not within the degree of relationship required by §372.108 of this division (relating to Relationship Requirement);

(B) committed an intentional TANF program violation as described in §357.562(b) of this title (relating to Determination and Disposition of Intentional Program Violations);

(C) failed to comply with §372.1101 of this chapter (relating to Social Security Number Requirements);

(D) failed to comply with Subchapter E, Division 5 of this chapter (relating to Third-party Resources);

(E) has exhausted the time limits for receiving TANF benefits under Division 8 of this subchapter (relating to Time Limits);

(F) failed to comply with §372.1401 of this chapter (relating to Changes a TANF Household Must Report);

(G) is a fugitive as explained in §372.501(1) of this subchapter (relating to Disqualifications Due to Criminal Activity); or

(H) has been convicted of a felony drug offense as explained in §372.501(2) of this subchapter.

§372.108. Relationship Requirement.

In the TANF Program, a person meets the relationship requirement, if the person is by law, marriage, or adoption a child's:

(1) father, mother, brother, or sister;

(2) stepfather or stepmother (if the child's legal parent is disabled or if there is no legal parent in the household);

(3) stepbrother or stepsister;

(4) grandparent, to the degree of a "great, great, great" grandparent;

(5) uncle or aunt, to the degree of a "great, great" uncle or aunt;

(6) nephew or niece, to the degree of a "great, great" nephew or niece;

(7) first cousin; or

(8) first cousin once removed.

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 11, 2009.

TRD-200901842
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 424-6900

DIVISION 2. SNAP HOUSEHOLDS

1 TAC §§372.151 - 372.153

Statutory Authority

The new sections are proposed under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; and Texas Human Resources Code, Chapter 31, which authorizes HHSC to administer financial assistance programs, and Chapter 33, which authorizes HHSC to administer nutritional assistance programs.

The new sections affect Texas Government Code, Chapter 531; and Texas Human Resources Code, Chapters 31 and 33. No other statutes, articles, or codes are affected by this proposal.

§372.151. Receiving SNAP Benefits.

SNAP provides benefits by household, as defined in 7 CFR §273.1. A household may consist of an individual or a group of individuals who live together.

§372.152. Required SNAP Household Members.

The Texas Health and Human Services Commission follows 7 CFR §273.1(b), which requires including in the household certain people living together.

§372.153. Determining SNAP Household Eligibility.

To determine eligibility for SNAP benefits of each of the following various types of households, the Texas Health and Human Services Com-

mission follows the federal regulation or regulations in 7 CFR indicated in the following table:
Figure: 1 TAC §372.153

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 11, 2009.

TRD-200901843
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 424-6900

DIVISION 3. CITIZENSHIP

1 TAC §§372.201 - 372.205

Statutory Authority

The new sections are proposed under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; and Texas Human Resources Code, Chapter 31, which authorizes HHSC to administer financial assistance programs, and Chapter 33, which authorizes HHSC to administer nutritional assistance programs.

The new sections affect Texas Government Code, Chapter 531; and Texas Human Resources Code, Chapters 31 and 33. No other statutes, articles, or codes are affected by this proposal.

§372.201. TANF Citizenship Requirements.

To be eligible for TANF benefits, a person must be:

(1) a citizen of the U.S.;

(2) an alien who legally entered the U.S. before August 22, 1996, and who meets the eligibility criteria in 8 U.S.C. §1641(b) or (c); or

(3) an alien who legally entered the U.S. on or after August 22, 1996, and who meets the eligibility criteria in 8 U.S.C. §1612(b) and §1613, except that a legal permanent resident alien is eligible after residing in the U.S. for five years only if the alien meets one of the following eligibility requirements:

(A) the alien is an honorably discharged veteran or active duty military personnel;

(B) the alien is a spouse, unmarried surviving spouse, or minor unmarried child of an honorably discharged veteran or active duty military personnel (if a surviving spouse of a deceased veteran or active duty military person, the surviving spouse must not have remarried);

(C) the alien entered the U.S. before August 22, 1996, and remained continuously present in the U.S. (a single absence from the U.S. of more than 30 days or a combined absence of more than 90 days interrupts the "continuous presence") since at least August 21, 1996, until obtaining qualifying immigrant status (an alien who entered the U.S. without proper documents or overstayed his or her visa, is treated the same as an alien who entered and remained in the U.S. with valid immigration documents);

(D) the alien entered the U.S. with a status described in Chart C and meets those eligibility criteria, or meets the criteria in A-343, How to Determine Eligibility for Battered Aliens; or

(E) the alien meets the 40 qualifying quarters requirements in A-354, Verifying 40 "Qualifying Quarters," and five years have passed since the alien's legal date of entry.

§372.202. Verifying Citizenship for TANF.

(a) TANF applicants must prove eligibility under §372.201 of this division (relating to TANF Citizenship Requirements). The Texas Health and Human Services Commission (HHSC) determines what proof is required. Applicants are responsible for providing proof. HHSC may obtain proof of citizenship from the Texas Bureau of Vital Statistics or from the Social Security Administration.

(b) HHSC disqualifies TANF applicants HHSC determines have failed without good cause to prove eligibility under §372.201 of this division.

(c) HHSC may grant good cause to a TANF applicant who has not complied with subsection (a) of this section and may postpone the requirement to provide proof until the next eligibility assessment, if the applicant:

(1) made a good faith effort to provide the proof; and

(2) was unable to provide proof because of circumstances beyond the applicant's control.

§372.203. SNAP Citizenship Requirements.

To be eligible for SNAP, a person must be:

(1) a citizen of the U.S.; or

(2) an alien legally admitted to the U.S. who meets the eligibility criteria in 8 U.S.C. §1612(a)(2).

§372.204. Verifying Citizenship for SNAP.

(a) The Texas Health and Human Services Commission (HHSC) requires proof of citizenship from a SNAP applicant if HHSC determines the applicant's citizenship is questionable. Applicants are responsible for proving eligibility under §372.203 of this division (relating to SNAP Citizenship Requirements) upon request.

(b) HHSC disqualifies applicants who fail to prove eligibility under §372.203 of this division until proof is provided.

§372.205. Reporting Undocumented Alien Applicants.

The Texas Health and Human Services Commission reports to the United States Citizenship and Immigration Service only those aliens who apply for TANF or SNAP benefits and who have a final order of deportation, as required for SNAP by 7 U.S.C. §2020(e).

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

Filed with the Office of the Secretary of State on May 11, 2009.

TRD-200901844
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 424-6900

DIVISION 4. RESIDENCY

1 TAC §372.251, §372.252

Statutory Authority

The new sections are proposed under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; and Texas Human Resources Code, Chapter 31, which authorizes HHSC to administer financial assistance programs, and Chapter 33, which authorizes HHSC to administer nutritional assistance programs.

The new sections affect Texas Government Code, Chapter 531; and Texas Human Resources Code, Chapters 31 and 33. No other statutes, articles, or codes are affected by this proposal.

§372.251. Residency Requirements for TANF.

(a) A person must be a Texas resident to be eligible for TANF benefits. A person meets the residency requirement if the Texas Health and Human Services Commission (HHSC) determines the person lives in Texas and intends to remain in Texas permanently or for an indefinite time.

(b) A migrant or itinerant worker meets the residency requirement if HHSC determines the migrant or itinerant worker lives in Texas, entered the state with a job commitment or an intention to seek employment, and is not receiving TANF benefits from another state.

(c) A TANF recipient who leaves Texas but returns within 90 days and declares the out-of-state stay was not permanent may establish residency for the period the person was out of state, as determined by HHSC, and may be eligible for retroactive TANF benefits for the period the person was out of state.

§372.252. Residency Requirements for SNAP.

(a) To be eligible for SNAP benefits, a person must live in Texas.

(b) The Texas Health and Human Services Commission follows 7 CFR §273.3 in determining a SNAP applicant's residency, which does not require a person to reside in a permanent dwelling or express an intent to reside in Texas permanently.

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 11, 2009.

TRD-200901845
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 424-6900

DIVISION 5. DOMICILE

1 TAC §372.301

Statutory Authority

The new section is proposed under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; and Texas Human Resources Code, Chapter 31, which authorizes HHSC to administer financial assistance programs.

The new section affects Texas Government Code, Chapter 531; and Texas Human Resources Code, Chapter 31. No other statutes, articles, or codes are affected by this proposal.

§372.301. Domicile Requirements for TANF.

(a) Each person the Texas Health and Human Services Commission (HHSC) includes in a TANF case for benefits must live in the household, unless HHSC has determined the person is temporarily out of the home.

(b) An unmarried minor parent must live in an adult supervised setting, as determined by HHSC, to be eligible for TANF benefits.

(c) HHSC may consider a person to be living in the household even though the person has entered a nursing facility, so long as HHSC determines the person's stay in the nursing facility is temporary.

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 11, 2009.

TRD-200901846
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 424-6900

DIVISION 6. RESOURCES

1 TAC §§372.351 - 372.356

Statutory Authority

The new sections are proposed under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; and Texas Human Resources Code, Chapter 31, which authorizes HHSC to administer financial assistance programs, and Chapter 33, which authorizes HHSC to administer nutritional assistance programs.

The new sections affect Texas Government Code, Chapter 531; and Texas Human Resources Code, Chapters 31 and 33. No other statutes, articles, or codes are affected by this proposal.

§372.351. Overview of Resources.

(a) In the TANF Program, resources are cash (or its equivalent) and property that is convertible to cash (or its equivalent). Resources include:

(1) cash from income not obligated in the month of receipt; and

(2) lump sum payments received intermittently and no more often than once annually.

(b) In SNAP, the Texas Health and Human Services Commission follows the definition of resources in 7 CFR §273.8(c).

§372.352. Resource Eligibility Requirements.

(a) In TANF, a household meets the resources eligibility requirement if the household's countable resources are at or below the applicable resource limits explained in §372.354 of this division (relating to Treatment of Resources in TANF).

(b) In SNAP, a household meets the resources eligibility requirement if the household's countable resources are at or below the

applicable resource limits explained in §372.355 of this division (relating to Treatment of Resources in SNAP).

§372.353. Determining the Value of a Non-Cash Resource.

(a) The Texas Health and Human Services Commission (HHSC) considers the value of a non-cash resource, except for a vehicle, to be the actual amount of money available from the sale of the resource. HHSC determines the value by subtracting any money owed on the resource and any costs usually associated with selling the resource from the resource's fair market value.

(b) HHSC considers the value of a vehicle to be its fair market value.

§372.354. Treatment of Resources in TANF.

(a) In the TANF Program, the countable resources limit is $1,000.

(b) Unless a resource is excluded under subsection (c) of this section, the Texas Health and Human Services Commission (HHSC) counts the resources of:

(1) the members of the certified group;

(2) each parent of a child in the certified group living in the household and ineligible or disqualified from receiving TANF benefits;

(3) each sibling of a dependent child in the certified group living in the household and disqualified from receiving TANF benefits; and

(4) the sponsors and the sponsors' spouses, for a household containing a sponsored alien.

(c) HHSC excludes the following resources:

(1) an amount up to $7,500 per person of prepaid burial insurance (or of a prepaid funeral plan);

(2) burial plots;

(3) crime victim compensation funds;

(4) earned income tax credit payments to applicants the month of receipt and the following month, and to recipients the month of receipt and the following 11 months;

(5) the homestead and surrounding real property, including:

(A) any structure, including a houseboat or a motor home, the household uses as its residence;

(B) surrounding real property divided by a public right-of-way (such as a street or road) but not divided by real property owned by others; and

(C) the homestead if it is temporarily unoccupied due to employment, training for future employment, illness, casualty, or natural disaster, as long as the household intends to return;

(6) resources HHSC determines are not accessible to the household, including:

(A) jointly owned property as described for SNAP in 7 CFR §273.8(d); and

(B) trust funds as described for SNAP in 7 CFR §273.8(e)(8);

(7) business property, including property retained for income-producing business purposes;

(8) vehicles used to transport a disabled household member and property used to maintain such vehicles;

(9) the cash value of all life insurance policies;

(10) funds from the earned income of a child as described in §372.404(2) of this subchapter (relating to Countable and Excluded Income in TANF);

(11) personal possessions HHSC determines are essential for daily living, such as clothing, jewelry, furniture, livestock, and farm equipment;

(12) funds from a reimbursement intended for and actually used in the month of receipt to repair or replace a lost or damaged resource excluded under this section, but HHSC counts the funds from such a reimbursement, beginning in the month after receipt, to the extent the funds were not used as intended to repair or replace the lost or damaged resource;

(13) federal, state, or local government payments provided to rebuild a home or replace personal possessions damaged in a disaster, including payments under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. §5121, et seq.), if the recipient is subject to legal sanction if the payment is not used as intended;

(14) any resource federal law excludes;

(15) funds in a retirement account excluded under 7 U.S.C. §2014(g);

(16) funds in an education account excluded under 7 U.S.C. §2014(g);

(17) loans, if the circumstances satisfy HHSC that there exists an understanding the money will be repaid, and the applicant or recipient reasonably explains to HHSC how the money will be repaid;

(18) funds from educational assistance payments (but only during the quarter, semester, or applicable period the payment is intended to cover);

(19) the value of real property the household is making a good faith effort to sell at a reasonable price;

(20) funds excluded under §372.355(d) of this division (relating to Treatment of Resources in SNAP);

(21) funds excluded under §372.404(25) of this subchapter; and

(22) the fair market value of one automobile up to $4,650.

§372.355. Treatment of Resources in SNAP.

(a) In SNAP, the Texas Health and Human Services Commission (HHSC) follows 7 CFR §273.8(a) and (b) to determine the countable resources limit. Unless a household is considered categorically eligible for SNAP under 7 CFR §273.2(j) by receiving Supplemental Security Income, TANF cash, or TANF non-cash benefits, the countable resource limit for a household is the amount of liquid resources and excess vehicle values specified in 7 CFR §273.8(b).

(b) HHSC follows 7 CFR §273.8 to determine whose resources to count in SNAP.

(c) HHSC follows 7 CFR §273.8 to determine what resources are counted, and 7 CFR §273.8(e) and 7 U.S.C. §2014(g) to determine what resources are excluded.

(d) HHSC also excludes:

(1) up to $2,000 of gifts annually from tax-exempt organizations provided to children with life-threatening conditions;

(2) independent living payments to youths who are leaving foster care, as provided by the Social Security Act, Title IV-E (42 U.S.C. §670 et seq.);

(3) funds from payments up to $2,000 to Native Americans made under the federal Old Age Assistance Claims Settlement Act (25 U.S.C. §2301) or the federal Alaska Native Claims Settlement Act (43 U.S.C. §1601);

(4) funds from payments made to volunteers under Title I of the Domestic Volunteer Services Act of 1973 (regardless of whether the recipient was receiving SNAP benefits at the time of receipt);

(5) funds from adoption subsidy payments made under Title IV-A and Title IV-E of the Social Security Act;

(6) funds from insurance policy dividends;

(7) funds from veterans payments earmarked as a housebound allowance or as an aid and attendance allowance;

(8) $15,000 for the first vehicle and $4,650 for each additional vehicle; and

(9) resources of categorically eligible households as described in 7 CFR §273.8(a).

§372.356. Consequences of Transferring Resources.

(a) In the TANF Program, the Texas Health and Human Services Commission (HHSC) calculates a period of ineligibility based on the fair market value of a resource the household transfers without compensation:

(1) during the three months before the application file date described in §372.903 of this chapter (relating to Application File Date), if the resource is countable under §372.354 of this division (relating to Treatment of Resources in TANF); and

(2) during any period HHSC has certified the household for TANF benefits, if the resource is countable under §372.354 of this division.

(b) In SNAP, HHSC follows 7 CFR §273.8(i) to determine whether a transfer of resources by an applicant or recipient affects the applicant's or recipient's eligibility.

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 11, 2009.

TRD-200901847
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 424-6900

DIVISION 7. INCOME

1 TAC §§372.401 - 372.411

Statutory Authority

The new sections are proposed under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; and Texas Human Resources Code, Chapter 31, which authorizes HHSC to administer financial assistance programs, and Chapter 33, which authorizes HHSC to administer nutritional assistance programs.

The new sections affect Texas Government Code, Chapter 531; and Texas Human Resources Code, Chapters 31 and 33. No other statutes, articles, or codes are affected by this proposal.

§372.401. Overview of Income.

(a) In the TANF Program, income is the receipt of cash or its equivalent, either earned or unearned, a person may directly or indirectly use to meet basic needs (such as food, clothing, and shelter). Earned income is compensation received from employment or job training and includes military and flight pay, allowances for housing and food, and receipts from self-employment (but not receipts from ownership of property involving less than 20 hours of work per week, which are unearned income). All other income is unearned income, including dividends and withdrawals from excluded resources. Lump-sum payments occurring no more than once annually are considered a resource. Lump-sum payments occurring more than once annually are considered income.

(b) In SNAP, the Texas Health and Human Services Commission follows the definition of income in 7 CFR §273.9(b).

§372.402. Income Eligibility Requirements.

In TANF and SNAP, a household meets the income eligibility requirement if the household's countable income is at or below the applicable income limits explained in §372.408 of this division (relating to Determining Income Eligibility).

§372.403. Determining Whose Income Counts in TANF.

Unless the income is excluded under §372.404 of this division (relating to Countable and Excluded Income in TANF), the Texas Health and Human Services Commission counts the income of:

(1) members of the certified group;

(2) each parent of a child in the certified group living in the household and ineligible or disqualified from receiving TANF benefits;

(3) each sibling of a dependent child in the certified group living in the household and disqualified from receiving TANF benefits;

(4) stepparents living with the certified group;

(5) parents living with an unmarried minor parent recipient; and

(6) sponsors and the sponsors' spouses, for a household with a sponsored alien.

§372.404. Countable and Excluded Income in TANF.

In the TANF program, the Texas Health and Human Services Commission (HHSC) counts all income of a person described in §372.403 of this division (relating to Determining Whose Income Counts in TANF), except HHSC excludes the following:

(1) any income federal law excludes;

(2) the earned income of a child who is:

(A) a full-time student, as defined by the school (regardless of how many hours the child works); or

(B) a part-time student employed less than 30 hours a week;

(3) up to $300 per federal fiscal quarter in cash gifts and contributions from private, nonprofit organizations and based on need;

(4) up to $75 per month in regular child support payments per household, except HHSC counts all child support payments a

household receives if HHSC determines the household violated an agreement to assign child support to the State;

(5) income legally diverted before actual receipt, such as payments a parent makes for alimony, child support, and to dependents outside the home;

(6) proceeds from claims on insurance policies to compensate a loss or used to pay medical expenses;

(7) payments from federal volunteer programs for volunteer service, such as payments:

(A) for volunteer service in a senior citizen volunteer program, under the Domestic Volunteer Service Act (42 U.S.C. §5000 et seq.);

(B) for volunteer service to Volunteers in Service to America (VISTA), under 42 U.S.C. §§4951 - 4960; and

(C) for volunteer service under the National and Community Service Act (42 U.S.C. §§12511 - 12656);

(8) payments from federal programs for on-the-job training made to a child under 19 years of age and under the parental control of another household member, including payments made under any law described in paragraph (7) of this section, or under the Workforce Investment Act of 1998;

(9) the value of any benefits received under a government nutrition assistance program based on need, including benefits under SNAP, the Child Nutrition Act of 1966, the National School Lunch Act, and the Older Americans Act of 1965;

(10) foster care payments;

(11) payments made under a government housing assistance program based on need;

(12) energy assistance payments;

(13) job training payments that:

(A) are earmarked as reimbursement for training-related expenses; and

(B) do not duplicate payment for an item covered by budgetary needs;

(14) a lump sum provided and used to pay burial, legal, or medical bills, or to replace damaged or lost possessions, except HHSC does not exclude amounts from lump sums used for another purpose;

(15) reimbursements for monies spent on items not covered by budgetary needs;

(16) amounts deducted from royalties for production expenses and severance taxes;

(17) all income of Supplemental Security Income recipients;

(18) third-party funds received and used for a third-party beneficiary who is not a household member;

(19) vendor payments from funds not legally obligated to the household;

(20) veterans benefits for special needs items not covered by budgetary needs;

(21) workers' compensation payments legally obligated to the recipient that are earmarked and used for medical expenses;

(22) the amount of any nonfarm self-employment income offsetting a tax deduction taken that year for a farm loss, for households with farms generating income of at least $1,000 annually;

(23) any income described in §372.355(d) of this subchapter (relating to Treatment of Resources in SNAP);

(24) any income described in §372.354(c)(4), (13), (17), and (18) of this subchapter (relating to Treatment of Resources in TANF);

(25) crime victim's compensation payments; and

(26) the earned income of a person who marries a caretaker or payee, for the first six months from the date of the marriage, if:

(A) the caretaker or payee is receiving TANF benefits on the date of the marriage; and

(B) the combined income of the person and the caretaker or payee, countable under this section, not exceeding 200% of the Federal Poverty Guidelines, as calculated based on the total number of the following persons:

(i) the caretaker or payee;

(ii) the person who marries the caretaker or payee;

(iii) each child living in the household who is related to the caretaker, payee, or person within the degree described in §372.108 of this chapter (relating to Relationship Requirement); and

(iv) a required member if not disqualified or ineligible.

§372.405. Determining Whose Income Counts in SNAP.

The Texas Health and Human Services Commission follows 7 CFR §273.9 to determine whose income to count in SNAP.

§372.406. Countable and Excluded Income in SNAP.

(a) In SNAP, the Texas Health and Human Services Commission (HHSC) follows 7 CFR §273.9 to determine what income to count, and 7 CFR §273.9(c) and 7 U.S.C. §2014(d) to determine what income to exclude.

(b) HHSC also excludes:

(1) payments described in §372.404(7) of this division (relating to Countable and Excluded Income in TANF);

(2) any income described in §372.355(d) of this subchapter (relating to Treatment of Resources in SNAP); and

(3) amounts deducted from royalties for production expenses and severance taxes.

§372.407. Consequences for Failure to Pursue Other Income.

(a) In SNAP, there is no requirement for members of a household to pursue or accept income; however, a recipient not exempt from work requirements must accept a suitable job as noted in §372.1351 of this chapter (relating to SNAP Work Requirements).

(b) In the TANF Program, a person described in §372.403 of this division (relating to Determining Whose Income Counts in TANF), without good cause, must pursue and accept all income to which the person is legally entitled. The Texas Health and Human Services Commission (HHSC) may determine a certified group ineligible for TANF benefits due to a household member's failure to comply with this requirement.

(c) HHSC may grant good cause for failure to comply with subsection (b) of this section if:

(1) the potential income is Supplemental Security Income (SSI), the person is physically or mentally unable to apply for the SSI, and HHSC fails to assist the person with the SSI application process; or

(2) if HHSC determines that pursuing or accepting the income:

(A) causes financial hardship to the household;

(B) is not cost-effective;

(C) endangers the health or safety of a household member; or

(D) requires the assistance of an attorney, which the person was unable to obtain after making a reasonable effort.

§372.408. Determining Income Eligibility.

(a) In the TANF Program, the Texas Health and Human Services Commission (HHSC) determines income eligibility by applying the following tests:

(1) Budgetary needs test. The first income eligibility test for TANF applicants, the budgetary needs test applies to households that have not received TANF benefits during the four months before the application month. HHSC determines the applicable budgetary needs amount from the table in paragraph (2) of this subsection, based on the persons in the certified group and whether the household includes a second parent. A household passes this test if the total income under §372.403 of this division (relating to Determining Whose Income Counts in TANF) does not exceed the budgetary needs amount.

(2) Recognizable needs test. The second income eligibility test for TANF applicants, the recognizable needs test applies to the continuing income eligibility of TANF recipients. HHSC determines the applicable recognizable needs amount from the following table, based on the persons in the certified group and whether the household includes a second parent. A household passes this test if the total income under §372.403 of this division, minus all applicable deductions in §372.409 of this division (relating to Allowable Deductions from Countable Income in TANF), is equal to or less than the recognizable needs amount.

Figure: 1 TAC §372.408(a)(2)

(b) In SNAP, HHSC follows 7 CFR §273.9 and §273.10 to determine income eligibility.

§372.409. Allowable Deductions from Countable Income in TANF.

(a) In the TANF Program, the Texas Health and Human Services Commission (HHSC) deducts the following amounts, in the order listed, for each person in the certified group:

(1) a standard work-related expense up to $120 from earned income;

(2) a disregard of 90% of earned income over $120, up to a maximum disregard amount of $1,400, which:

(A) is allowed the first four months the earnings should be budgeted;

(B) is allowed no more than four months in any 12-month period; and

(C) is not allowed:

(i) for a full calendar year after HHSC applies the maximum disregard of $1,400, beginning on the date HHSC first determines the household ineligible for TANF; and

(ii) if HHSC determines the client voluntarily quit a job without good cause within 60 days before applying for TANF;

(3) the actual cost of dependent child care needed to allow a household member to work, up to $200 monthly for each dependent child under age two and up to $175 monthly for each dependent child age two or older (or incapacitated adult); and

(4) the amount of any farm loss not excluded under §372.404(22) of this division (relating to Countable and Excluded Income in TANF).

(b) In the case of a parent ineligible or disqualified from receiving TANF benefits under Division 3 of this subchapter (relating to Citizenship); Division 8 of this subchapter (relating to Time Limits); or §372.301(b) of this subchapter (relating to Domicile Requirements for TANF), HHSC deducts only the following from income and counts any amount remaining as unearned income of the members of the certified group:

(1) the amount of any alimony or child support payments paid to or for nonhousehold members;

(2) the amount of any payments the parent makes to tax dependents not living in the home of the parent;

(3) the standard $120 work-related expense deduction; and

(4) the applicable budgetary needs amount indicated in the table in §372.408(a)(2) of this division (relating to Determining Income Eligibility) corresponding to the following number of persons:

(A) the parent; plus

(B) each member of the household:

(i) who is not included in the certified group for any reason other than failing to meet the eligibility requirement in Division 3 of this subchapter; and

(ii) whom the parent can claim as a tax dependent or is legally obligated to support.

(c) In the case of a parent who is ineligible or disqualified from receiving TANF benefits for any reason other than those described in subsection (b) of this section, HHSC allows deductions from countable income as indicated in subsection (a) of this section; however, HHSC does not include the disqualified parent in the certified group.

(d) In the case of a stepparent who is not in the certified group, HHSC deducts only the following and counts any amount remaining as unearned income of the members of the certified group:

(1) the standard $120 work-related expense deduction from earned income;

(2) the amount of any payments the stepparent makes for alimony or child support paid to or for nonhousehold members;

(3) the amount of any payments the stepparent makes to tax dependents not living in the home of the stepparent; and

(4) the applicable budgetary needs amount indicated in the table in §372.408(a)(2) of this division corresponding to the following number of persons:

(A) the stepparent; plus

(B) each member of the household:

(i) not included in the certified group for any reason other than failing to meet the eligibility requirement in Division 3 of this subchapter; and

(ii) whom the stepparent can claim as a tax dependent or is legally obligated to support.

(e) In the case of a parent of an unmarried minor parent choosing not to apply for TANF, HHSC deducts only the following and counts any amount remaining as unearned income of the members of the certified group:

(1) the standard $120 work-related expense deduction from earned income;

(2) the amount of any payments the parent makes for alimony or child support paid to or for nonhousehold members;

(3) the amount of any payments the parent makes to tax dependents not living in the home of the parent; and

(4) the applicable budgetary needs amount indicated in the table in §372.408(a)(2) of this division that corresponds to the following number of persons:

(A) the parent; plus

(B) each member of the household:

(i) not included in the certified group for any reason other than failing to meet the eligibility requirement in Division 3 of this subchapter; and

(ii) whom the parent can claim as a tax dependent or is legally obligated to support.

§372.410. Allowable Deductions from Countable Income in SNAP.

In SNAP, the Texas Health and Human Services Commission (HHSC) follows 7 CFR §273.9 and HHSC:

(1) does not deduct costs related to self-employment income from illegal activities;

(2) allows an uncapped excess shelter deduction for households with an elderly or disabled member, even if the member is disqualified;

(3) deducts a standard utility allowance for households that qualify due to out-of-pocket heating and cooling costs;

(4) deducts a basic utility allowance for households with utility expenses that do not qualify for the standard utility allowance in paragraph (3) of this section;

(5) allows a standard shelter deduction for homeless households under 7 CFR §273.9(d)(1); and

(6) gives elderly or disabled households the option of deducting actual allowable medical expenses (as explained in 7 CFR §273.9(d)(3)) or, using a standard medical deduction, which is a set amount HHSC negotiates annually with the U.S. Department of Agriculture, Food and Nutrition Service.

§372.411. Projecting Future Household Income.

(a) In both TANF and SNAP, the Texas Health and Human Services Commission (HHSC) follows 7 CFR §273.10(c) to budget future anticipated income.

(b) To convert weekly or biweekly payments to monthly amounts, HHSC multiplies weekly payments by 4.33 and biweekly payments by 2.17.

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 11, 2009.

TRD-200901848

Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 424-6900

DIVISION 8. TIME LIMITS

1 TAC §§372.451 - 372.457

Statutory Authority

The new sections are proposed under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; and Texas Human Resources Code, Chapter 31, which authorizes HHSC to administer financial assistance programs, and Chapter 33, which authorizes HHSC to administer nutritional assistance programs.

The new sections affect Texas Government Code, Chapter 531; and Texas Human Resources Code, Chapters 31 and 33. No other statutes, articles, or codes are affected by this proposal.

§372.451. Time Limits.

(a) Time limits in TANF and SNAP are a set maximum amount of time a person is eligible to receive a benefit. A person becomes ineligible for a benefit once the time limit for that benefit has expired.

(b) In the TANF Program, the Texas Health and Human Services Commission (HHSC) applies time limits:

(1) in all areas of the state;

(2) to all cases of TANF cash assistance; and

(3) to all adult members of the certified group.

(c) In SNAP, HHSC follows 7 CFR §273.24 and applies time limits to household members ages 18 to 49 who fail to meet the work requirement described in §372.1351 of this chapter (relating to SNAP Work Requirements), unless the household member is exempt as described in §372.456 of this division (relating to SNAP Time Limit Exemptions).

(d) A TANF recipient who exhausts a time limit becomes ineligible for TANF cash assistance for five years, unless the person demonstrates that the person is exempt from the time limit on the basis of hardship, as outlined in §372.452 of this division (relating to TANF Time Limit Exemptions).

§372.452. TANF Time Limit Exemptions.

(a) The Texas Health and Human Services Commission (HHSC) may exempt a recipient and continue TANF cash assistance after a time limit expires if HHSC determines:

(1) the recipient cooperated with all applicable Choices requirements during the time the recipient was subject to the time limit (as explained in §372.1154(g) of this chapter (relating to Cooperating with Personal Responsibility Agreement Requirements)); and

(2) the recipient meets one of the following hardship criteria:

(A) severe personal hardship, for such reasons as:

(i) a terminal or permanent disabling illness or injury;

(ii) temporary incapacity due to illness or injury; or

(iii) the need to provide 30 or more days of care to a close family member (does not have to be a household member) who is disabled due to a temporary, permanent, or terminal illness or injury; or

(B) local economic hardship, for reasons such as:

(i) the recipient lives in a county with an unemployment rate of more than 10% (this is also known as a county hardship); or

(ii) the recipient completed an independent job search, including contacting at least 40 potential employers within 30 days, but failed to find employment earning at least the amount of the TANF cash assistance plus any applicable work-expense disregard (this is also known as an employment hardship).

(b) A recipient HHSC exempted from a time limit due to the employment hardship explained in subsection (a)(2)(B)(ii) of this section must search for work by contacting at least 40 potential employers each month of the exemption period. If HHSC determines the recipient has not met this requirement, the recipient loses the employment hardship exemption and may not receive another employment hardship exemption during the five-year period of ineligibility.

§372.453. Requesting a TANF Time Limit Exemption.

A TANF recipient must request a time limit exemption:

(1) in the case of a severe personal hardship as described at §372.452(a)(2)(A) of this division (relating to TANF Time Limit Exemptions), within 90 days after:

(A) the date the personal illness or injury began; or

(B) the date the recipient is needed to care for a close family member;

(2) in the case of a county hardship as described at §372.452(a)(2)(B)(i) of this division, at any time during the recipient's five-year period of ineligibility; and

(3) in the case of an employment hardship as described at §372.452(a)(2)(B)(ii) of this division, within 90 days after the date that the recipient exhausts the TANF time limit, loses a job, or experiences a reduction in work hours.

§372.454. 60-Month Lifetime TANF Cash Limit.

The Texas Health and Human Services Commission (HHSC) follows 45 CFR §264.1 and applies a 60-month lifetime limit to all TANF households with an adult in the certified group. HHSC counts both TANF and TANF-State Program cash assistance benefit months toward the 60-month lifetime limit.

§372.455. Continuing Eligibility Beyond the 60-Month Lifetime TANF Cash Limit.

(a) A TANF household subject to ineligibility due to the 60-month lifetime TANF cash limit is eligible for extended TANF cash assistance if:

(1) Texas Health and Human Services Commission (HHSC) records indicate each adult member of the certified group cooperated with any applicable Choices or child support requirements for at least 48 months of the 60-month period; and

(2) HHSC determines any adult in the household meets one or more of the following hardship criteria:

(A) the adult has a verified mental or physical disability expected to last more than 180 days, is certified to receive community-based services through the Texas Department of Aging and Disability Services (DADS), and the adult has applied for or agrees to apply for Supplemental Security Income (SSI) benefits;

(B) the adult is listed as the primary caregiver for a family member receiving community-based services from DADS or who has a verified mental or physical disability expected to last more than 180 days, and who has applied for or agrees to apply for SSI benefits;

(C) the adult is a victim of domestic violence;

(D) the adult currently resides in a county that does not offer full Choices services;

(E) the adult resided in a county without full Choices services during at least one month of the last 12 countable months of the 60-month period; or

(F) the adult:

(i) was unable to obtain or maintain employment, other than migrant or seasonal work, during the last 12 months before the end of the 60-month period, earning at least enough to have exceeded the TANF income limit if the earnings were calculated without taking the earned income deduction that is explained in §372.409 of this subchapter (relating to Allowable Deductions from Countable Income in TANF);

(ii) had no more than one Choices penalty during the 60-month period; and

(iii) did not voluntarily quit a job during the last 12 months of the 60-month period.

(b) Eligibility for extended TANF cash assistance under subsection (a)(2)(D) - (F) of this section is limited to a total of 24 months.

(c) A household receiving extended TANF benefits permanently loses eligibility for the extended TANF benefits if HHSC determines an adult member of the certified group failed without good cause to comply with the TANF Choices or child support requirements.

§372.456. SNAP Time Limit Exemptions.

The Texas Health and Human Services Commission (HHSC) may exempt a person from a SNAP time limit if HHSC determines the person:

(1) meets the criteria explained in 7 CFR §273.24(c);

(2) resides in a federally approved waiver area to which the time limit does not apply, as described in 7 U.S.C. §2015(o)(4); or

(3) resides in a county in which SNAP Employment and Training is not provided.

§372.457. Regaining SNAP Eligibility After a Time Limit Disqualification.

A person disqualified because of SNAP time limits regains eligibility if the person:

(1) meets the work requirement as provided by 7 CFR §273.24(d) and (e); or

(2) becomes exempt from the time limit under §372.456 of this division (relating to SNAP Time Limit Exemptions).

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 11, 2009.

TRD-200901849

Steve Aragón

Chief Counsel

Texas Health and Human Services Commission

Earliest possible date of adoption: June 21, 2009

For further information, please call: (512) 424-6900

DIVISION 9. CRIMINAL ACTIVITY

1 TAC §372.501

Statutory Authority

The new section is proposed under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; and Texas Human Resources Code, Chapter 31, which authorizes HHSC to administer financial assistance programs, and Chapter 33, which authorizes HHSC to administer nutritional assistance programs.

The new section affects Texas Government Code, Chapter 531; and Texas Human Resources Code, Chapters 31 and 33. No other statutes, articles, or codes are affected by this proposal.

§372.501. Disqualifications Due to Criminal Activity.

In TANF and SNAP, a person is disqualified from receiving benefits if the Texas Health and Human Services Commission determines the person:

(1) is a fugitive (a person fleeing to avoid prosecution or confinement for a felony criminal conviction, or found by a court to be violating federal or state probation or parole); or

(2) is convicted of a felony drug offense committed on or after April 1, 2002.

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 11, 2009.

TRD-200901850
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 424-6900

SUBCHAPTER C. ASSOCIATED PROGRAMS
DIVISION 1. SNAP BENEFITS FOR DISASTER VICTIMS

1 TAC §372.601

Statutory Authority

The new section is proposed under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; and Texas Human Resources Code, Chapter 33, which authorizes HHSC to administer nutritional assistance programs.

The new section affects Texas Government Code, Chapter 531; and Texas Human Resources Code, Chapter 33. No other statutes, articles, or codes are affected by this proposal.

§372.601. SNAP Benefits for Disaster Victims.

To address the specific nutrition needs of disaster victims for a temporary period during and after a disaster, the Texas Health and Human Services Commission may:

(1) administer SNAP benefits to disaster victims as explained in 7 U.S.C. §2014(h); and

(2) request that the U.S. Department of Agriculture, Food and Nutrition Service grant waivers from applicable requirements of the SNAP regulations.

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 11, 2009.

TRD-200901851
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 424-6900

DIVISION 2. SNAP-COMBINED APPLICATION PROJECT (SNAP-CAP)

1 TAC §§372.651 - 372.655

Statutory Authority

The new sections are proposed under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; and Texas Human Resources Code, Chapter 31, which authorizes HHSC to administer financial assistance programs.

The new sections affect Texas Government Code, Chapter 531; and Texas Human Resources Code, Chapter 31. No other statutes, articles, or codes are affected by this proposal.

§372.651. Overview of SNAP-CAP.

SNAP-Combined Application Project (SNAP-CAP) is a demonstration project the Texas Health and Human Services Commission administers to improve access to SNAP for elderly and disabled individuals.

§372.652. SNAP-CAP Eligibility Requirements.

A recipient is eligible for SNAP-CAP if the recipient:

(1) receives Supplemental Security Income;

(2) lives in Texas;

(3) is 50 years of age or older (unless the U.S. Department of Agriculture, Food and Nutrition Service approves modifications to this requirement in the waiver);

(4) is not receiving SNAP benefits (unless the U.S. Department of Agriculture, Food and Nutrition Service approves modifications to this requirement in the waiver); and

(5) is not institutionalized.

§372.653. SNAP-CAP Application Process.

(a) The Texas Health and Human Services Commission (HHSC) identifies potentially eligible Supplemental Security Income (SSI) recipients and mails them a simplified application.

(b) To apply, the SSI recipient completes and signs the application, and submits the simplified application to the HHSC Centralized Benefit Services unit.

§372.654. SNAP-CAP Certification Process.

(a) The Texas Health and Human Services Commission (HHSC), Centralized Benefit Services unit processes SNAP-CAP applications without requiring an interview and without the involvement

of the local HHSC office (except in special situations when local office assistance is requested).

(b) HHSC certifies eligible applicants as single person households.

(c) Using Social Security Administration data obtained under Supplemental Security Income regulations, HHSC certifies eligible applicants for 36 months of benefits at a time.

(d) HHSC provides each SNAP-CAP recipient a standard monthly benefit amount, as approved by the U.S. Department of Agriculture, Food and Nutrition Service. The SNAP-CAP benefit amount is a set amount based on what the average SNAP benefit amount would be under the regular SNAP policy. A recipient with high shelter costs may receive a higher standard benefit amount than a recipient with lower shelter costs, as required by the U.S. Department of Agriculture, Food and Nutrition Service.

(e) HHSC sends the applicant a notice of eligibility upon certification.

§372.655. Reporting Changes.

The Texas Health and Human Services Commission does not require SNAP-CAP participants to report changes between certification periods.

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 11, 2009.

TRD-200901852
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 424-6900

DIVISION 3. TANF NON-CASH PROGRAM

1 TAC §372.701, §372.702

Statutory Authority

The new sections are proposed under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; and Texas Human Resources Code, Chapters 31 and 34, which authorize HHSC to administer financial assistance programs.

The new sections affect Texas Government Code, Chapter 531; and Texas Human Resources Code, Chapters 31 and 34. No other statutes, articles, or codes are affected by this proposal.

§372.701. Overview of the TANF Non-Cash Program.

(a) The TANF Non-Cash Program is a component of the TANF Program, with different eligibility requirements, providing services but not cash assistance.

(b) The Texas Health and Human Services Commission (HHSC) provides information about the TANF Non-Cash Program to SNAP applicants and others who are potentially eligible. HHSC describes the program's TANF-funded services, including services relating to the prevention and treatment of substance abuse, adult education, and employment.

§372.702. TANF Non-Cash Eligibility Requirements.

(a) An applicant is eligible for services under the TANF Non-Cash Program if the Texas Health and Human Services Commission (HHSC) determines the household's countable liquid resources combined with any excess vehicle value do not exceed $5,000.

(b) HHSC determines a household's excess vehicle value by adding together:

(1) the amount of the fair market value of one countable vehicle exceeding $15,000; and

(2) the amount of the fair market value of other countable vehicles exceeding $4,650.

(c) In evaluating a household's eligibility for the TANF Non-Cash Program, HHSC applies any applicable exclusions in §372.354 of this chapter (relating to Treatment of Resources in TANF).

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 11, 2009.

TRD-200901853
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 424-6900

DIVISION 4. TANF STATE PROGRAM (TANF-SP)

1 TAC §§372.751 - 372.753

Statutory Authority

The new sections are proposed under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; and Texas Human Resources Code, Chapter 31, which authorizes HHSC to administer financial assistance programs.

The new sections affect Texas Government Code, Chapter 531; and Texas Human Resources Code, Chapter 31. No other statutes, articles, or codes are affected by this proposal.

§372.751. Overview of the TANF State Program.

The TANF State Program (TANF-SP) is a state-created and state-funded program that is the same as the TANF Program, except limited to certain Texas counties and two-parent households. The Texas Health and Human Services Commission determines who participates in TANF-SP.

§372.752. TANF-State Program Eligibility Requirements.

TANF-State Program (TANF-SP) participants must meet all TANF program requirements in this chapter, except a TANF-SP participant is not required to assign child support payments received by the participant to the State.

§372.753. Determining Eligibility and Benefits.

The Texas Health and Human Services Commission (HHSC) determines eligibility and benefits for the TANF-State Program the same way it determines eligibility and benefits for the TANF Program, except HHSC counts as unearned income the amount of any monthly child support payments above $75 received by a participant in determining the household's:

(1) income eligibility under Subchapter B, Division 7, of this chapter (relating to Income); and

(2) benefits under Subchapter F, Division 1, of this chapter (relating to Benefits in General).

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 11, 2009.

TRD-200901854
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 424-6900

DIVISION 5. ONE-TIME TANF (OTTANF)

1 TAC §372.801, §372.802

Statutory Authority

The new sections are proposed under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; and Texas Human Resources Code, Chapter 31, which authorizes HHSC to administer financial assistance programs.

The new sections affect Texas Government Code, Chapter 531; and Texas Human Resources Code, Chapter 31. No other statutes, articles, or codes are affected by this proposal.

§372.801. Overview of One-Time TANF.

One-Time TANF is an option within the TANF Program. Instead of monthly TANF benefits, the applicant receives a single lump sum assistance payment.

§372.802. One-Time TANF Eligibility Requirements.

(a) A One-Time TANF (OTTANF) applicant must:

(1) meet all TANF eligibility and participation requirements in this chapter, except the requirement at §372.1154(g) of this chapter (relating to Cooperating with Personal Responsibility Agreement Requirements) to participate in the Choices work program;

(2) not have received an OTTANF benefit during the 12 months before the application month;

(3) be in need of emergency assistance; and

(4) be employed or likely to be employed within a short period of time.

(b) The household meets the criteria in subsection (a)(2) and (3) of this section if a caretaker adult:

(1) is facing a crisis due to the loss or potential loss of transportation or shelter, or due to a medical emergency that temporarily prevents the person from working;

(2) lost employment during the period beginning two months before the application month through the month the Texas Health and Human Services Commission (HHSC) determines the household's eligibility (loss of employment does not include voluntary quit without good cause); or

(3) graduated from a university, college, junior college, or technical training school within the 12 months before the application month through the month HHSC determines household eligibility and:

(A) is unemployed or underemployed;

(B) is not currently enrolled in an institution of higher learning;

(C) provides proof of his or her degree or certificate of completion from a university, college, junior college, or technical training school; and

(D) received TANF benefits or an OTTANF benefit anytime in the 12 months before enrolling or while attending a university, college, junior college, or technical training school.

(c) In the case of a household with only one adult in the certified group, the household meets the criteria in subsection (a)(2) and (3) of this section if:

(1) a child in the household lost the financial support of a parent or stepparent through death, divorce, separation, abandonment, or termination or reduction of financial support within the last 12 months before the application month through the month HHSC determines household eligibility; and

(2) the adult has a history of employment within the 12 months before the application month or the month HHSC determines household eligibility.

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 11, 2009.

TRD-200901855
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 424-6900

SUBCHAPTER D. APPLICATION PROCESS

DIVISION 1. APPLICATION

1 TAC §§372.901 - 372.906

Statutory Authority

The new sections are proposed under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; and Texas Human Resources Code, Chapter 31, which authorizes HHSC to administer financial assistance programs, and Chapter 33, which authorizes HHSC to administer nutritional assistance programs.

The new sections affect Texas Government Code, Chapter 531; and Texas Human Resources Code, Chapters 31 and 33. No other statutes, articles, or codes are affected by this proposal.

§372.901. Applying for TANF or SNAP.

(a) A person applies for benefits under the TANF Program:

(1) on the Internet at www.yourtexasbenefits.com;

(2) over the telephone by calling 2-1-1; or

(3) by completing a paper application and mailing or faxing it to the Texas Health and Human Services Commission (HHSC).

(b) A person applies for SNAP benefits or for both TANF and SNAP:

(1) on the Internet at www.yourtexasbenefits.com; or

(2) by completing a paper application and mailing or faxing it to HHSC.

(c) A person may obtain a paper application:

(1) from an HHSC benefits office or other location that carries the application;

(2) by printing, downloading, or requesting a paper application at www.yourtexasbenefits.com;

(3) by calling 2-1-1; or

(4) by submitting a written request by mail or fax to HHSC.

(d) To apply, a person or the person's authorized representative must:

(1) provide all requested information in accordance with HHSC instructions (upon request, HHSC will assist);

(2) sign and date the application; and

(3) submit the signed and dated application to HHSC in accordance with HHSC instructions.

(e) If all members of a household have applied with the Social Security Administration for Supplemental Security Income (SSI) benefits, but they do not yet receive SSI, the household may apply for SNAP benefits at the Social Security office.

(f) A person receiving SSI may choose to apply for SNAP benefits under the SNAP-Combined Application Project (SNAP-CAP), as explained in §372.653 of this chapter (relating to SNAP-CAP Application Process).

§372.902. Incomplete Applications.

(a) The Texas Health and Human Services Commission (HHSC) accepts incomplete applications if they contain the applicant's name, address, and an acceptable signature (meaning the applicant's signature or the signature of a person HHSC is satisfied has authority to represent the applicant).

(b) An applicant who fails to complete the application must provide the omitted information during the eligibility interview and, as a result, may have a longer than normal interview.

§372.903. Application File Date.

The application file date is the date, determined by the Texas Health and Human Services Commission (HHSC), that HHSC receives an acceptable application.

§372.904. Application Processing Time Frame.

(a) For a TANF application, the Texas Health and Human Services Commission (HHSC) certifies or denies the application by the 45th day after the application file date explained in §372.903 of this division (relating to Application File Date), unless the household is subject to a one-month period of demonstrating cooperation as explained in §372.1155(d) of this chapter (relating to Consequence for Noncooperation with Personal Responsibility Agreement Requirements), in which case the application processing period is extended by the time period for demonstrating cooperation.

(b) For a SNAP application, except in the case of an expedited application as described in §372.956 of this subchapter (relating to Expedited SNAP Application Process), HHSC certifies or denies the application as soon as possible but not later than 30 days after the application file date explained in §372.903 of this division. If the 30th day is not a workday, then the processing period ends on the last previous workday.

(c) The first day of the application processing period is the day after the application file date, except as described in subsection (d) of this section.

(d) In SNAP, if an applicant resides in an institution and is also applying for Supplemental Security Income, the first day of the application processing period is the day the applicant is released from the institution, if the day is after the application file date.

§372.905. Designation of an Authorized Representative.

(a) TANF applicants or recipients may designate an authorized representative to represent the household in the application and review process if the household is unable to conduct business due to incapacity or incompetence. The Texas Health and Human Services Commission (HHSC) may designate another person or entity as authorized representative and protective payee to apply for and manage benefits on the household's behalf if HHSC determines a parent is not using the benefits for his or her dependent child's needs.

(b) SNAP applicants or recipients may designate an authorized representative according to the requirements in 7 CFR §273.2.

§372.906. Choosing to Apply for TANF Benefits.

(a) The TANF Program may not be the best choice for some families seeking assistance. Together, Texas Health and Human Services Commission (HHSC) staff and potential applicants discuss the program and explore the family's situation and needs. HHSC explains:

(1) assistance is temporary;

(2) alternatives must be explored;

(3) adults should seek employment and pursue other resources (such as child support from an absent parent); and

(4) a TANF application is also a request to help family members find jobs.

(b) As appropriate, HHSC encourages potential applicants to seek independence and self-sufficiency by, for example, choosing employment instead of TANF assistance. To support employment, families may apply for Medicaid coverage, SNAP benefits, or both.

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 11, 2009.

TRD-200901856
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 424-6900

DIVISION 2. INTERVIEW

1 TAC §§372.951 - 372.958

Statutory Authority

The new sections are proposed under Texas Government Code, §531.0055, which provides the Executive Commissioner of

HHSC with rulemaking authority; and Texas Human Resources Code, Chapter 31, which authorizes HHSC to administer financial assistance programs, and Chapter 33, which authorizes HHSC to administer nutritional assistance programs.

The new sections affect Texas Government Code, Chapter 531; and Texas Human Resources Code, Chapters 31 and 33. No other statutes, articles, or codes are affected by this proposal.

§372.951. Interview Requirements.

(a) Except as noted in §372.654 of this chapter (relating to SNAP-CAP Certification Process), the Texas Health and Human Services Commission (HHSC) requires an interview to determine eligibility for:

(1) TANF and SNAP applicants;

(2) TANF recipients at the periodic eligibility review; and

(3) SNAP recipients at recertification.

(b) HHSC conducts the interview with applicants and recipients face-to-face if:

(1) the applicant or recipient requests a face-to-face interview;

(2) a member of the household is currently disqualified from TANF or SNAP because of an intentional program violation, unless the household proves to HHSC's satisfaction that the interview requirement is a hardship as described in subsection (c)(2) of this section;

(3) HHSC is unable to reach the applicant or recipient by telephone.

(c) Unless the applicant or recipient requests a face-to-face interview, HHSC conducts the interview with the applicant or recipient by telephone if the household provides HHSC a contact telephone number and:

(1) all adult members of the household are elderly or disabled and have no earned income;

(2) a hardship as determined by HHSC (such as illness, prolonged severe weather, transportation difficulties, or conflict with a work or training schedule) prevents a face-to-face interview in the office;

(3) the applicant resides in a shelter for battered women and would be in danger if she left the center; or

(4) HHSC chooses to conduct the interview by telephone.

§372.952. Interview Scheduling.

(a) The Texas Health and Human Services Commission (HHSC) schedules TANF and SNAP interviews after the application file date explained in §372.903 of this subchapter (relating to Application File Date). HHSC attempts to schedule interviews on dates and at times that accommodate the needs of applicants. For example, if the only adult is working, HHSC may schedule the interview after working hours.

(b) Unless HHSC interviews the applicant on the day of application, HHSC provides applicants with advance written notice of the date, time, and location of the interview. If the interview location is the applicant's home, the notice may set the time as "morning" or "afternoon."

§372.953. Interview Content.

(a) During TANF and SNAP interviews, the Texas Health and Human Services Commission (HHSC):

(1) provides information; and

(2) asks questions to obtain eligibility information and verifications.

(b) Applicants are primarily responsible for proving their eligibility; however, HHSC may provide reasonable assistance. HHSC allows an applicant at least 10 calendar days to provide proof of an eligibility factor.

(c) In TANF cases, as a condition of eligibility, applicants and recipients must provide HHSC any requested information or designate a source of the information acceptable to HHSC. Applicants and recipients must cooperate during the eligibility process and during any later reviews, such as quality control reviews and audits. Such required cooperation includes answering HHSC questions regarding how the household meets its expenses based on the income and resources reported to HHSC, and providing verification of the answers to such questions. HHSC may deny benefits for failure to cooperate.

(d) In SNAP cases, HHSC follows 7 CFR §273.2(d), allowing a person who has lost eligibility to reapply.

§372.954. Action Taken After an Interview.

After the TANF or SNAP interview, the Texas Health and Human Services Commission:

(1) certifies an eligible household;

(2) denies an ineligible household or an individual household member who fails to meet or prove an eligibility factor, or who fails to agree to or, after agreeing, fails to comply with a requirement; or

(3) delays the eligibility decision, as provided by §372.955 of this division (relating to Delayed Eligibility Decisions).

§372.955. Delayed Eligibility Decisions.

(a) If the Texas Health and Human Services Commission (HHSC) delays a TANF or SNAP eligibility decision to give an applicant time to prove eligibility information, HHSC informs the applicant in writing of possible sources of available proof. The notice to delay an eligibility decision specifies:

(1) the reason for the delay;

(2) what information HHSC needs from the applicant or what action the applicant or HHSC must take; and

(3) the final date by which:

(A) the applicant must provide the requested information or prove he has taken the required action; or

(B) HHSC must take action.

(b) An applicant's failure to provide information or to take a required action may result in adverse action, including denial of the application.

§372.956. Expedited SNAP Application Process.

(a) The Texas Health and Human Services Commission (HHSC) follows 7 CFR §273.2(i) and expedites SNAP eligibility decisions for applicants in need of emergency food benefits.

(b) For applicants who qualify for expedited service, HHSC provides an eligibility decision no later than the workday after the application is filed.

(c) For eligible applicants who do not qualify for expedited service, HHSC provides an eligibility decision:

(1) within seven days after application, for an applicant living in a drug or alcohol treatment center; or

(2) within five days after release from a public institution, for a joint SNAP and Supplemental Security Income applicant released from a public institution.

(d) HHSC may choose to postpone certain eligibility steps to expedite SNAP services, including the verification of the eligibility information required by 7 CFR §273.2(i)(4). HHSC does not postpone the following requirements:

(1) verification of the identity of the person interviewed, as required by 7 CFR §273.2(f)(1)(vii);

(2) verification that household members who are subject to the 20-hour-per-week work requirement explained in 7 CFR §273.24 meet this requirement; and

(3) finger imaging of nonexempt household members who are present during the eligibility interview, as required by §372.1202 of this chapter (relating to Finger-imaging Requirement).

§372.957. Periodic Eligibility Review.

(a) In some TANF cases, the Texas Health and Human Services Commission (HHSC) elects to review eligibility every 12 months, but in most cases, HHSC reviews eligibility every six months.

(b) SNAP eligibility periods vary from one to 12 months, based on household circumstances and as determined by HHSC, except:

(1) as explained in §372.654 of this chapter (relating to SNAP-CAP Certification Process); and

(2) for a categorically eligible household in which all members receive Supplemental Security Income, the eligibility period is 36 months (as approved by the U.S. Department of Agriculture, Food and Nutrition Service).

§372.958. Renewal Notification.

(a) Before the end of the eligibility period, the Texas Health and Human Services Commission (HHSC) mails a review form to the household. HHSC schedules an appointment for an eligibility interview when the recipient returns the application.

(b) HHSC follows 7 CFR §273.14(b) and notifies SNAP households of the expiration of their certification periods.

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 11, 2009.

TRD-200901857
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 424-6900

DIVISION 3. CASE DISPOSITION

1 TAC §§372.1001 - 372.1003

Statutory Authority

The new sections are proposed under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; and Texas Human Resources Code, Chapter 31, which authorizes HHSC to administer financial assistance programs, and Chapter 33, which authorizes HHSC to administer nutritional assistance programs.

The new sections affect Texas Government Code, Chapter 531; and Texas Human Resources Code, Chapters 31 and 33. No other statutes, articles, or codes are affected by this proposal.

§372.1001. Notification of Final Eligibility Decision.

(a) In the TANF Program, the Texas Health and Human Services Commission (HHSC) notifies TANF applicants in writing of HHSC's final eligibility decision. The written notice informs the applicant or recipient of the right to request a hearing to appeal the eligibility determination.

(b) In SNAP, HHSC provides notice:

(1) to SNAP applicant households as explained in 7 CFR §273.10(g)(1);

(2) related to recertification as explained in 7 CFR §273.10(g)(2); and

(3) related to returned or undeliverable mail as explained in 7 CFR §273.13(c).

§372.1002. Appeal of Eligibility Decision.

TANF and SNAP households may appeal Texas Health and Human Services Commission (HHSC) decisions as provided by HHSC's fair hearing rules in Chapter 357 of this title (relating to Hearings).

§372.1003. Reopening a Denied Application.

(a) Applications. When processing SNAP and TANF applications, the Texas Health and Human Services Commission (HHSC) follows 7 CFR §273.2(h)(2)(i)(A) and reopens a denied application, so long as the household complies with the missed requirements as required by the federal regulation. HHSC otherwise requires the household to file a new application.

(b) SNAP recertifications. HHSC follows 7 CFR §273.14(e)(2) and reopens a denied SNAP application for recertification, so long as the household complies with the missed requirements as required by the federal regulation. HHSC otherwise requires the household to file a new application.

(c) TANF periodic reviews. For TANF periodic reviews, HHSC follows the same policy for SNAP recertifications in subsection (b) of this section, except HHSC reopens the denied application if the household complies with the missed requirements within 60 days after the original file date. HHSC otherwise requires the household to file a new application.

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 11, 2009.

TRD-200901858
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 424-6900

SUBCHAPTER E. PARTICIPATION REQUIREMENTS

DIVISION 1. SOCIAL SECURITY NUMBERS

1 TAC §372.1101

Statutory Authority

The new section is proposed under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; and Texas Human Resources Code, Chapter 31, which authorizes HHSC to administer financial assistance programs, and Chapter 33, which authorizes HHSC to administer nutritional assistance programs.

The new section affects Texas Government Code, Chapter 531; and Texas Human Resources Code, Chapters 31 and 33. No other statutes, articles, or codes are affected by this proposal.

§372.1101. Social Security Number Requirements.

(a) In the TANF Program, all certified group members must either provide a social security number (SSN) or demonstrate having applied for an SSN. The Texas Health and Human Services Commission (HHSC) postpones requiring proof of application for an SSN for a child who is six months of age or younger until either the next review of eligibility or the sixth month after the child's birth month, whichever is later.

(b) For SNAP, household members must meet the requirements in 7 CFR §273.6.

(c) HHSC verifies with the Social Security Administration the accuracy of the SSN provided by a TANF or SNAP applicant. Household members must cooperate to clear any discrepancies.

(d) HHSC may disqualify a person from TANF benefits, SNAP benefits, or both, if HHSC determines that the person has failed to comply with this section.

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

Filed with the Office of the Secretary of State on May 11, 2009.

TRD-200901859
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 424-6900

DIVISION 2. THE TANF PERSONAL RESPONSIBILITY AGREEMENT (PRA)

1 TAC §§372.1151 - 372.1156

Statutory Authority

The new sections are proposed under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; and Texas Human Resources Code, Chapter 31, which authorizes HHSC to administer financial assistance programs.

The new sections affect Texas Government Code, Chapter 531; and Texas Human Resources Code, Chapter 31. No other statutes, articles, or codes are affected by this proposal.

§372.1151. Purpose and Scope of the Personal Responsibility Agreement.

(a) A Personal Responsibility Agreement (PRA) is a written agreement that defines the responsibilities of a participant in the TANF Program and the State.

(b) As a condition of participation in the TANF Program, the following persons must sign and cooperate with the requirements of a PRA:

(1) each adult in a certified group;

(2) each minor parent in a certified group whom the Texas Health and Human Services Commission (HHSC) certifies as an adult; and

(3) each payee.

(c) A person described in subsection (b) of this section must cooperate with every requirement of a PRA the person has signed, unless HHSC determines the person is exempt from a particular requirement.

§372.1152. Consequence of Not Signing a Personal Responsibility Agreement.

If a household member who is required to sign a Personal Responsibility Agreement fails or refuses to do so, the Texas Health and Human Services Commission denies TANF benefits to the household.

§372.1153. Personal Responsibility Agreement Requirements.

(a) A Personal Responsibility Agreement (PRA) of a payee contains the following requirements:

(1) Child support. The parent of a dependent child must cooperate if necessary to establish the paternity of the dependent child and to establish or enforce child support.

(2) Children's health checkups. A dependent child must complete early and periodic screening, diagnosis, and treatment checkups on schedule.

(3) Children's immunizations. A dependent child must be immunized unless the child is exempt, as prescribed by the Texas Health and Safety Code, §161.004.

(4) Children's school attendance. A dependent child under 18 years of age and a parent under 19 years of age must attend school regularly, if the child or parent has not completed high school or its equivalent, unless the child or parent is exempt under the Texas Education Code, §25.086.

(5) No drug or alcohol abuse. A person must refrain from abusing alcohol and from possessing, using, or selling marijuana or a controlled substance in violation of the Texas Health and Safety Code, Chapter 481.

(b) The PRA of an adult in a certified group and a minor parent in a certified group whom the Texas Health and Human Services Commission (HHSC) has certified as an adult contains all the requirements in subsection (a) of this section and the following requirements:

(1) Retaining employment. The person must refrain from voluntarily quitting employment of at least 30 hours per week without good cause.

(2) Activities toward becoming self-sufficient. The person must engage in an activity toward becoming self-sufficient through participation in an education, job placement, employment skills, volunteer, or work program.

(3) Parenting skills training. If appropriate, the person must attend appropriate parenting skills training classes.

§372.1154. Cooperating with Personal Responsibility Agreement Requirements.

(a) Child support.

(1) A person cooperates with this requirement:

(A) for a person who is not exempt, by:

(i) assigning the right to receive child support payments to the State of Texas;

(ii) providing information to the Texas Health and Human Services Commission (HHSC) for a referral to the Office of the Attorney General (OAG) to, if necessary, establish the paternity of a dependent child, and to establish or enforce child and medical support; and

(iii) cooperating with Title IV-D program rules as specified in §55.3 and §55.4 of this title (relating to Cooperation Required for Recipients of Child Support Services; and Determination of Cooperation); or

(B) for a person who claims to be exempt, by providing HHSC any requested information to verify the exemption.

(2) A person is exempt from the child support requirement if the OAG or HHSC determines:

(A) the person is a participant in the TANF State Program;

(B) the child was conceived as a result of incest or rape;

(C) adoption proceedings for the child are pending and the parent of the child, for three months or less, has been working with an agency to decide whether to place the child for adoption;

(D) the child may be physically or emotionally harmed by cooperation;

(E) the parent may be physically harmed, or emotionally harmed to the extent of impairing the parent's ability to care for the child, by cooperation; or

(F) the requirement is waived under 45 CFR §260.52(c) in accordance with the requirements of the Texas Human Resources Code, §31.0322.

(b) Children's health checkups.

(1) A person cooperates with this requirement by:

(A) enrolling the child in the Texas Health Steps Program administered by the Texas Department of State Health Services (DSHS);

(B) ensuring that the child participates in the Texas Health Steps Program; and

(C) providing DSHS any requested verification of cooperation.

(2) HHSC communicates with DSHS, or the Medicaid insurance carrier that DSHS contracts with, to verify cooperation with this requirement.

(c) Children's immunizations. A person cooperates with this requirement:

(1) for a child who is not exempt, by:

(A) ensuring that the child receives all appropriate immunization shots on schedule (or in accordance with any alternate immunization schedule prescribed for the child); and

(B) submitting verification to HHSC in the form of an immunization record from a licensed medical professional or a record showing the child attends a public school; or

(2) for a child who is exempt under the Texas Health and Safety Code, §161.004, by verifying the exemption to HHSC with information such as:

(A) medical records indicating or a statement from a licensed physician stating that immunization is not in the child's best medical interests; or

(B) a statement by the caretaker or parent that the requirement violates the caretaker's or parent's religious beliefs or conscience.

(d) Children's school attendance. A person cooperates with this requirement:

(1) for a child who is not exempt, by:

(A) ensuring regular school attendance by each person in the household subject to the requirement; and

(B) submitting verification to HHSC on request, such as a written or oral statement from the school; or

(2) for a child who is exempt under the Texas Education Code, §25.086, by providing HHSC any requested information that would verify the exemption.

(e) No drug or alcohol abuse. HHSC verifies cooperation with this requirement by obtaining criminal history information on the person from the Texas Department of Public Safety or another law enforcement agency. HHSC considers a person to be cooperating with this requirement if the person is neither convicted of nor receives deferred adjudication for:

(1) a crime involving alcohol abuse; or

(2) an offense under the Texas Health and Safety Code, Chapter 481, involving marijuana or another controlled substance.

(f) Retaining employment. A person cooperates with this requirement by not voluntarily quitting a job of 30 or more hours per week without good cause to do so. HHSC determines cooperation with this requirement. When HHSC learns that the person no longer has the job, HHSC investigates and decides whether the work separation was a voluntary quit, and if so, whether there was good cause to quit under §372.1156 of this division (relating to Good Cause for Noncooperation with Personal Responsibility Agreement Requirements).

(1) Voluntarily quitting a job means any separation from employment that HHSC determines was initiated by the person, regardless of whether the employer or the person claims that the person resigned or was fired. For example, HHSC may decide the work separation was not a voluntary quit if a person resigned at the employer's demand. Similarly, HHSC may decide the work separation was a voluntary quit when a person is fired for reasons such as leaving a job unannounced.

(2) HHSC does not consider either of the following to be a separation from employment:

(A) a reduction in work hours below 30 per week, if the person continues to work for the same employer; or

(B) the ending of a self-employment enterprise.

(g) Activities toward becoming self-sufficient.

(1) A person who is not exempt cooperates with this requirement by enrolling and participating in the Choices work program administered by the Texas Workforce Commission (TWC). TWC determines cooperation with the Choices work program and informs HHSC of noncooperation.

(2) A person who claims to be exempt from this requirement cooperates by demonstrating the exemption to HHSC or TWC.

(3) A person is exempt from this requirement (but may choose to voluntarily participate, as applicable) if the person:

(A) chooses the One-Time TANF benefit instead of regular TANF benefits, as explained in §372.802 of this chapter (relating to One-Time TANF Eligibility Requirements);

(B) lives in a county that does not offer Choices work program services;

(C) is a caretaker relative of a disabled person who lives in the home and requires the caretaker relative's presence, or is a single person caring for a child under one year of age;

(D) is a single grandparent 50 years of age or older caring for a child under three years of age;

(E) is disabled and the disability is expected to last more than 180 days;

(F) is pregnant and unable to work as a result of the pregnancy; or

(G) is 60 years of age or older.

(h) Parenting skills training. A person cooperates with this requirement by:

(1) ensuring that each minor parent in the certified group and each parent in the certified group with a child in the home under five years of age attends parenting skills training classes; and

(2) submitting verification to HHSC, such as a written or oral statement from the provider of the training.

§372.1155. Consequence for Noncooperation with Personal Responsibility Agreement Requirements.

(a) If a person fails or refuses to cooperate with a requirement of a Personal Responsibility Agreement (PRA) the person signed, the Texas Health and Human Services Commission (HHSC) takes the applicable action described in subsections (b) - (d) of this section, unless the person demonstrates good cause for the noncooperation as explained in §372.1156 of this division (relating to Good Cause for Noncooperation with Personal Responsibility Agreement Requirements).

(b) HHSC stops TANF benefits to a person and to the household for a one-month period or until the person demonstrates cooperation with the requirement of the PRA for which the sanction was imposed, whichever is longer.

(c) If a person fails or refuses to cooperate with either of the requirements described in §372.1154(a) or (g) of this division (relating to Cooperating with Personal Responsibility Agreement Requirements), HHSC denies Medicaid benefits to the person (but not to other members of the household who are receiving Medicaid), unless the person demonstrates to HHSC:

(1) the person is pregnant; or

(2) the person is under age 19.

(d) If a person fails to cooperate for two consecutive months, HHSC terminates the person's and the household's eligibility for TANF benefits. The person must reapply for TANF benefits and demonstrate cooperation with all PRA requirements that apply to the person for a one-month period before the person or the household may again receive TANF benefits.

§372.1156. Good Cause for Noncooperation with Personal Responsibility Agreement Requirements.

(a) Child support. The Texas Health and Human Services Commission (HHSC) grants good cause for noncooperation with child support requirements only if the person demonstrates:

(1) the person was exempt under §372.1154(a)(2) of this division (relating to Cooperating with Personal Responsibility Agreement Requirements) at the time of the noncooperation; or

(2) the noncooperation resulted from other circumstances the person could not control (reasons that do not conflict with Title IV-D program rules).

(b) Children's health checkups. HHSC grants good cause for noncooperation with the Texas Health Steps program if:

(1) a licensed physician documents that the participation would risk the child's health;

(2) the child's caretaker or parent represents to HHSC staff that participation would violate his or her religious beliefs; or

(3) the Texas Health Steps worker confirms that transportation was unavailable, medical providers were unavailable, or the health screening was not needed (because, for example, the child is on a modified immunization schedule).

(c) School attendance. HHSC grants good cause for failure to comply with school attendance if:

(1) the teen parent has a child under 12 weeks of age; or

(2) no one in the home is willing and able to care for the child and child care is not available through the Texas Workforce Commission or the school district.

(d) Retaining employment. Good cause for quitting a job of 30 or more hours per week means being forced to quit due to circumstances beyond the control of the person. HHSC does not consider good cause for quitting to include resigning a job in order to accept another job that:

(1) does not materialize;

(2) results in employment of less than 30 hours a week; or

(3) results in employment with weekly earnings of less than federal minimum hourly wage multiplied by 30.

(e) Activities toward becoming self-sufficient. The Texas Workforce Commission determines whether a person has good cause for failing to cooperate with the Choices program.

(f) Parenting skills training. HHSC grants good cause for failure to comply with parenting skills training if:

(1) HHSC verifies that there are no classes in the area;

(2) the person provides a statement from the provider that classes were full;

(3) the person submits a doctor's statement or medical records verifying that the person was ill; or

(4) the person fails to attend a class due to circumstances beyond the person's control, as determined by HHSC, and the person submits verification satisfactory to HHSC.

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 11, 2009.

TRD-200901860

Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 424-6900

DIVISION 3. FINGER IMAGING

1 TAC §§372.1201 - 372.1204

Statutory Authority

The new sections are proposed under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; and Texas Human Resources Code, Chapter 31, which authorizes HHSC to administer financial assistance programs, and Chapter 33, which authorizes HHSC to administer nutritional assistance programs.

The new sections affect Texas Government Code, Chapter 531; and Texas Human Resources Code, Chapters 31 and 33. No other statutes, articles, or codes are affected by this proposal.

§372.1201. Legal Basis and Purpose.

(a) The Texas Health and Human Services Commission (HHSC) takes and keeps on file an electronic copy of a person's fingerprints, as required by Texas Human Resources Code, §31.0325.

(b) Finger imaging allows HHSC to verify the identity of a person to help prevent fraud.

§372.1202. Finger-imaging Requirement.

(a) TANF and SNAP household members must comply with the finger-imaging requirement in this section as a condition of eligibility for benefits.

(b) If the Texas Health and Human Services Commission (HHSC) does not already have fingerprints on file at the time of an eligibility interview and if the person is not exempt under §372.1203 of this division (relating to Finger-imaging Exemption), HHSC requires finger imaging of:

(1) TANF adults and minor parents of children, including disqualified household members; and

(2) eligible adult SNAP household members and minors who are heads-of-household.

§372.1203. Finger-imaging Exemption.

(a) The Texas Health and Human Services Commission (HHSC) exempts the following TANF and SNAP household members from the finger-imaging requirement if HHSC determines the exemption applies:

(1) persons physically unable to provide the requested finger images;

(2) persons who attempt to comply but are unable through no fault of their own, such as equipment failure;

(3) elderly or disabled persons, if HHSC determines the requirement would cause an undue burden to the person because of the person's condition, in which case HHSC may require written verification of the person's condition from a medical professional; and

(4) persons temporarily unable to travel to the Lone Star Image System (LSIS) site to be finger imaged, if the person:

(A) has an injury or illness that prevents traveling to the LSIS site;

(B) resides at a battered women's shelter and is unable to safely travel to the LSIS site to be finger imaged;

(C) is out of the geographic area at the time of the interview or when the finger image is requested (not applicable to One-Time TANF (OTTANF));

(D) resides more than five miles from the closest LSIS site and does not have a vehicle or other reliable transportation to that location, or is unable to travel for reasons beyond the person's control, regardless of distance (not applicable to OTTANF); or

(E) has a work schedule that does not allow the person to travel to the LSIS site during HHSC office hours (not applicable to OTTANF).

(b) A person who meets any of the exemption criteria in subsection (a)(4)(A) - (E) of this section must comply with the finger-imaging requirement no later than the next TANF periodic review, or the next SNAP recertification or reapplication, unless the person is exempt for a different reason.

(c) If finger images were not previously provided, HHSC may request finger imaging each time HHSC redetermines a TANF or SNAP household's eligibility. An exemption granted by HHSC under subsection (a) of this section applies only to the finger-imaging request that prompted the exemption. If HHSC requests finger imaging of a person who was previously exempt under subsection (a) of this section, the person must either comply with the request or again request an exemption from the requirement.

§372.1204. Consequence for Noncompliance with Finger-imaging Requirement.

If a member of a TANF or SNAP household who is required to comply with the finger-imaging requirement fails to comply, the Texas Health and Human Services Commission denies benefits to the household.

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 11, 2009.

TRD-200901861
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 424-6900

DIVISION 4. TANF WORKFORCE ORIENTATION

1 TAC §§372.1251 - 372.1253

Statutory Authority

The new sections are proposed under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; and Texas Human Resources Code, Chapter 31, which authorizes HHSC to administer financial assistance programs.

The new sections affect Texas Government Code, Chapter 531; and Texas Human Resources Code, Chapter 31. No other statutes, articles, or codes are affected by this proposal.

§372.1251. TANF Workforce Orientation Requirement.

(a) A person described in subsection (b) of this section must attend an orientation presented by a local workforce development board as a condition of TANF eligibility, unless the person is exempt under §372.1252(b) of this division (relating to TANF Workforce Orientation Exemption).

(b) The following must comply with the workforce orientation requirement:

(1) a person applying for TANF as a caretaker; and

(2) a person who has reached the 60th month of TANF assistance and is applying for an extension of TANF benefits on the basis of hardship, as explained in §372.452 of this chapter (relating to TANF Time Limit Exemptions).

§372.1252. TANF Workforce Orientation Exemption.

(a) A person is not exempt from the workforce orientation requirement even if extraordinary circumstances prevent the person from attending a regularly scheduled orientation within the time frame of the Texas Health and Human Services Commission's (HHSC's) processing of the TANF application. Instead, the person must attend an alternative workforce orientation by a local workforce development board, such as through an individually scheduled appointment or through participating by telephone.

(b) If a person is prevented from attending a regularly scheduled orientation due to extraordinary circumstances, and the person attempts to attend an alternative orientation within the time frame of HHSC's processing of the TANF application but no alternative orientation is provided, HHSC may consider the person to have met the workforce orientation requirement due to the person's attempts to cooperate.

§372.1253. Consequence for Noncompliance With TANF Workforce Orientation Requirements.

If a person who is required to comply with the TANF workforce orientation requirement fails to comply, the Texas Health and Human Services Commission may deny TANF benefits to the household.

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 11, 2009.

TRD-200901862
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 424-6900

DIVISION 5. THIRD-PARTY RESOURCES

1 TAC §§372.1301 - 372.1303

Statutory Authority

The new sections are proposed under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; and Texas Human Resources Code, Chapter 31, which authorizes HHSC to administer financial assistance programs, and Chapter 33, which authorizes HHSC to administer nutritional assistance programs.

The new sections affect Texas Government Code, Chapter 531; and Texas Human Resources Code, Chapters 31 and 33. No other statutes, articles, or codes are affected by this proposal.

§372.1301. Overview of Third-party Resources.

(a) A third-party resource is a source of payment for medical expenses other than Medicaid. Third-party resources include payments from private and public health insurance and from other liable third parties that can be applied toward the recipient's medical expenses.

(b) Members of a certified group who receive Medicaid must comply with third-party resources requirements, as described in §372.1302 of this division (relating to Third-party Resource Requirements).

§372.1302. Third-party Resource Requirements.

TANF recipients who receive Medicaid must:

(1) cooperate in identifying and pursuing any third party who may be liable for medical expenses; and

(2) reimburse the State for medical expenses paid by Medicaid that should have been paid from a third-party resource.

§372.1303. Consequence for Noncompliance with Third-party Resource Requirements.

If a person who must comply with third-party resource requirements fails to comply, the Texas Health and Human Services Commission may disqualify the person from receiving TANF benefits.

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 11, 2009.

TRD-200901863
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 424-6900

DIVISION 6. WORK

1 TAC §§372.1351 - 372.1353

Statutory Authority

The new sections are proposed under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; and Texas Human Resources Code, Chapter 31, which authorizes HHSC to administer financial assistance programs, and Chapter 33, which authorizes HHSC to administer nutritional assistance programs.

The new sections affect Texas Government Code, Chapter 531; and Texas Human Resources Code, Chapters 31 and 33. No other statutes, articles, or codes are affected by this proposal.

§372.1351. SNAP Work Requirements.

In SNAP, the Texas Health and Human Services Commission follows 7 CFR §273.7 and requires non-exempt household members to:

(1) register for work;

(2) not voluntarily quit a job or reduce work hours to less than 30 per week, without good cause to do so;

(3) participate in a SNAP Employment and Training Program;

(4) participate in a workfare program;

(5) report to an employer; and

(6) accept a bona fide offer of suitable employment.

§372.1352. Consequence for Noncompliance with SNAP Work Requirements.

(a) If a non-exempt household member fails to comply with SNAP work requirements and does not demonstrate good cause for the failure to comply, the Texas Health and Human Services Commission:

(1) denies benefits to the household if the primary wage earner failed to comply; or

(2) disqualifies only the person who failed to comply if the person is not the household's primary wage earner.

(b) The length of the period of denial or disqualification under subsection (a) of this section is as follows or until the person complies, whichever is longer:

(1) one month, if it is the first noncompliance;

(2) three months, if it is the second noncompliance; and

(3) six months, if it is the third or any subsequent noncompliance.

§372.1353. Consequence for a TANF Parent on Strike.

The Texas Health and Human Services Commission denies TANF benefits to the household for any month in which a parent participates in a strike.

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 11, 2009.

TRD-200901864
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 424-6900

DIVISION 7. REPORTING CHANGES

1 TAC §§372.1401 - 372.1404

Statutory Authority

The new sections are proposed under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; and Texas Human Resources Code, Chapter 31, which authorizes HHSC to administer financial assistance programs, and Chapter 33, which authorizes HHSC to administer nutritional assistance programs.

The new sections affect Texas Government Code, Chapter 531; and Texas Human Resources Code, Chapters 31 and 33. No other statutes, articles, or codes are affected by this proposal.

§372.1401. Changes a TANF Household Must Report.

A TANF household must report a change in:

(1) income, including the source of income and the amount of countable income;

(2) resources, including the amount of countable resources, changes in vehicle ownership, and the receipt of a lump sum payment or settlement;

(3) household composition, including new household members and household members who leave the home;

(4) residence;

(5) medical insurance;

(6) information relating to an absent parent (such as a new job or residence address); and

(7) circumstances, other than employment, that affect the amount of benefits or an exemption from participation in the Choices work requirement, as described in §372.1154(g) of this subchapter (relating to Cooperating with Personal Responsibility Agreement Requirements).

§372.1402. Changes a SNAP Household Must Report.

(a) A SNAP household must report changes as explained in 7 CFR §273.12, except:

(1) households are not required to report changes in shelter costs; and

(2) all households must report changes in their resident address.

(b) This section does not apply to a participant in the SNAP-Combined Application Project (SNAP-CAP), as explained in §372.655 of this chapter (relating to Reporting Changes).

§372.1403. Time Frame to Report a Change.

TANF and SNAP households must report a change described in §372.1402 of this division (relating to Changes a SNAP Household Must Report) within 10 days after the household learns of the change, as described in 7 CFR §273.12(a)(3).

§372.1404. Time Frame for Action on a Reported Change.

(a) The Texas Health and Human Services Commission (HHSC) takes action on a reported change promptly as required by 7 CFR §273.12.

(b) For situations in which verification is required, HHSC requires verification of a reported change that would increase benefits before action is taken to increase benefits, as described in 7 CFR §273.12(c)(1)(iii). The effective date of the benefit increase is dependent on whether verification is provided timely as described in 7 CFR §273.12(c)(1)(iii).

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 11, 2009.

TRD-200901865
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 424-6900

SUBCHAPTER F. BENEFITS

DIVISION 1. BENEFITS IN GENERAL

1 TAC §§372.1501 - 372.1521

Statutory Authority

The new sections are proposed under Texas Government Code, §531.0055, which provides the Executive Commissioner of

HHSC with rulemaking authority; and Texas Human Resources Code, Chapter 31, which authorizes HHSC to administer financial assistance programs, and Chapter 33, which authorizes HHSC to administer nutritional assistance programs.

The new sections affect Texas Government Code, Chapter 531; and Texas Human Resources Code, Chapters 31 and 33. No other statutes, articles, or codes are affected by this proposal.

§372.1501. Definitions.

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

(1) Cash-back--The disbursement of funds from a TANF account transacted through a point-of-sale (POS) terminal.

(2) Client--A person authorized to receive benefits and perform transactions.

(3) Day--A calendar day unless otherwise specified.

(4) Electronic Benefit Transfer (EBT)--An electronic system that allows public assistance benefits to be issued to a client via an EBT card. The client authorizes transfer of benefits from the client's account to a retailer account to receive cash or pay for products.

(5) EBT card--A debit card used to access SNAP and TANF benefits for the purchase of food or allowable items, or to obtain cash.

(6) EBT contractor--A vendor that contracts with the Texas Health and Human Services Commission to provide EBT services in Texas.

(7) EBT program transactions--Benefit or account transactions involving:

(A) authorization;

(B) issuance;

(C) redemption;

(D) accounting;

(E) settlement;

(F) reconciliation; or

(G) inquiry.

(8) EBT system--An electronic payments system that uses electronic funds transfer, automated teller machines, and point-of-sale technology for the delivery of public assistance benefits. The major components of the Texas EBT system are call center, retailer management, application software, and central processing.

(9) Personal identification number (PIN)--A four-digit alphanumeric code selected by or assigned to a client. The PIN is used to verify the identity of a cardholder when performing an online EBT program transaction at an automated teller machine or point-of-sale terminal.

(10) Point-of-sale (POS) terminal--A range of electronic devices deployed at retailer locations and used to initiate the electronic debit of client accounts and credit retailer accounts as a purchase is made, or to initiate the electronic credit to the client account and debit to the retailer account for a return.

(11) Retailer--A merchant authorized by the U.S. Department of Agriculture, Food and Nutrition Service to accept SNAP benefits, or that chooses to accept TANF cash for purchases or chooses to provide TANF cash.

§372.1502. Maximum Benefit Amounts.

(a) In the TANF Program, there is no guarantee of a particular benefit amount. The Texas Health and Human Services Commission periodically determines benefit amounts based on funds appropriated by state law.

(b) In SNAP, the U.S. Department of Agriculture, Food and Nutrition Service annually determines the maximum benefit amounts. The current amounts may be found at the following Internet site: www.fns.usda.gov/fsp/applicant_recipients/fs_Res_Ben_Elig.htm.

§372.1503. Minimum Benefit Amounts.

(a) In the TANF Program, the minimum amount of monthly benefits is $10. A household must qualify for at least this amount in order to receive TANF benefits.

(b) In SNAP, the minimum amount of benefits in the first month is $10, and a household must qualify for at least this amount to receive SNAP benefits. For subsequent months, there is no minimum benefit amount.

§372.1504. SNAP Benefit Allotment Amounts.

Under a waiver granted Texas by the U.S. Department of Agriculture, Food and Nutrition Service, the Texas Health and Human Services Commission issues SNAP benefits in allotments of $1, $3, and $5 without rounding up as otherwise required by 7 CFR §274.2(f)(3).

§372.1505. Determining Monthly Benefits.

(a) In the TANF Program, the Texas Health and Human Services Commission (HHSC) determines the monthly amount of benefits by:

(1) totaling the household's countable income under §372.403 of this chapter (relating to Determining Whose Income Counts in TANF);

(2) subtracting applicable deductions explained in Subchapter B, Division 7, of this chapter (relating to Income); and

(3) subtracting the result from the maximum benefit amount the household is eligible to receive.

(b) In SNAP, HHSC follows 7 CFR §273.10 to determine the household's monthly amount of benefits.

§372.1506. Benefit Time Frames.

(a) In the TANF Program, benefits begin:

(1) on the date the Texas Health and Human Services Commission (HHSC) certifies the application; or

(2) on the 30th day after the application file date explained in §372.903 of this chapter (relating to Application File Date).

(b) In SNAP, HHSC:

(1) provides benefits by calendar month; and

(2) follows 7 CFR §273.10(a)(1), which provide that benefits begin in the month of application but may be prorated for that month depending on the date of application.

§372.1507. TANF Supplemental Grandparent Payment.

In addition to regular TANF benefits, the Texas Health and Human Services Commission pays a one-time payment to eligible grandparents who care for a TANF-certified grandchild as authorized by the Texas Human Resources Code, §31.0041.

§372.1508. Eligibility for Benefits if a Household Member Dies or Leaves the Home.

If a TANF or SNAP household member dies or leaves the home, the household is eligible for the benefit if the household was eligible on the first day of the month.

§372.1509. Appropriate Use of Benefits.

(a) SNAP benefits. A recipient of SNAP benefits must purchase food with the benefits at any business or facility that the U.S. Department of Agriculture, Food and Nutrition Service authorizes as a SNAP retailer. The account can be used to purchase most food products, including seeds and plants to grow foods for personal consumption. A client must not use SNAP benefits to purchase:

(1) alcoholic beverages, cigarettes, or tobacco;

(2) any non-food item, such as pet food, soap, paper products, and household supplies;

(3) vitamins and medicines;

(4) food that will be eaten in the store; and

(5) hot foods or hot food products prepared for immediate consumption, except in certain situations, as explained in the definition of eligible foods at 7 CFR §271.2, and under the circumstances described in 7 CFR §274.10.

(b) TANF benefits. A recipient of TANF benefits must use the money to purchase goods and services necessary and essential to the welfare of the children, such as food, clothing, housing, furniture, transportation, laundry, medical supplies, household supplies, and recreation.

§372.1510. Issuance of and Access to Benefits.

(a) The Texas Health and Human Services Commission (HHSC) uses an EBT system to issue SNAP and TANF benefits.

(b) HHSC uses EBT contractors to maintain EBT accounts.

(c) Eligible TANF and SNAP households use an EBT card and a personal identification number (PIN) to access their benefits. HHSC may assign a PIN for a new cardholder or allow the cardholder to select a PIN.

(d) HHSC issues an EBT card to:

(1) a primary cardholder; or

(2) an authorized representative, as required by §372.1512 of this division (relating to Required Authorized Representative).

(e) If requested by the primary cardholder, HHSC may issue a second EBT card and PIN to a secondary cardholder. The secondary cardholder uses the EBT card and PIN to access the primary cardholder's EBT account.

§372.1511. Using an EBT Card.

(a) A TANF household uses its EBT card at participating retailers to:

(1) make purchases of its choice; or

(2) obtain cash.

(b) A SNAP household uses its EBT card to purchase eligible food at authorized retail food stores as defined in 7 CFR §271.2.

§372.1512. Required Authorized Representative.

The following households must have an authorized representative:

(1) TANF households with a protective payee or representative payee assigned by the Texas Health and Human Services Commission (HHSC); and

(2) SNAP households residing in an alcoholic or narcotic treatment center or group living arrangement, as required by 7 CFR §273.11(e) and (f).

§372.1513. Availability of Monthly Benefits.

After certifying a household for monthly benefits, the Texas Health and Human Services Commission makes the benefits available during the first 15 days of the month. The specific day is determined by the last digit in the case number as follows:
Figure: 1 TAC §372.1513

§372.1514. Cash Back from a SNAP Account Purchase.

A retailer deducts only payment amounts from the EBT SNAP account and does not return change to the cardholder.

§372.1515. Transaction Charges on a TANF Account.

(a) Participating retailers in Texas may charge $.50 per transaction for the third and subsequent cash-only or cash-back transactions over $50 in a month from a TANF account.

(b) Participating out-of-state businesses determine the amount they charge for cash-back transactions.

(c) A household must verify and accept the amount of a charge before initiating a transaction to withdraw cash at an out-of-state retailer or business.

§372.1516. Using Benefits after Moving from Texas.

(a) SNAP.

(1) A primary cardholder who moves from Texas, either permanently or temporarily, may use the EBT card to access SNAP benefits at a retailer in another state.

(2) If the cardholder cannot find a retailer in another state that accepts the EBT card, the cardholder must contact the Texas EBT call center's toll-free number. The EBT Help Desk helps find a retailer where the cardholder can use his or her benefits.

(b) TANF.

(1) A primary cardholder who moves from Texas, either permanently or temporarily, may use the EBT card to access TANF benefits at a retailer or business in another state.

(2) If the cardholder cannot find a retailer or business in another state that accepts the EBT card, the cardholder must contact the Texas EBT call center's toll-free number. The EBT Help Desk helps find a retailer or business where the cardholder can use his or her benefits.

(3) If the cardholder moved from Texas on or after the first of the month but before accessing that month's TANF benefits and cannot find a retailer that accepts the Texas EBT card, the Texas Health and Human Services Commission (HHSC) may mail a benefit conversion warrant (full month's benefit amount only) to the household's new address. A cardholder must contact a local HHSC eligibility determination office to request the conversion.

§372.1517. Alternate Benefit Issuance Methods during a Disaster.

(a) If TANF and SNAP benefits become unavailable for more than three days because of a natural disaster or other major emergency or crisis, the Texas Health and Human Services Commission (HHSC) may offer an alternate benefit issuance method.

(b) HHSC determines alternate benefit issuance methods for TANF, which may include:

(1) issuing money orders at specified locations; or

(2) issuing checks, either mailed or obtained at specified locations.

(c) Alternate benefit issuance methods for SNAP benefits must be approved by the United State Department of Agriculture, Food and Nutrition Service.

§372.1518. Reporting and Replacing a Lost or Stolen EBT Card.

(a) TANF and SNAP cardholders are responsible for protecting their EBT cards and personal identification numbers (PIN).

(b) Cardholders must contact the Texas EBT call center's toll-free number to report a lost or stolen card or compromised PIN.

(1) The call center EBT contractor immediately places a hold on the card access.

(2) The Texas Health and Human Services Commission applies the requirements of 7 CFR §274.12(f)(5) to both TANF and SNAP accounts.

(c) A cardholder initiates replacement of the EBT card or PIN.

§372.1519. Reporting and Replacing Lost or Stolen Benefits.

(a) The Texas Health and Human Services Commission (HHSC) replaces benefits removed without authorization after the household or authorized representative reports a lost or stolen EBT card or compromised personal identification number to the EBT call center.

(b) HHSC does not replace benefits, except as provided in subsection (a) of this section.

§372.1520. Action Taken on Non-accessed Benefits.

(a) If a household does not access the TANF account for three consecutive months or the SNAP account for three consecutive months (or six consecutive months when the last month's issuance is less than $20), the EBT contractor notifies the Texas Health and Human Services Commission (HHSC).

(b) If a TANF household does not access a benefit for one year, HHSC cancels and removes the benefits from the TANF account.

(c) If a SNAP household does not access a benefit for one year, HHSC cancels and removes the benefit from the SNAP account. See 7 CFR §274.12(f)(7).

(d) If a one-person SNAP household is denied due to the death of the client, HHSC cancels and removes all benefits from the SNAP account.

§372.1521. Account Balance and Transaction Errors.

(a) TANF and SNAP households contact the Electronic Benefit Transfer (EBT) call center's toll-free number to report an EBT account balance error or an EBT transaction error for resolution by the retailer management EBT contractor.

(b) After receiving written notice of the retailer management EBT contractor's decision, the client may contact the Texas Health and Human Services Commission (HHSC) Lone Star Business Services for a second review.

(c) If a TANF or SNAP household is dissatisfied with HHSC Lone Star Business Services' decision, the household may request a fair hearing as provided in HHSC's fair hearing rules in Chapter 357 of this title (relating to Hearings).

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

Filed with the Office of the Secretary of State on May 11, 2009.

TRD-200901866
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 424-6900

DIVISION 2. OVERPAYMENTS

1 TAC §372.1551, §372.1552

Statutory Authority

The new sections are proposed under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; and Texas Human Resources Code, Chapter 31, which authorizes HHSC to administer financial assistance programs, and Chapter 33, which authorizes HHSC to administer nutritional assistance programs.

The new sections affect Texas Government Code, Chapter 531; and Texas Human Resources Code, Chapters 31 and 33. No other statutes, articles, or codes are affected by this proposal.

§372.1551. TANF Overpayments.

(a) A TANF overpayment may occur because of:

(1) a Texas Health and Human Services Commission (HHSC) error;

(2) a household error; or

(3) an intentional program violation.

(b) TANF households must repay any benefits they were not entitled to receive.

(c) For overpayments resulting from a change in circumstances in an active case, the first month of overpayment is the first month in which a change would have been effective had it been reported and processed in a timely manner. This can be no later than two months after the month the change occurred.

(d) HHSC collects overpayments from TANF households:

(1) by check or money order; or

(2) by withholding a portion of benefits the household would otherwise receive.

§372.1552. SNAP Overpayments.

A household must repay overpayment of SNAP benefits as explained in 7 CFR §273.18.

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

Filed with the Office of the Secretary of State on May 11, 2009.

TRD-200901867
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 424-6900

DIVISION 3. RESTORATION

1 TAC §372.1601

Statutory Authority

The new section is proposed under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; and Texas Human Resources Code, Chapter 31, which authorizes HHSC to administer financial assistance programs, and Chapter 33, which authorizes HHSC to administer nutritional assistance programs.

The new section affects Texas Government Code, Chapter 531; and Texas Human Resources Code, Chapters 31 and 33. No other statutes, articles, or codes are affected by this proposal.

§372.1601. Restoring TANF and SNAP Benefits.

The Texas Health and Human Services Commission restores TANF and SNAP benefits to households as specified in 7 CFR §273.17, except TANF households that do not receive benefits for the month of application due to proration are not eligible for restoration of benefits back to the application date.

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 11, 2009.

TRD-200901868

Steve Aragón

Chief Counsel

Texas Health and Human Services Commission

Earliest possible date of adoption: June 21, 2009

For further information, please call: (512) 424-6900

SUBCHAPTER G. RETAILER REQUIREMENTS

1 TAC §§372.1701 - 372.1716

Statutory Authority

The new sections are proposed under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; and Texas Human Resources Code, Chapter 31, which authorizes HHSC to administer financial assistance programs, and Chapter 33, which authorizes HHSC to administer nutritional assistance programs.

The new sections affect Texas Government Code, Chapter 531; and Texas Human Resources Code, Chapters 31 and 33. No other statutes, articles, or codes are affected by this proposal.

§372.1701. Definitions.

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

(1) Automated Clearing House Network (ACH)--A secure payment system of the U.S. Federal Reserve Bank that provides electronic funds transfer between banks.

(2) Advice--An electronic message a retailer sends to receive reimbursement for a transaction. The Electronic Benefit Transfer (EBT) system acknowledges receipt of the Advice, but does not send another approval. The Advice may be declined if it does not match the record of information associated with the original transaction authorized by the call center.

(3) Banking business day--A calendar day (begins at midnight and ends the following midnight), not including a Saturday, Sunday, or a holiday when banks are closed.

(4) Cash-back--The disbursement of funds from a TANF account transacted through a point-of-sale (POS) terminal.

(5) Chargeback--An account adjustment entry against the respondent's settlement account. The adjustment is made as a result of the resolution of the dispute in favor of the initiator.

(6) Client--A person authorized to receive benefits and perform transactions.

(7) Day--A calendar day unless otherwise specified.

(8) Electronic Benefit Transfer (EBT)--An electronic system that allows public assistance benefits to be issued to a client via a debit card. The client authorizes transfer of benefits from the client's account to a retailer account to receive cash or pay for products.

(9) EBT contractor--A vendor that contracts with the Texas Health and Human Services Commission (HHSC) to provide EBT services in Texas.

(10) EBT program transaction--Benefit or account transaction involving:

(A) authorization;

(B) issuance;

(C) redemption;

(D) accounting;

(E) settlement;

(F) reconciliation; or

(G) inquiry.

(11) EBT system--An electronic payments system that uses electronic funds transfer, automated teller machines, and point-of-sale technology for the delivery of public assistance benefits. The major components of the Texas EBT system are call center, retailer management, application software, and central processing.

(12) Entertainment--The sale of alcoholic beverages, legalized games of chance, sexually oriented material, coin-operated amusement machines, or amusement services as defined by the Comptroller of Public Accounts for tax purposes in 34 TAC §3.298 (relating to Amusement Services).

(13) Equipment--The hardware, including POS terminals, personal identification number (PIN) pads, cables, connectors, and power cords, the retailer management EBT contractor provides to state-supported retailers on behalf of HHSC.

(14) Food and Nutrition Service (FNS)--The division of the U.S. Department of Agriculture responsible for administering SNAP at the federal level.

(15) Initiator--The party initiating the process to resolve a disputed EBT account discrepancy with the respondent.

(16) Personal identification number (PIN)--A four-digit alphanumeric code selected by or assigned to a client. A PIN is used to verify the identity of a cardholder when performing an online EBT program transaction at an automatic teller machine or POS terminal.

(17) Point-of-sale (POS) terminal--A range of electronic devices deployed at retailer locations and used to initiate the electronic debit of client accounts and credit retailer accounts as a purchase is

made, or to initiate the electronic credit to the client account and debit to the retailer account for a return.

(18) Respondent--The second party to a disputed EBT account discrepancy identified by the initiator.

(19) Retailer--A merchant authorized by the U.S. Department of Agriculture, Food and Nutrition Service to accept SNAP benefits, or that chooses to accept TANF cash for purchases or chooses to provide TANF cash.

(20) Retailer management EBT contractor--The vendor that contracts with HHSC and is responsible for retailer services, including settlement and reconciliation; dispute resolution; retailer agreement; retailer operating rules; and training, managing, and supplying equipment and help desk services for state-supported retailers.

(21) Settlement--The exchange of information that results in the transfer of funds from one entity to another to complete a financial transaction.

(22) Settlement date--The date on which settlement occurs.

(23) Software--The EBT applications program operated on or in connection with the equipment.

(24) State-supported retailer--A retailer that chooses to operate POS terminals supplied by the retailer management EBT contractor on behalf of HHSC.

(25) Switch provider--An entity that records, tracks, and accounts for EBT transaction activity and relays Texas EBT program transactions between the central processing system and the proper third-party processor or retailer.

(26) Third-party processor (TPP)--An entity that relays EBT program transactions through its own host system to the Texas EBT central processing system for authorization. The entity may be:

(A) a financial institution;

(B) a cardholder authorization processor other than a Texas EBT contractor; or

(C) a retailer that operates its own POS terminals.

§372.1702. EBT System Participation Requirements.

(a) To participate in the EBT system, a retailer must be:

(1) currently authorized by the U.S. Department of Agriculture to participate in SNAP; or

(2) a nonfood (not Food and Nutrition Service-authorized) retailer that provides TANF cash-back, and receives no more than 10% of its gross revenue from entertainment.

(b) A retailer must represent and warrant that the facility in which a point-of-sale terminal is or will be located complies with all applicable building and zoning codes and ordinances.

(c) A retailer or third-party processor:

(1) must represent and warrant that it validly exists and is in good standing under the laws of the jurisdiction of its organization and the State of Texas;

(2) must not have been debarred from contracting by any unit of the federal government or any unit of a state government; and

(3) must not be delinquent in making State of Texas franchise tax payments, if the retailer or third-party processor is a for-profit corporation.

(d) A retailer must comply with all applicable regulations in 7 CFR Parts 274 and 278, and this chapter.

(e) A retailer or third-party processor and the retailer management EBT contractor must execute a written agreement with HHSC adopted in compliance with 7 CFR §274.12(g)(6).

(f) Retailer participation in the EBT system is voluntary. A Food and Nutrition Service-authorized retailer must notify the retailer management EBT contractor in writing that it wishes to decline participation in the EBT system.

(g) A retailer that is suspended or terminated as a redeemer of SNAP benefits, for any reason, must:

(1) immediately notify the retailer management EBT contractor, whereupon the retailer management EBT contractor will discontinue connection to the retailer; and

(2) stop using the EBT system to redeem SNAP benefits.

(h) The retailer management EBT contractor provides a retailer's employees with training, in person, by phone, or by mail, in the processing of EBT program transactions, including operation of the equipment if the retailer management EBT contractor supplies the equipment. Employee training is completed before the retailer accepts EBT program transactions. If the retail management EBT contractor is providing in-person training, the retailer management EBT contractor notifies the retailer in advance of the scheduled time for in-person training.

(i) Access to the EBT system is granted:

(1) after the training in subsection (h) of this section has been completed; and

(2) when system testing has been approved.

(j) A retailer must not subject a client, employee, or applicant to actions that are discriminatory in nature or refuse to process a client's EBT program transaction on the grounds of race, color, national origin, age, sex, disability, religious belief, or political belief.

(k) A retailer redeeming TANF benefits by providing cash-back on a no-purchase-required basis must maintain a sufficient amount of cash on hand to accommodate cash-back transaction volumes.

(l) A retailer must not ask a client to reveal the client's personal identification number.

§372.1703. Point-of-Sale Terminal Requirements.

(a) Equipment. As specified in 7 CFR §274.12(g)(2), a retailer may, but is not required to, obtain equipment from the retailer management EBT contractor.

(b) Site survey. If a retailer obtains equipment from the retailer management EBT contractor, the retailer must permit the retailer management EBT contractor to:

(1) conduct necessary site surveys at all locations of a retailer participating in the EBT program; and

(2) during the course of the site survey, the retailer management EBT contractor determines the equipment needs for each qualified location to comply with the applicable point-of-sale (POS) terminal deployment, as provided by §372.1704 of this chapter (relating to Point-of-Sale Terminal Requirements to Redeem SNAP Benefits).

(c) Terminal software license. The retailer management EBT contractor provides software, under license, to state-supported retailers.

§372.1704. Point-of-Sale Terminal Requirements to Redeem SNAP Benefits.

(a) General. Retailers must deploy point-of-sale (POS) terminals, as required by 7 CFR §274.12(g)(4)(ii), whether the terminals are

provided by the retailer management EBT contractor or by a third-party processor.

(b) Optional terminals. A retailer may deploy a POS terminal within its respective store office, customer service area, or another location to enable clients who are not making a purchase to complete credit transactions and TANF cash transactions.

(c) Minimum redemptions. Retailers with a SNAP redemption average, over any six-month period, that is:

(1) $100 per month or more, receive equipment at no cost from the retailer management EBT contractor; or

(2) less than $100 per month, must:

(A) obtain the software and equipment at their own expense; or

(B) use the manual voucher transaction process, as described in §372.1705 of this subchapter (relating to Manual Voucher Transaction Requirements).

(d) Special checkout lanes. A retailer must not establish special checkout lanes that are only for EBT program transactions, as stated in 7 CFR §274.12(g)(4)(i).

§372.1705. Manual Voucher Transaction Requirements.

(a) Retailers that must provide manual voucher services are:

(1) stores that do not qualify for equipment because they do not average at least $100 a month in SNAP transactions; or

(2) do not have electricity or a phone line at the time of the purchase.

(b) A retailer with online transaction processing capabilities may provide manual voucher services if the third-party processor, the Texas EBT system, the POS terminal, or the personal identification (PIN) pad is inoperative.

(c) A retailer authorized under 7 CFR §278.1 may use manual vouchers with preliminary or delayed telephone verification.

(d) Retailers that delay telephone verification or obtain preliminary telephone verification may process manual TANF cash-back redemptions and SNAP redemptions when they are able to:

(1) contact the EBT call center by telephone; and

(2) obtain an authorization number for the amount of purchase before completing the sale.

(e) Retailers that delay telephone verification or obtain preliminary telephone verification must:

(1) complete the manual voucher properly and legibly;

(2) include the telephone authorization number;

(3) ensure that the voucher is signed by the client and initialed by the sales clerk; and

(4) submit the voucher to the retailer management EBT contractor within 15 calendar days after the date of purchase.

(f) The retailer management EBT contractor:

(1) processes a voucher within three banking business days after receipt; or

(2) if the voucher is incomplete or otherwise improperly prepared and submitted, returns the voucher to the retailer for correction or completion, or both, within four banking business days after the date the retailer management EBT contractor receives it.

§372.1706. Electronic Manual Voucher Transaction Requirements.

(a) Electronic voucher transaction. A retailer may enter a manual voucher into a point-of-sale terminal at the retailer location and submit it as an electronic voucher in the form of an Advice transaction.

(b) Electronic Benefit Transfer (EBT) electronic manual voucher procedures. If a retailer with electronic voucher capacity uses a manual voucher, the retailer or its third-party processor must complete the manual voucher as specified in §372.1705 of this subchapter (relating to Manual Voucher Transaction Requirements) and:

(1) obtain voice authorization from the EBT call center before completing the manual voucher transaction;

(2) enter the authorization code on the manual voucher and in the Advice; and

(3) submit the Advice transaction within 15 calendar days after the date of purchase.

(c) In a dispute, a retailer must submit the manual voucher to the Texas Health and Human Services Commission (HHSC) or the retailer management EBT contractor upon request by HHSC or the retailer management contractor.

§372.1707. Liability Implications for Manual Transactions.

(a) The Texas Health and Human Services Commission's (HHSC's) manual transactions liability is only for those manual transactions performed in accordance with the written agreement under 7 CFR §274.12(g)(6) and processing standards in 7 CFR §274.12(h).

(b) HHSC reimburses a retailer for manual transactions, as required by the terms and conditions of the retailer agreement, for which an insufficient amount of benefits remain in the client's account at the time the manual voucher is presented for processing and payment.

(c) If authorization cannot be obtained before or at the time of purchase, a retailer assumes the risk of insufficient benefits being available in the client's account.

(d) A retailer using voice authorization and electronic voucher is liable if the retailer management EBT contractor rejects its or its third-party processor's submission because of failure to follow the procedures in §372.1706 of this subchapter (relating to Electronic Manual Voucher Transaction Requirements).

(e) Neither the retailer management EBT contractor nor the retailer may re-present a manual voucher for payment if insufficient funds exist when the voucher is submitted for processing and payment.

§372.1708. Store-and-Forward as an Alternative to Manual Transaction.

In compliance with 7 CFR §274.12(m), a Texas EBT third-party processor may be certified for store-and-forward approvals as an alternative to manual voucher transactions. Store-and-forward is an electronic back-up for the retailer's online system. It is also known as stand-in processing.

(1) At the retailer's own choice and liability, a retailer may store transactions when the EBT central processing system cannot be accessed for any reason and then forward the transactions to the EBT central processing system after the system again becomes available.

(2) A retailer may forward the transaction to the EBT central processing system one time within 24 hours after the system again becomes available. If the 24-hour period crosses into the beginning of a new benefit issuance period, the retailer may draw against all available benefits in the account.

§372.1709. Liability Implications for Store-and-Forward Transactions.

If there are insufficient funds to authorize the full amount of an otherwise approvable store-and-forward transaction, the balance remaining in the client's account is paid to the retailer in accordance with the following:

(1) The EBT central processing system approves a partial amount of the store-and-forward transaction, crediting the retailer with the balance remaining in the client's account through a one-step process.

(2) The transaction must be in accordance with the standard message format requirements for store-and-forward transactions.

(3) The retailer must not obtain the uncollected balance from a client's current or future month's benefits.

§372.1710. Third-Party Processor Requirements.

(a) Retailers entering the EBT system that choose to use an authorized third-party processor must choose one that is certified to the Texas EBT system.

(b) A third-party processor must:

(1) comply with performance and technical standards set forth in 7 CFR §274.12(h);

(2) execute a written agreement adopted in accordance with 7 CFR §274.12(g)(6) with the retailer management EBT contractor;

(3) meet the qualifications established in §372.1702 of this subchapter (relating to EBT System Requirements); and

(4) comply with applicable general conditions established in §372.1702 of this subchapter.

§372.1711. Reimbursement for Electronic Benefit Transfer Transactions.

(a) A retailer or third-party processor must have a bank account with a federally insured financial institution capable of accepting credits and debits in the Automated Clearing House Network (ACH) format.

(b) A retailer management EBT contractor transfers the reimbursement for Electronic Benefit Transfer transactions into the third-party processor's bank account for reimbursement to the retailer's bank account.

§372.1712. Account Discrepancies.

(a) If there is a discrepancy between the retailer management EBT contractor's settlement total and a retailer's or third-party processor's settlement total, the retailer or third party-processor must:

(1) notify the retailer management EBT contractor in writing within 10 banking business days after discovering the discrepancy; and

(2) submit all applicable documentation.

(b) The retailer management EBT contractor rejects discrepancies or adjustments reported more than 90 days after the settlement date.

§372.1713. Transaction Disputes.

(a) If a retailer or third-party processor does not receive or disagrees with the amount of an Electronic Benefit Transfer (EBT) to its bank account, the retailer or third-party processor must contact the retailer management EBT contractor to dispute the reimbursement or lack of reimbursement. (Participant or household-related disputes are resolved as required by §372.1521 of this chapter (relating to Account Balance and Transaction Errors).)

(b) A dispute may be initiated for any reason deemed valid by the initiator, including:

(1) processing errors, including duplicate processing; or

(2) incorrect manual vouchers.

(c) A dispute must be initiated with the respondent no later than 90 calendar days after the date the initiator knows or has reason to know of the dispute.

§372.1714. Transaction Dispute Resolution.

(a) The retailer management EBT contractor:

(1) investigates and resolves transaction disputes between a retailer and third-party processor; and

(2) requests information from the initiator and responder as needed.

(b) The retailer management EBT contractor responds in writing:

(1) within 10 banking business days after initiation, if the dispute is over system errors; and

(2) within 15 calendar days after initiation for all other disputes.

(c) Funds are transferred to the retailer or third-party processor only.

(d) A chargeback transaction may be used to resolve a disputed EBT program transaction. A chargeback may be issued against the:

(1) retailer management EBT contractor;

(2) retailer; or

(3) third-party processor's settlement account.

§372.1715. Appeal of Transaction Dispute Resolution.

(a) If a retailer or third-party processor disagrees with the resolution of a transaction dispute, the retailer or third-party processor:

(1) must first file a complaint in writing with the retailer management EBT contractor; and

(2) may send a written request for an informal review within 15 days after the official notice of action from the retailer management EBT contractor to the Texas Health and Human Services Commission, Lone Star Business Services, Electronic Benefit Transfer, P.O. Box 12688, Mail Code 2033, Austin, Texas 78751.

(b) If a retailer or third-party processor is dissatisfied with the results of an informal review, the retailer or third-party processor may send a written request for an administrative hearing to the Texas Health and Human Services Commission, Hearings Department, P.O. Box 149030, Mail Code W-613, Austin, Texas, 78714-9030. The administrative hearing is held in accordance with Chapter 357, Subchapter I of this title (relating to Hearings Under the Administrative Procedure Act).

§372.1716. Out-of-State Transactions of Texas-issued Benefits.

(a) Retailers outside of Texas may accept the Electronic Benefits Transfer (EBT) card and process transactions if they route those transactions through a third-party processor or transaction switch providers certified to the Texas EBT system.

(b) Third-party processors may accept and route transactions from retailers outside of Texas if they are certified to the Texas EBT system or if they route transactions through a switch provider certified to the Texas EBT system.

(c) Retailers outside of Texas must:

(1) provide their own equipment and arrange for their own training for electronic transaction processing; or

(2) obtain equipment and training from the state in which they are located.

(d) Retailers outside of Texas that route transactions through a switch provider must not use off-line (manual) vouchers.

(e) Disputes with out-of-state retailers involving transactions for Texas clients are resolved using the same procedures as for Texas retailers, as described in §372.1713 of this subchapter (relating to Transaction Disputes).

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 11, 2009.

TRD-200901869
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 424-6900

TITLE 4. AGRICULTURE

PART 1. TEXAS DEPARTMENT OF AGRICULTURE

CHAPTER 19. QUARANTINES AND NOXIOUS AND INVASIVE PLANTS

SUBCHAPTER E. DATE PALM LETHAL DECLINE QUARANTINE

4 TAC §§19.51 - 19.53

The Texas Department of Agriculture (the department) proposes amendments to §§19.51 - 19.53, concerning the department's Date Palm Lethal Decline Quarantine regulations. The department adopted amendments to this quarantine on an emergency basis on December 3, 2008, as published in the December 19, 2008, issue of the *Texas Register* (33 TexReg 10263). The department withdrew these emergency amendments to the quarantine and resubmitted revised amendments on an emergency basis on April 7, 2009, as published in the April 24, 2009, issue of the *Texas Register* (34 TexReg 2577) and are now in effect. The current Date Palm Lethal Quarantine was developed in 1976, and is outdated and not based on current science and regulatory practice. Although the current quarantine has not been utilized broadly due to a low prevalence and rare occurrence of the disease in Texas, the department is updating the quarantine to conform to current information, science and regulatory practices.

The proposed amendments establish a regulatory practice utilizing an immediate buffer area and an extended buffer area surrounding any infected trees in Texas. Similar to the current quarantine regulation, the immediate buffer area will be the area within one mile of the infected tree. The extended buffer area will be the area within two miles of the infected tree and outside the one-mile immediate buffer area. The proposed amendments will operate as follows regarding each regulated area within the quarantine.

Regarding the immediate buffer area, no trees within this area will be allowed to move outside the area for at least six months following the removal of the infected tree. In order to be allowed to move trees outside the immediate buffer area, a treatment regiment extending for at least three months, during the six-month period, will be required following the removal of an infected tree. This treatment is added because the vectors, primarily leafhoppers, which are present in the vicinity of an infected tree, pose the greatest risk of spreading the disease.

Regarding the extended buffer area, a phytosanitary certificate must accompany shipment from the extended buffer area to outside. This requirement expires following the six-month period from the detection date assuming the treatment practices in the immediate buffer area are conducted as described herein.

Regarding areas inside the quarantine zone but outside two buffer areas, shipments will be unrestricted.

The proposed amendments also add Nueces County of Texas and the entire State of Florida to the quarantined area and the requirements for quarantined palms entering Texas. Nueces County is added to the quarantine because the disease has been detected in that county. The State of Florida is added to the quarantine because scientists from the University of Florida, Institute of Food and Agricultural Sciences recently confirmed the phytoplasma, which causes the date palm lethal decline in Texas also occurs in five Florida counties. Furthermore, the State of Florida has not enacted an intra-state quarantine to restrict movement of the infected host plants and potential vectors from spreading to disease-free counties. Consequently, instead of quarantining just the infected counties, the Texas Department of Agriculture has opted to quarantine the entire State of Florida. In addition, the Florida Department of Agriculture and Consumer Services, Division of Plant Industry declined to implement the requirements Texas uses when an infected tree is found, such as removal of the infected tree, a six-month prohibition on movement of quarantined palms located within one mile of the infected tree and the use of the treatment methods mentioned above. Consequently, the entry requirements for the quarantined palms from Florida into Texas were developed in consultation with the Florida Division of Plant Industry. Silver date palm *Phoenix sylvestris,* queen palm *Syagrus romanzoffiana,* and cabbage palm or sabal palm *Sabal palmetto,* are added to the list of quarantined articles since Florida scientists recently confirmed the occurrence of date palm lethal decline in these species.

The proposed amendments are identical to the emergency amendments adopted on April 7, 2009, except the former clarify that the requirements listed are for movement of quarantined articles outside the two-miles from an infected tree. The amendments add silver date palm, queen palm, and cabbage palm or sabal palm to the list of quarantined articles, add Nueces County of Texas and the State of Florida to the quarantined areas, and prescribe entry requirements for movement of the quarantined articles from Florida into Texas, as well as outlines requirements to move quarantined articles from a quarantined area of Texas to a free area of Texas. The amendments specify that a phytosanitary certificate issued by the department is required only upon detection of an infected tree and over a six-month duration to move quarantined palms outside two miles of an infected tree. Because Florida lacks intra-state quarantine and the state

refrains from destroying the infected trees, all Florida shipments of the quarantined palms are required to be accompanied by a phytosanitary certificate.

The proposed amendments outline necessary steps to prevent introduction and artificial spread of the date palm lethal decline into non-infected areas of Texas. The palm nursery industry, landscapers, homeowners, and others who use the quarantined palms are in peril because without these amendments, chances of these palms becoming infected with the disease increase significantly. Treatment options to control the disease are very limited. Moreover, once the spear leaf has died due to the disease, scientists recommend removal of the tree as soon as possible.

The proposed amendment to §19.51 adds Nueces County of Texas and the State of Florida to the quarantined areas. The proposed amendment to §19.52 adds silver date palm, queen palm, and cabbage palm or sabal palm to the list of quarantined articles. The proposed amendment to §19.53 deletes the option, which requires a treatment of quarantined palms located more than two miles from an infected tree and adds a treatment requirement for movement of quarantined palms located within one mile from an infected tree. The proposed amendment replaces the special permit provision with a phytosanitary certificate, clarifies that a phytosanitary certificate is required over a six-month period for movement of the quarantined articles located more than one mile and less than two miles from an infected tree to outside this area, prescribes entry requirements for quarantined palms from Florida into Texas, prohibits quarantined palms within two miles of a known infected tree in Florida, and requires the quarantined palms in Florida located more than two miles from a known infected tree to be treated within 48 hours of the shipment.

Dr. Shashank Nilakhe, State Entomologist, has determined that for the first five-year period the amended sections, as proposed, are in effect, there will be no fiscal implication for the state or local government as a result of enforcing or administering the new sections.

Mr. Nilakhe also has determined that for each year of the first five years the amended sections, as proposed, are in effect, the public benefit anticipated as a result of enforcing the new sections will be to prevent introduction of the date palm lethal decline into Texas. It is estimated that five palm nurseries are located in Nueces County, Texas. Of these five nurseries, one is a large business and the remaining four meet the criterion of small business as well as a micro-business as defined in the Texas Government Code §2006.001(2) and §2006.001(1), respectively. As mentioned above, the date palm lethal decline rarely occurs in Texas, and the measures used to combat the disease apparently lead to disease eradication. If the disease is found at any of these five nurseries or at a retail garden store, there will be adverse economic impact since the quarantined articles are prohibited from movement for six months. However, it is not possible to quantify such economic impact. To move the quarantined palms located within two miles of an infected tree outside the area, will require treatment for leafhoppers, the apparent vector of the disease, at a cost of about $200 per acre. Since it is not possible to predict the quantity of palms to be shipped from this area, and the frequency of the disease occurrence, the treatment costs can not be estimated. For the same reasons, the treatment cost to move quarantined palms located within one mile of an infected tree in Cameron, Hidalgo and Willacy counties can not be estimated. Alternative methods to the insecticidal treatments were considered to reduce adverse impact on small businesses. None of the alternative methods, such as biological control and cultural control, would provide effective, economical, and timely control of the leafhoppers.

The treatment cost to control leafhoppers, will be borne by Florida nurseries shipping the quarantined articles to Texas. The cost to control leafhoppers would be reduced significantly since many of the pesticides commonly used for controlling mites and insect pests in palm nurseries would also control leafhoppers. The Florida Division of Plant Industry's cost for inspection and issuance of a phyosanitary certificate will be borne by the nurseries. The Division of Plant Industry charges $50 and the mileage cost for issuance of a phytosanitary certificate. A nursery may consider this cost as an overhead, or may recoup it by adding to the relevant shipment, by distributing over all the shipments, or by some other means. If a Florida nursery opts to recoup the certification cost, fewer than 100 Texas small businesses and micro-businesses which import Florida palms might experience a slight increase in the palm prices. However, it is not possible to quantify such an increase because of the different size of nurseries, different volume of shipments, various species and sizes of palms shipped, price variation between palm species, nursery-specific pest management practices employed, nursery-specific management decisions, etc. If a nursery opts to add the phytosanitary certificate cost such as $75 to a small shipment, such as five palm plants, it would have a greater negative economic impact on micro-businesses than small businesses. Furthermore, statistics on small versus large shipment of palms is not available.

Comments on the proposal may be submitted to Dr. Shashank Nilakhe, State Entomologist, Texas Department of Agriculture, P.O. Box 12847, Austin, Texas 78711. Comments must be received no later than 30 days from the date of publication of the proposal in the *Texas Register.*

The amendments are proposed under the Texas Agriculture Code, §71.001, which authorizes the department to establish a quarantine against out-of-state 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.

The code affected by the proposal is the Texas Agriculture Code, Chapter 71.

§19.51. Quarantined Areas.

The quarantined areas are Cameron, Hidalgo, Nueces, and Willacy counties [~~Counties~~] of Texas, and the State of Florida.

§19.52. Quarantined Articles.

(a) (No change.)

(b) All parts of the Canary Island date palm, *Phoenix canariensis*; silver date palm, *Phoenix sylvestris;* queen palm, *Syagrus romanzoffiana;* cabbage palm or sabal palm, *Sabal palmetto;* and [~~all parts of~~] the date palm, *Phoenix dactylifera* are quarantined.

(c) (No change.)

§19.53. Restrictions.

(a) (No change.)

(b) Exemptions.

(1) Palm seed are exempt from the provisions of this subchapter.

(2) Quarantined articles from quarantined areas of Texas are exempt from the requirements of treatment and a phytosanitary certificate after a six-month absence of an infected tree or when located more than 2 miles from an infected tree.

(c) Exceptions [Exception].

(1) When an infected tree has been detected, shipments [Shipments] of quarantined palms from quarantined areas of Texas specified in subparagraphs (A) or (B) of this paragraph may be allowed to move [movement into the free areas of Texas under special permit from the department] under the following conditions.

(A) Quarantined palms located within one mile of a known infected tree may:

(i) not move [from the quarantined area] for a period of six months following removal of an infected tree; and [or]

(ii) have been treated, as approved by the department, for a minimum period of three months during the six-month period following the removal of an infected tree; and

(iii) [(ii)] be allowed to move after six months if no other infected trees are found within a mile radius [and the conditions specified in subparagraphs (B) or (C) of this paragraph are met].

(B) Quarantined palms located more than one mile and less than two miles from known infected trees must:

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

(iii) must be treated within 48 hours prior to [on the day of] movement; and[.]

(iv) be allowed to move when accompanied by a phytosanitary certificate over a three-month period since completion of the treatment.

(C) A phytosanitary certificate is not required for shipments made beyond six months since detection of an infected tree.

[(C) Quarantined palms located more than two miles from known infected trees must:]

[(i) be inspected within 24 hours prior to shipment with no symptoms of lethal decline apparent; and]

[(ii) must be treated on the day of movement.]

(2) (No change.)

(3) Shipments of quarantined palms from Florida may be allowed movement into Texas when accompanied by a phytosanitary certificate issued by the Florida Department of Agriculture and Consumer Services, Division of Plant Industry, under the following conditions.

(A) Quarantined palms located within two miles of known infected trees are prohibited.

(B) Quarantined palms located more than two miles from known infected trees:

(i) must be inspected within 24 hours prior to shipment with no symptoms of date palm lethal decline apparent;

(ii) must be under a prescribed pest management program for six weeks prior to shipment and receive a final treatment within 48 hours prior to movement; and

(iii) tools used in pruning and handling of host plants must be disinfected with one part liquid household bleach (sodium hypochlorite) to four parts water or some other suitable disinfectant.

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 8, 2009.

TRD-200901757
Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 463-4075

TITLE 16. ECONOMIC REGULATION

PART 3. TEXAS ALCOHOLIC BEVERAGE COMMISSION

CHAPTER 31. ADMINISTRATION

The Texas Alcoholic Beverage Commission (commission) proposes the repeal of §31.1, relating to powers delegated to the administrator, and proposes new §31.1, relating to separation of duties between commission and administrator.

The rule was reviewed under Government Code, §2001.039, which requires that each state agency review and consider for readoption each rule adopted by that agency under Government Code, Chapter 2001 (Administrative Procedure Act). The commission has reviewed the rule and has determined that the reason for adopting the rule continues to exist.

Section 5.12 of the Alcoholic Beverage Code (Code) requires the commission to specify the duties and powers of the administrator by printed rules or policies. Section 5.12 was amended by S.B. 904, §8 (80th Legislature, Regular Session, 2007) to require commission rules and policies clearly separate the policy-making responsibilities of the commission from the management responsibilities of the administrator. The commission has determined that the existing §31.1 is outdated and should be repealed and a new §31.1 adopted to replace the repealed section.

Subsection (a) states the purpose of the section is to implement §5.12 and §5.31 of the Code.

Subsection (b) states the duties and authority granted to the commission by the Code that are being retained by the commissioners, consistent with the policy making functions of a state agency.

Subsection (c) states the duties and authority that the commission delegates to the administrator. These duties and authority are consistent with the effective and efficient management and operations of a state agency.

Charlie Kerr, Chief Financial Officer, has determined that for each year of the first five years that the section will be in effect, there will be no impact on state or local government. There will be no fiscal or regulatory impact on micro-businesses and small businesses or persons regulated by the commission. There is no anticipated negative impact on local employment.

Jose Cuevas, Jr., Chairman, and Steven M. Weinberg, MD, JD, and Melinda Fredricks, members of the commission, have determined that for each year of the first five years the section is in effect, the public will benefit from adoption of the section. In

addition to stating the duties and authority of the commission and administrator generally, the rule sets forth the commitment of the commissioners and the administrator to service, courtesy, integrity, and accountability to the public.

Comments on the proposed repeal and proposed new rule may be submitted to Joan Carol Bates, Deputy General Counsel, Texas Alcoholic Beverage Commission, P.O. Box 13127, Austin, Texas 78711, or electronically to joan.bates@tabc.state.tx.us. Comments will be accepted for 30 days following publication of the proposed repeal and new rule in the *Texas Register.*

16 TAC §31.1

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

The proposed repeal is authorized by Texas Alcoholic Beverage Code, §5.12 and §5.31, which grant specific and general rulemaking authority, and Government Code, §2001.039, which requires each agency review its rules each four years.

Cross Reference: Texas Alcoholic Beverage Code, Chapter 5, and Government Code, Chapter 2001 are affected by the proposed repeal.

§31.1. Powers Delegated to the Administrator.

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 7, 2009.

TRD-200901734
Alan Steen
Administrator
Texas Alcoholic Beverage Commission
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 206-3204

16 TAC §31.1

The proposed new rule is authorized by Texas Alcoholic Beverage Code, §5.12 and §5.31, which grant specific and general rulemaking authority, and Government Code, §2001.039, which requires each agency review its rules each four years.

Cross Reference: Texas Alcoholic Beverage Code, Chapter 5, and Government Code, Chapter 2001 are affected by the proposed new rule.

§31.1. Separation of Duties Between Commission and Administrator.

(a) This rule implements §5.12 and §5.31 of the Alcoholic Beverage Code (Code), which requires the Texas Alcoholic Beverage Commission (commission) to adopt rules to clearly separate the policy-making authority of the commissioners from the management responsibilities of the administrator.

(b) The commission retains the duty and authority to:

(1) Establish agency policies and goals to carry out the duties and authority granted to the commission under the Code;

(2) Provide leadership and direction to ensure agency laws, rules, policies and goals are implemented in a responsible, effective and cost efficient manner;

(3) Ensure accountability and transparency within the agency and to the Governor, the Legislature, the public, and persons regulated;

(4) Appoint and remove the administrator;

(5) Adopt agency rules to implement statutory duties and agency policies;

(6) Employ or appoint and terminate or remove an internal auditor, adopt an audit plan, approve audit findings and ensure agency compliance with audit requirements;

(7) Exercise any authority and carry out any duty of the commission not delegated to the administrator.

(c) The commission delegates the following duties and authority to the administrator:

(1) Plan and implement an effective an efficient operational and organizational structure;

(2) Act as the agency liaison and resource to the executive and legislative branch;

(3) Prepare and submit the agency budget and appropriations requests;

(4) Employ or appoint an executive management team with the skills, knowledge and commitment necessary to achieve the goals and implement the policies adopted by the commission;

(5) Assign and delegate to each member of the executive management team the responsibility and authority necessary to effectively administer all agency operations, duties and functions, implement policy, and manage staff and resources, including the authority to further delegate and assign the essential duties and responsibilities of the agency to ensure the highest and best use of agency staff and resources;

(6) Develop, monitor and report measures or expectations for the administrative, regulatory and enforcement functions of the agency to ensure that the agency goals are accomplished and policies followed;

(7) Develop and implement comprehensive and agency-wide internal policies and procedures necessary to carry out each essential function, duty, policy or goal of the agency;

(8) Ensure that all agency staff has access to, knowledge of and responsibility for consistently following policies adopted by the commission and agency-wide internal policies and procedures;

(9) Administer the oath of office or commission to agency staff and agents;

(10) Render, or delegate to agency staff, the agency decision or order in any matter over which the agency has final decision-making authority.

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 7, 2009.

TRD-200901735
Alan Steen
Administrator
Texas Alcoholic Beverage Commission
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 206-3204

♦ ♦ ♦

TITLE 22. EXAMINING BOARDS

PART 1. TEXAS BOARD OF ARCHITECTURAL EXAMINERS

CHAPTER 1. ARCHITECTS

SUBCHAPTER C. EXAMINATION

22 TAC §1.43

The Texas Board of Architectural Examiners proposes an amendment to §1.43, Reexamination of Chapter 1, Subchapter C, concerning Examination. The amendment allows a candidate for registration to obtain an extension to the 5-year deadline for completing all sections of the examination for registration. A candidate may seek an extension of up to 6 months when the candidate becomes a parent through childbirth or adoption. The amendment also repeals an obsolete "grandfather" provision which allowed for the preservation of pre-existing passing grades when the 5-year deadline was initially adopted.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five-year period the amended rule is in effect there will be no fiscal impact to state or local governments.

Ms. Hendricks has also determined that for the first five-year period the amended rule is in effect the public benefits expected as a result of the amended rule are as follows: candidates who become parents during the examination period will not be unduly delayed or discouraged from gaining licensure. The rule will have no impact on small business and therefore an alternative impact statement is not required nor was it prepared.

There will not be a change in the cost to persons required to comply with the section.

There will be a positive fiscal impact upon persons required to comply with the section to the extent that they do not forfeit grades and would otherwise be required to undergo the expense of re-examination on sections of the examination.

Comments may be submitted to Cathy L. Hendricks, RID, Executive Director, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, TX 78711-2337.

The amendment is proposed pursuant to §1051.202, Texas Occupations Code, which provide the Texas Board of Architectural Examiners with authority to promulgate rules to implement Chapter 1051, including rules relating to the registration examination.

The proposed amendment does not affect any other statutes.

§1.43. Reexamination.

(a) A [~~Effective January 1, 2002, a~~] Candidate's passing grade for any section of the examination is valid for five (5) years. Each Candidate [~~who, after December 31, 2001, is approved for examination by the Board~~] must pass all sections of the examination within five (5) years after the date the Candidate passes a section of the examination. A Candidate [~~approved for examination by the Board after December 31, 2001,~~] who does not pass all sections of the examination within five (5) years after passing a section of the examination will forfeit credit for the section of the examination passed and must pass that section of the examination again.

(b) The Board may grant one extension to the 5-year period for completion of the examination if a Candidate is unable to pass all sections of the examination within that period because of the adoption or birth of a child within that 5-year period. A Candidate may request one extension of up to 6 months by filing a written application with the Board together with any corroborating evidence immediately after the Candidate learns of the impending adoption or birth. [~~Each Candidate approved for examination by the Board prior to January 1, 2002, must pass all sections of the examination no later than December 31, 2006. A Candidate approved for examination by the Board prior to January 1, 2002, who does not pass all sections of the examination by December 31, 2006, will forfeit credit for each section of the examination the candidate passed before January 1, 2002, and must pass each of those sections again. The Candidate's passing grade for any section of the examination taken after January 1, 2002, is valid for five (5) years.~~]

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

Filed with the Office of the Secretary of State on May 11, 2009.

TRD-200901798

Cathy L. Hendricks, RID

Executive Director

Texas Board of Architectural Examiners

Earliest possible date of adoption: June 21, 2009

For further information, please call: (512) 305-8544

♦ ♦ ♦

SUBCHAPTER I. DISCIPLINARY ACTION

22 TAC §1.161, §1.162

The Texas Board of Architectural Examiners proposes amendments to §1.161, Purpose and Scope and §1.162, Computation of Time of Chapter 1, Subchapter I, concerning Disciplinary Action.

The proposed changes to §1.161 will have no substantive or procedural effect upon Board enforcement actions or persons within the jurisdiction of the Texas Board of Architectural Examiners but are intended merely to simplify and modernize existing regulatory language.

The proposed changes to §1.162 will have no substantive or procedural effect upon Board enforcement actions except to create a rebuttable presumption that materials which have been sent by the Board to a person's last known address have been received by that person, or his or her agent, not less than eight (8) days after the materials have been properly deposited into the United States mail, first class postage paid. This presumption allows increased use of first class mail and conforms the agency's practice to that utilized at the State Office of Administrative Hearings which permits the use of first class mail in serving documents. See, 1 TAC §155.103. This change is expected to result in cost savings to the agency without the loss of legal rights to those persons with whom the agency is seeking to communicate. This change is also expected to make correspondence more effective because many times individuals will refuse to sign for a piece of mail which is sent by certified mail and will not retrieve it from the Post Office if delivery was attempted when the person was not present.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five-year period the amended rules are in effect, there will be no fiscal consequences to state or local governments upon implementation of

either rule apart from the cost savings which will result from increased use of "regular" mail.

Ms. Hendricks also has determined that for the first five-year period the amended rules are in effect the public benefits expected as a result of the amended rule are as follows:

The simplification of language as proposed for §1.161 will result in greater comprehension of the rule's text. The proposed change will not have an impact on small businesses and there will be no change in cost to persons required to comply with this rule.

The proposed changes to §1.162 will benefit the public by decreasing agency mailing costs and making receipt of documents more certain than by exclusive reliance upon certified mail. The proposed change will not have an impact on small businesses and there will be no change in cost to persons required to comply with this rule.

Comments may be submitted to Cathy L. Hendricks, RID, Executive Director, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, TX 78711-2337.

The amendments are proposed pursuant to the Architects' Practice Act, Texas Occupations Code Annotated, §§1051.001 - 1051.701 and the specific legislative authority delegated to the Board to adopt rules for the administration and enforcement of Subtitle B of the Texas Occupations Code contained at §1051.202.

The proposed amendments do not affect any other statutes.

§1.161. Purpose and Scope.

This chapter shall provide a system of procedures for the initiation, investigation, prosecution, hearing and resolution of disciplinary matters and allegations involving persons who are subject to the jurisdiction of the Texas Board of Architectural Examiners.

[(a) Unless specifically indicated in the Rules and Regulations of the Board, this subchapter governs the procedure followed by the Board in a Contested Case against an Architect, in the informal disposition of a Contested Case against an Architect, or in an informal conference with an Architect. Unless specifically indicated, the Architects' Registration Law, the Administrative Procedure Act, and the Rules of Practice and Procedure of the State Office of Administrative Hearings, as appropriate, also govern the procedure followed by the Board in a Contested Case against an Architect.]

[(b) The Architects' Registration Law and Sections 1.162, 1.163, 1.164, 1.1167, 1.172, and 1.173 of this subchapter govern disciplinary action against a person who is not an Architect. If the person is an Applicant, Section 1.151 of Subchapter H also governs disciplinary action against him/her.]

§1.162. Computation of Time.

(a) (No change.)

(b) A person shall be presumed to have received all pleadings and other notices upon a showing that such materials were sent to the respondent's last known address; the materials were sent by United States mail, first class postage prepaid; a return address was affixed to the exterior of the mailing materials and the materials were not returned; and in excess of seven days has elapsed from placement of the materials into the United States mail. [For purposes of this subchapter, an Architect is presumed to have received a notice from the Board on the fifth day after the date the Board sent the notice to the Architect's current address of record via certified mail, return receipt requested.]

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 11, 2009.

TRD-200901780
Cathy L. Hendricks, RID
Executive Director
Texas Board of Architectural Examiners
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 305-8544

22 TAC §1.163

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

The Texas Board of Architectural Examiners proposes the repeal of §1.163, Ex Parte Communication of Chapter 1, Subchapter I, concerning Disciplinary Action.

This rule was redundant of prohibitions already found at §2001.061 of the Texas Government Code. This section will be reserved for expansion.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five-year period after the rule is repealed there will be no fiscal implications to state or local governments.

Ms. Hendricks also has determined that for the first five-year period after the repeal of §1.163 the public benefits expected as a result of the repealed rule will be to minimize regulations which merely restate existing law. The repeal of this rule will not have impact on small business.

There will not be a change in the cost to persons required to comply with the section.

Comments may be submitted to Cathy L. Hendricks, RID, Executive Director, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, TX 78711-2337.

The repeal is proposed under authority of Texas Occupations Code Annotated, §1051.202 which enables the Texas Board of Architectural Examiners to adopt reasonable rules in order to administer or enforce the laws governing the practice of architecture, landscape architecture and interior design.

The proposed repeal does not affect any other statutes.

§1.163. Ex Parte Communication.

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 11, 2009.

TRD-200901781
Cathy L. Hendricks, RID
Executive Director
Texas Board of Architectural Examiners
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 305-8544

22 TAC §1.164, §1.165

The Texas Board of Architectural Examiners proposes amendments to §1.164, Initiating a Contested Case and §1.165, Informal Disposition of a Contested Case of Chapter 1, Subchapter I, concerning Disciplinary Action.

The proposed changes to §1.164 remove the requirement that a notarized complaint is required in order to commence contested case proceedings and investigations. In order to make the process simpler and more accessible, a member of the public may now file a complaint without the need to have it notarized. The other proposed change would remove language which permits to Board to refuse to disclose certain information. This change brings the Board rule into alignment with the Texas Public Information Act and does not waive any rights to information as permitted by TPIA.

The proposed changes to §1.165 simplify the overall language and would make two modifications to the present rule. Subsection (e) permits the agency to move for entry of a default judgment in those instances when a respondent, after receiving legally required notice of the docketing of a contested case proceeding alleging a violation of any law or rule over which TBAE possesses jurisdiction at the State Office of Administrative Hearings (SOAH), fails to file a written answer or other written response with SOAH. Default is also permitted if a Respondent fails to appear at a scheduled hearing of which he or she has received legally required notice.

It has been the experience of enforcement staff that individuals who, after receiving notice of the commencement of contested case proceedings, choose not to make any written reply do not generally seek or otherwise avail themselves of the due process and evidentiary protections to which they are entitled. Similarly, a person who fails after legally required notice to appear for a contested case hearing has knowingly waived due process rights. Permitting default fault under such circumstances increases efficiency in the prosecution of cases and rendition of a final agency ruling without sacrificing or prejudicing any legal rights to which respondents are entitled.

The proposed changes to §1.165(f) develop and specify those factors which the Board and the Executive Director are to consider in fixing an administrative penalty pursuant to Texas Occupations Code Annotated, §1051.452. However, rather than merely tracking the statutory language, the Board proposes to more exactly detail the relevant factors which it and the Executive Director will evaluate and includes consideration of the public welfare, evaluating any harm resulting from sanctioned conduct (not simply 'economic harm'), taking into account both the specific and general deterrent value of a penalty and whether or not the Respondent has taken prompt remedial action. These changes provide greater notice to those who are subject to the Board's jurisdiction of the criteria which will be used to determine an administrative penalty and serve to prevent the Executive Director or the Board from the unbridled exercise of authority.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five-year period the amended rules are in effect there will be no fiscal implications to state or local governments.

Ms. Hendricks also has determined that for the first five-year period the amended rules are in effect the public benefits which will be realized are more efficient resolution of contested cases without any loss of due process rights and more certain criteria upon which administrative penalties may be assessed and evaluated. The rules will not have any impact on small businesses and there will be no change in cost to those persons required to comply with the proposed changes.

Comments may be submitted to Cathy L. Hendricks, RID, Executive Director, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, TX 78711-2337.

The amendments are proposed pursuant to Texas Occupations Code Annotated, §1051.202 which authorizes the Board to adopt reasonable rules to administer and enforce Subtitle B of the Architects' Practice Act.

The proposed amendments do not affect any other statutes.

§1.164. Initiating a Contested Case.

(a) The Board may initiate a Contested Case proceeding in response to:

(1) a [~~notarized~~] written complaint filed by a member of the public;

(2) information provided in a registration application or renewal form; or

(3) other information known to the Board which establishes probable cause.

(b) The Board shall not act on a written complaint filed by a member of the public unless the allegations in the complaint[~~, if proven,~~] describe conduct that violates a rule or statutory provision enforceable by the Board.

(c) (No change.)

[~~(d) The Board may refuse to disclose the identity of a person who furnishes information regarding an alleged violation of a rule or statutory provision enforceable by the Board.~~]

(d) [~~(e)~~] The Board shall not act on a written complaint filed by a member of the public if the complaint is filed later than ten (10) years after the date of the act(s) or omission(s) described in the complaint.

§1.165. Informal Disposition of a Contested Case.

(a) A Contested Case may be resolved informally at any time [~~after the Contested Case is initiated by the Board~~].

(b) If the respondent agrees in writing to a settlement agreement [~~arising out of the proposed informal disposition of a Contested Case~~] and the Executive Director executes the written settlement agreement, the settlement agreement shall be presented to the Board for approval or rejection. The settlement agreement must include written findings of fact and conclusions of law and may be in the form of a consent order, letter of reprimand, or other format approved by the Executive Director.

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

(e) An informal disposition may be made of a Contested Case by default. Default occurs whenever a respondent neither answers nor makes other written response to the filing of a Complaint or Petition at the State Office of Administrative Hearings alleging a violation of any law or Rule over which TBAE possesses jurisdiction. Default also occurs if the respondent fails to appear at a scheduled and properly noticed hearing to be conducted by the State Office of Administrative Hearings. [~~Default shall occur when a respondent neither responds in writing nor appears at a scheduled hearing related to a disciplinary matter.~~]

(f) The Board and the Executive Director shall take into account the following factors when considering a proposed settlement agreement:

[~~(1) the seriousness of the conduct that is the source of the allegation(s) against the respondent, including consideration of:~~]

(1) [~~(A)~~] the nature, circumstances, extent, and gravity of any relevant act or omission; [~~, and~~]

(2) [~~(B)~~] the hazard or potential hazard to the health, safety or welfare [~~health or safety~~] of the public;

(3) [~~(2)~~] the economic harm resulting from the conduct [~~damage to property caused by the conduct~~];

(4) [~~(3)~~] the respondent's history concerning any previous ground for sanction;

(5) [~~(4)~~] the severity of penalty necessary to effectuate specific and general deterrence [~~deter a future ground for sanction~~];

(6) [~~(5)~~] any effort by the respondent to take prompt remedial action [~~to correct the ground for sanction~~];

(7) [~~(6)~~] the economic benefit gained by the respondent as a result of the conduct; [~~and~~]

(8) [~~(7)~~] any other matter justice may require; and

(9) [~~(8)~~] When considering a referral from the Texas Department of Licensing and Regulation, in addition to the factors described in this subsection, the Board shall consider the actual number of days that the submission was late.

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 11, 2009.

TRD-200901782
Cathy L. Hendricks, RID
Executive Director
Texas Board of Architectural Examiners
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 305-8544

22 TAC §1.167

The Texas Board of Architectural Examiners proposes amendments to §1.167, Publication of Disciplinary Action of Chapter 1, Subchapter I, concerning Disciplinary Action.

The amendment being proposed to §1.167 is in order to obtain greater clarification concerning the Board's directive that persons who have "received" disciplinary action will have their names published. While this has been the Board's practice it was felt that present language, which requires persons who are "the subject" of disciplinary proceedings to have their names publicized, is overly broad.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five-year period the amended rule is in effect there will be no fiscal implications to state or local governments.

Ms. Hendricks also has determined that for the first five-year period the amended rule is in effect the public benefit will result from a clearer understanding of the rule. The rule will not have any impact on small businesses and there will be no change in cost to those persons required to comply with the proposed changes.

Comments may be submitted to Cathy L. Hendricks, RID, Executive Director, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, TX 78711-2337.

The amendments are proposed pursuant to Texas Occupations Code Annotated, §1051.202 which authorizes the Board to adopt reasonable rules to administer and enforce Subtitle B of the Architects' Practice Act including the practice of architecture, landscape architecture and interior design.

The proposed amendments do not affect any other statutes.

§1.167. Publication of Disciplinary Action.

(a) The Board shall cause to be published in the Board's official newsletter, on the Board's Web site, in a newspaper, or in another publication the name of any person who has received [~~is the subject of~~] disciplinary action by the Board. The publication may include a narrative summary of the facts giving rise to disciplinary action and a description of the action taken.

(b) (No change.)

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

Filed with the Office of the Secretary of State on May 11, 2009.

TRD-200901783
Cathy L. Hendricks, RID
Executive Director
Texas Board of Architectural Examiners
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 305-8544

22 TAC §§1.170 - 1.175

The Texas Board of Architectural Examiners proposes amendments to §1.170, Referrals from the Texas Department of Licensing and Regulation; §1.171, Responding to Request for Information; §1.172, Continuing Violation; §1.173, Violation By One Not an Architect; §1.174, Complaint Process, and §1.175, Evaluation of Evidence by Expert of Chapter 1, Subchapter I, concerning Disciplinary Action.

Section 1.170 requires Architects to submit certain plans and specifications to the Texas Department of Licensing and Regulation for accessibility review not later than the fifth day after issuance. Architectural Barriers Act, Texas Government Code Annotated §469.101. If an architect fails to do so, the TDLR reports the legal violation to the Texas Board of Architectural Examiners. Id., §469.101. The Texas Board of Architectural Examiners will, upon confirmation of a violation, take appropriate disciplinary action in order to further the policy of this state which is to eliminate, to the extent possible, unnecessary barriers encountered by persons with disabilities whose ability to achieve maximum personal independence is needlessly restricted. Texas Occupations Code Annotated §1051.702(2) (West 2005 & Supp. 2008).

The Board proposes minor changes to §1.170 which result in greater certainty regarding the enforcement action which will be taken by directing the Executive Director to issue a written warning upon a first violation and requiring the imposition of an administrative penalty for all subsequent violations.

Section 1.171 requires certain persons to respond to a request for information from the Board. It is the mission of the Texas board of Architectural examiners to ensure a safe built environment for Texas. In order to effectively and efficiently investigate and prosecute instances of statutory or regulatory violation it is essential that the Board be able to acquire information expeditiously; the use of investigatory letters as permitted by §1.171 has proven effective in these efforts.

The Board proposes to expand the class of persons who are responsible for responding to letters of inquiry to include candidates and applicants as well as registrants. These persons are often in a position to provide vital information concerning matters within the Board's jurisdictions and relevant to enforcement proceedings. The proposed change will, if adopted, permit agency staff to request that a registrant, candidate or applicant provide records and documents in response to a request.

The proposed changes permit a failure to respond to be treated as a distinct disciplinary infraction from the underlying matter being investigated, and, in order to stress the importance of a candidate's, applicant's or registrant's cooperation with a Board inquiry, state that a failure to respond within 30 days may constitute grounds for the Board to impose suspension or revocation of a registration.

Section 1.172 will be amended to include a new subsection (b) which expressly classifies each sheet of plans and each separate section of specifications which are prepared, modified or issued in violation of applicable statutory and regulatory requirements to constitute discreet and independent legal violations each of which provides a basis for the imposition of an administrative penalty. The Texas Board of Architectural Examiners proposes this addition in recognition of the fact that plans and specifications which are issued in violation of law present an unacceptable risk of significant bodily harm and economic injury to the citizens of Texas. It is anticipated that registrants and nonregistrants will be deterred from issuing plans and specifications in violation of the law.

The amendment to §1.173 bring the rule into conformity with Subtitle B of the Texas Occupations Code as well as the Administrative Procedure Act (Title 10, Texas Government Code) by deleting references to Section 11 of the Architects' Registration Law (Art. 294a, Vernon's Texas Civil Statutes). The rule implements the practice of the Texas Board of Architectural Examiners to refer all contested case hearings to the State Office of Administrative Hearings (SOAH) for issuance of a proposal for decision regardless of whether the case involves a registrant or a nonregistrant. Because the Board no longer conducts contested case hearings, subsection (d)(3), (4) and (5) of the original rule are no longer necessary. In place of procedural rules governing a contested case hearing the proposed rules would set forth the procedural sets to be taken by the Executive Director once an investigation determined that a nonregistrant has engaged in a legal violation including methods of settlement and notification of rights to a hearing at SOAH. The proposed amendment will make it clear that a recommended settlement or other informal disposition presented to the Board by the Executive Director may, but need not be, approved by the Board. This is consistent with well established law that only a Board may act on behalf of the agency in such instances.

The proposed amendment to §1.174 permits the agency to provide a copy of its policies and procedures to a complainant and/or a respondent by providing information which will allow review of the policies on the internet or, if requested by a party, by mailing a copy of the policies and procedures upon request. The changes to §1.174 also establish "probable cause" as the investigatory standard required to proceed with investigation and settlement/prosecution of a disciplinary matter. This standard has a clear legal definition and is readily applicable to agency investigations. This does not, however, diminish the agency's responsibility to prove a case by the customary "preponderance of the evidence" standard when prosecuting cases through contested case proceedings before the State Office of Administrative Hearings. The final substantive change proposed for §1.174 authorizes, but does not require, the Executive Director to respond to a request for reconsideration if a complaint is dismissed because of lack of probable cause to continue the investigation and refer a matter for prosecution.

Section 1.175 requires that any case involving professional competency or honesty be evaluated by an architect to ensure that professional standards applicable to the profession be objectively reviewed by a peer prior to the docketing of a case at the State Office of Administrative Hearings. The proposed amendment expands this to include 'candidate' along with registrants or applicants as persons whose conduct may be subject to peer review and strikes as unnecessary the entirety of subsection (c). The Board believes that while the qualifications of an expert are very important to valid and reliable case evaluation there is no need to establish the thresholds and automatic disqualifications which presently exist.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five-year period the amended rules are in effect, there will be no fiscal implications to state or local governments.

Ms. Hendricks also has determined that for the first five-year period the amended rules are in effect the public benefits expected as a result of the amended rules are to cause greater compliance by those within the jurisdiction of the agency and to increase efficiencies in acquiring information necessary for thorough investigation and prosecution of enforcement matters. The rules will not have an impact on small businesses.

There will not be a change in the cost to persons required to comply with the sections.

Comments may be submitted to Cathy L. Hendricks, RID, Executive Director, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, TX 78711-2337.

The amendments are proposed pursuant to the Architects' Practice Act, Texas Occupations Code Annotated, §1051.202 which authorizes the Board to adopt reasonable rules as necessary to administer and enforce the Architects' Practice Act.

The proposed amendments do not affect any other statutes.

§1.170. Referrals from the Texas Department of Licensing and Regulation.

(a) If an Architect fails to submit any document to the Texas Department of Licensing and Regulation as required by the Architectural Barriers Act, or a rule or procedure enacted pursuant to the Architectural Barriers Act, the Board may take disciplinary action against the Architect.

(b) An Architect's failure to submit documents to the Texas Department of Licensing and Regulation as required by subsection (a) of this section, shall result in a written warning from the Executive Director. An administrative penalty shall be imposed upon second and subsequent failures. [~~If an Architect submits a document described by subsection (a) of this section no more than fifteen (15) days following~~

~~the deadline for submission of the document, the Executive Director may issue an informal reprimand to the Architect. It shall not be necessary for the informal reprimand to be presented to or approved by the Board.~~]

(c) When considering potential disciplinary action , including imposition of an administrative penalty [~~pursuant to subsection (a) of this section~~], the Board and the Executive Director shall take into account the number of previous incidents involving a registrant's failure to timely submit documents to the Texas Department of Licensing and Regulation and the length of the delay in making the present submission. [~~the factors listed in Subsection 1.165(f) of this subchapter.~~]

§1.171. Responding to Request for Information.

An Architect, a Candidate or an Applicant shall answer an inquiry or produce requested documents to the Board concerning any matter under the jurisdiction of the Board within thirty (30) days after the date the person [~~Architect~~] receives [~~notice of~~] the inquiry. Failure [~~An Architect's failure~~] to respond within thirty (30) days may [~~to an inquiry concerning any matter under the jurisdiction of the Board shall~~] constitute a separate violation subject to disciplinary action by the Board up to and including suspension or revocation of a registration.

§1.172. Continuing Violation.

(a) Each day a violation of any statutory provision or rule enforced by the Board occurs or continues may be considered a separate violation subject to disciplinary action by the Board.

(b) Each sheet of architectural plans and each separate section of the specifications which are prepared, modified or issued in violation of these rules or any laws over which the Board has jurisdiction shall each be considered an independent violation of applicable rules and laws.

§1.173. Violation By One Not an Architect.

(a) A person who is not an Architect who violates any of the laws or rules over which the Board has jurisdiction is [~~title or practice restrictions of the Architects' Registration Law may be~~] subject to any or all of the following:

(1) judicial proceedings for injunctive relief; [~~injunctive action;~~]

(2) criminal prosecution in a court of appropriate jurisdiction; [~~and/or~~]

(3) imposition of an administrative penalty; [~~.~~]

(4) issuance of a cease and desist order from the board.

(b) In taking action against a person who is not an Architect, the Board may be represented by agency staff, the Texas Attorney General, by a county or district attorney, or by other counsel as necessary.

(c) The Executive Director may recommend and the Board may, after notice and an opportunity for hearing, impose an administrative penalty in the manner prescribed in Subchapter I of the Architects' Practice Act and otherwise as permitted by law and Board rules [~~Section 11 of the Architects' Registration Law~~].

(d) A person charged with a violation may request a hearing to contest a proposed administrative penalty that has been recommended by the Executive Director:

(1) A request for a hearing must be received in the Board's office no later than the 20th day after the date the person receives notice that the Executive Director has recommended the imposition of an administrative penalty.

(2) The hearing shall be conducted by an Administrative Law Judge at the State Office of Administrative Hearings under provision of the Administrative Procedure Act, Texas Government Code Annotated, Chapter 2001, and this subchapter. [~~The Board shall preside over a hearing held pursuant to this section. The Board shall send notice of the date, time, and location of the hearing to the person charged with a violation. During the hearing, the Board's staff and the person charged with a violation or the person's authorized representative shall have the opportunity to present testimony and other evidence and make legal arguments regarding the alleged violation and the amount of the proposed administrative penalty.~~]

[~~(3) During a hearing on a proposed administrative penalty, the Board shall have the authority and duty to:~~]

[~~(A) conduct a full, fair, and impartial hearing;~~]

[~~(B) take action to avoid unnecessary delay in the disposition of the proceeding;~~]

[~~(C) maintain order; and~~]

[~~(D) regulate the conduct of the parties and their authorized representatives, including the authority and duty to limit irrelevant, immaterial, and unduly repetitious testimony and reasonably limit the time for presentations.~~]

[~~(4) After a hearing on a proposed administrative penalty, the Board's chair shall issue a written order stating the Board's findings regarding the occurrence of a ground for sanction and the amount of the penalty, if any. In determining the amount of the penalty, if any, the Board shall consider the factors listed in Subsection 11(j) of the Architects' Registration Law.~~]

[~~(5) The Board may stop a hearing on a proposed administrative penalty in order to consult privately with legal counsel regarding any matter related to the hearing.~~]

(e) If a person charged with a violation agrees to a proposed administrative penalty recommended by the Executive Director, the Board may [~~shall~~] approve the Executive Director's recommendation and order payment of the proposed penalty without a hearing.

(f) Within thirty (30) days after the date on which the Board's order imposing an administrative penalty or taking other final agency action in a contested case proceeding becomes final, the person charged must pay the administrative penalty and otherwise ensure compliance with the terms set forth in the Board's Final Order [~~in full~~] or file a petition for judicial review with a district court in Travis County as provided by Subchapter G, Chapter 2001, Government Code.

(g) If the Executive Director determines that a Nonregistrant is violating, or has violated, a statutory provision or rule enforced by the Board, the Executive Director may:

(1) issue to the Nonregistrant a written notice describing the alleged violation and the Executive Director's intention [~~intent~~] to request that the Board impose administrative penalties and issue a cease and desist order. The written notice shall offer the Nonregistrant an opportunity to resolve all matters contained in the written notice by means of an agreed order or other instrument deemed appropriate by the Executive Director and of the Nonregistrant's ability to request an informal conference as well as of his or her right to request a hearing before an Administrative Law Judge at the State Office of Administrative Hearings; and [~~offering an opportunity for a hearing regarding the alleged violation pursuant to Section 1051.504 of the Texas Occupations Code;~~]

[~~(2) request that the Board, after providing an opportunity for a hearing as described in subsection (g)(1) of this section, issue a cease and desist order to the Nonregistrant prohibiting the Nonregistrant's misconduct; and~~]

(2) [~~(3)~~] take any other action and impose any other penalty described in this section or permitted [~~provided~~] by [~~other~~] law.

§1.174. Complaint Process.

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

(c) Once a complaint has been received, the Board's enforcement staff shall:

[~~(1) provide the complainant and respondent with copies of the Board's policies and procedures regarding complaint investigation and resolution;~~]

(1) [~~(2)~~] conduct a preliminary evaluation of the complaint within thirty (30) days to determine:

(A) Jurisdiction: whether the complaint provides information sufficient to establish probable cause for the Board's staff to believe an actionable violation might have occurred;

(B) Disciplinary History: whether there has been previous enforcement activity involving the person against whom the complaint has been filed; and

(C) Priority Level: the seriousness of the complaint relative to other pending enforcement matters;

(2) provide the complainant and respondent with information which will permit review of the Board's policies and procedures from the Board's web site regarding complaint investigation and resolution. If the complainant or respondent requests a copy of the policies and procedures in written format a copy shall be mailed upon request.

(3) notify the complainant and respondent of the status of the investigation at least quarterly unless providing notice would jeopardize an investigation; and

(4) maintain a complaint file that includes at least:

(A) the name of the person who filed the complaint unless the complaint was filed anonymously;

(B) the date the complaint was received by the Board's staff;

(C) a description of the subject matter of the complaint;

(D) the name of each person contacted in relation to the complaint;

(E) a summary of the results of the review and investigation of the complaint; and

(F) an explanation for the reason the complaint was dismissed if the complaint was dismissed without action other than the investigation of the complaint.

(d) - (e) (No change.)

(f) If the Board's staff proceeds with an investigation, the staff shall:

(1) investigate the complaint according to the priority level assigned to the complaint;

(2) notify the complainant and respondent that, as a result of the staff's preliminary evaluation of the complaint, the staff has determined that the Board has jurisdiction over the allegations(s) described in the complaint and has decided to proceed with an investigation of the allegation(s) against the respondent; and

(3) gather sufficient information and evidence to determine whether there is probable cause to believe that a violation of a statutory provision or rule enforced by the Board has occurred.

(g) (No change.)

(h) If the information and evidence gathered during an investigation are insufficient to establish probable cause to believe [~~prove~~] that a violation has occurred, the Board's staff shall:

(1) dismiss the complaint;

(2) send notices to the complainant and respondent regarding the dismissal;

(3) if warranted, include in the respondent's notice a recommendation or warning regarding the respondent's future conduct; and

(4) if a complaint is determined to be unfounded, state in the respondent's notice that no violation was found.

(i) If the information and evidence gathered during an investigation are sufficient to establish probable cause to believe [~~prove~~] that a violation has occurred, the Board's staff shall:

(1) seek to resolve the matter pursuant to §§1.165, 1.166 [~~section 1.165~~] or [~~section~~] 1.173 of this subchapter; or

(2) issue a warning to the respondent if the violation is the respondent's first violation and:

(A) the respondent has not received a written warning or advisory notice from the Board [~~regarding the law's restrictions which was directed to the respondent~~];

(B) the respondent provided a satisfactory remedy which has [~~that alleviated or~~] eliminated any harm or threat to the health or safety of the public; and

(C) the guidelines for determining an appropriate penalty for the violation recommend an administrative penalty or a reprimand as an appropriate sanction for the violation.

(j) (No change.)

(k) If a complaint is dismissed, the complainant may submit to the Executive Director a written request for reconsideration. The written request must explain why the complaint should not have been dismissed. The Executive Director may, but is not required to, respond to the request for reconsideration.

§1.175. Evaluation of Evidence by Expert.

(a) If the Board's staff determines that a respondent who is a Registrant, Candidate, or Applicant appears to have engaged in the Practice of Architecture [~~acted~~] in a manner that was Reckless, Grossly [~~reckless, grossly~~] incompetent, or dishonest, the matter may not be docketed at [~~presented to the Board or referred to~~] the State Office of Administrative Hearings for a formal hearing unless the evidence and information gathered during the investigation have been reviewed by a member of the Board or the Board's staff or a consultant who is registered as an Architect.

(b) The purpose of the review [~~described in subsection (a) of this section~~] shall be to confirm, prior to the commencement of formal disciplinary proceedings, that the respondent's professional conduct did not satisfy the requisite standard of care which should be applied by a reasonably prudent Architect under similar circumstances.

[~~(c) In order to act as a consultant for the purposes of subsection (a) of this section, a person must:~~]

[~~(1) have been actively registered as an Architect for at least five (5) years;~~]

[~~(2) have significant experience in the area(s) relevant to the issue(s) to be considered by the consultant; and~~]

~~[(3) not have been the subject of disciplinary action by the Board at any time.]~~

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 11, 2009.

TRD-200901784
Cathy L. Hendricks, RID
Executive Director
Texas Board of Architectural Examiners
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 305-8544

22 TAC §1.177, §1.178

The Texas Board of Architectural Examiners proposes amendments to §1.177, Administrative Penalty Schedule and §1.178, Reinstatement Following Suspension or Revocation of Chapter 1, Subchapter I, concerning Disciplinary Action.

The Texas Board of Architectural Examiners ("Board") is responsible for enforcing the Architects' Practice Act, Texas Occupations Code Annotated §§1051.001 - 1051.701 (West 2004 & Supp. 2008). Upon a finding that disciplinary action is warranted the Board is permitted by statute to impose administrative penalties as well as suspend or revoke the certificate of registration of a registered architect. Id., §1051.451, §1051.751. In conjunction with this authority the Board is required by statute to adopt an administrative penalty schedule and may reinstate a certificate of registration which has been suspended or revoked. Id., §1051.403, §1051.452(c).

The Board proposes changers to the present administrative penalty schedule for violations of the Architects' Practice Act as set forth in §1.177 and to amend §1.178. The proposed changes to §1.178 will implement statutory language which permits the board to assess "all fees and costs incurred by the Board as the result of any proceeding that led to the denial, revocation or suspension [of the certificate of registration]." Texas Occupations Code Annotated §1051.403(1) (West 2004 & Supp. 2008).

The newly stated purpose of the penalty schedule found in §1.177 is to "guide the Board's assessment of an appropriate administrative penalty." The Texas Board of Architectural Examiners recognizes that uniformity in the application of a penalty schedule is necessary to ensure that similarly situated individuals are treated in a consistent manner and to thereby avoid even the appearance of unbridled agency discretion.

Equally important, however, is the Board's recognition that each case must be evaluated based upon the unique facts and the underlying equities of any given situation. In order to treat similarly situated individuals in a consistent manner the proposed rule incorporates concrete criteria and finite ranges of penalty in conjunction with a recognition that the regulatory criteria are to "guide the Board's assessment" rather than compel the imposition of a specific administrative penalty.

The administrative penalty schedule presently classifies violation(s) as "minor", "moderate" or "major." The proposed amendments would continue this classification system, add clarifying language and allow consideration of relevant factors which are not expressly set forth in the rule as it now exists but which the Board feels to be significant for determining an appropriate administrative penalty for each of the three classifications. Making these criteria express will give notice of those factors upon which the Board will place primary reliance.

The proposed amendments will increase the penalties which the Board may impose within each of the three classifications and expand the type of legally recognized harm which the Board may consider beyond simply "economic damage to property" to include the broader concept of "monetary loss to the project owner or other involved persons and entities" as well as other "economic injury."

The resulting administrative penalty associated with each of the three classifications has been increased. A minor violation may result in an administrative penalty of not more than $500.00. Previously the amount was $350.00. A moderate violation may result in an administrative penalty of not more than $2,000.00. Previously a moderate violation was subject to a penalty of between $351.00 and $1,200.00. A major violation may not exceed $5,000.00. Many of the criteria, as well as the maximum administrative penalty amount of $5,000.00, reflect statutory language contained at Texas Occupations Code Annotated §§1051.451 - 1051.452. These changes reflect enforcement experience encountered by the agency and the need to consider unique circumstances of each case while also serving as a general and specific deterrent to violations. Enforcement history has shown that effective deterrent is as essential to the Board's mission of ensuring a safe built environment as is aggressive investigation and prosecution of legal violations.

The proposed rules would, for three defined types of statutory violations, implement specific penalty ranges for the violations. The Board has determined that these violations present significant risk of injury and are so fundamental to the practice of architecture that they should presumptively be classified as 'major' violations.

The first violation involves the situation in which construction documents for nonexempt work are prepared and/or issued by persons who are not architects.

The second specific violation addressed by the proposed rules changes involves the signing and sealing of construction documents by an architect who is under a duty to exercise supervision and control over the work of a nonregistrant. "Supervision and Control" is defined in 22 TAC §1.5(65). The Board will evaluate evidence, including correspondence, to ensure that the supervision and control exercised by a registrant over the work of a nonregistrant is active, affirmative and superior rather than passive and subservient during the entire design process.

The third violation which will be presumed to be a 'major' violation for calculation of an administrative penalty results from failure to respond to a Board inquiry made under authority of 22 TAC §1.171.

The Board has determined that the health, safety and welfare of citizens is always put at an unacceptable risk of harm when persons who lack the education, training and experience of registered architects engage in the practice of architecture and it therefore possesses a compelling interest in deterring and sanctioning the unauthorized practice of architecture. This interest is furthered by a presumption that unauthorized practice is always a 'major' violation.

The Board has, within the proposed rule change, made it clear that each individual document and separately numbered section

of the architectural specifications prepared by a nonregistrant will be treated as a separate violation. As an example, an unregistered person who prepares and issues five (5) sheets of architectural plans in violation of the Architects' Practice Act will be considered to have engaged in five (5) separate legal violations each of which may be classified as a "major" administrative penalty, i.e., warranting a penalty up to $5,000.00 or, under these facts, $25,000 in the aggregate.

It is the expectation of the Board that significant deterrent value will be recognized from the combined effect of the proposed changes to §1.177 and that acquisition of information in response to Board inquiry made under authority of §1.177 will become more efficient and effective for the prompt investigation of cases.

The Board has also determined that the failure of a registrant to actively and affirmatively exercise "supervision and control" over the work of a nonregistrant when such a duty exists likewise presents unacceptable risks of harm and, for the same policy reasons as detailed above, has classified such a failure as a "major" violation. Similarly, each sheet of architectural plans and separately numbered section of the specifications will be deemed separate violations.

The efficient investigative functions of the Board requires that accurate information be provided when sought under authority of 22 TAC §1.171. The proposed rule change would place a failure to timely respond within the administrative penalty schedule as a "moderate" violation if the response is received within 60 days of receipt of the inquiry or, to put it differently, if the response is no more than 30 days late. However, any delay beyond 30 days is considered a "major" violation with each 15 day period constituting a separate penalty.

The proposed changes to the administrative penalty schedule would add content which strengthens the enforcement mechanisms available to TBAE and gives more precise notice to stakeholders and other interested parties of which criteria will be evaluated in order to (a) classify a violation as "minor", "moderate" or "major" and (b) the consequences of such classification.

The Board believes that there will be substantial deterrent effect resulting from adoption of the proposed changes to §1.177 attributable to increased compliance by those under the agency's jurisdiction.

The Board also proposes to change §1.178 which addresses the reinstatement of a registrant after his or her certificate of registration has been suspended or revoked. The proposed change is based upon the statutory language found in Texas Occupations Code Annotated §1051.403(1) (West 2004 & Supp. 2008) (Board may assess "all fees and costs incurred by the Board as the result of any proceeding that led to the denial, revocation or suspension [of the certificate of registration].") The proposed change makes clear that the Board, as a condition of issuance or reissuance of a certificate of registration, may require that attorney's fees and other costs directly associated with a prior contested case proceeding resulting in "the denial, revocation or suspension" of a registration be paid to the agency.

Those who seek to have their certificates of registration reinstated will be now be aware that the privilege of reinstatement will require, among other things reimbursement to the agency. This is not a rule which seeks to impose attorney's fees and related costs by the prevailing party but, rather, a condition precedent to the reinstatement of a certificate of registration which was suspended or revoked through contested case proceedings.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five-year period the amended rules are in effect, there will be no fiscal implications. While penalties may be increased to serve the desired deterrent purposes the number of violations will decrease. There is no anticipated fiscal impact to state or local governments.

Ms. Hendricks also has determined that for the first five-year period the amended rules are in effect the public benefits expected as a result of the amended rule are to cause greater compliance by those within the jurisdiction of the agency and to increase efficiencies in acquiring information necessary for thorough investigation and prosecution of enforcement matters. The rules will not have an impact on small businesses.

There will not be a change in the cost to persons required to comply with the sections except that those individuals who have had their certificates of registration revoked or suspended by previous contested case proceedings will be required to pay the fees and costs arising out of those proceedings.

Comments may be submitted to Cathy L. Hendricks, RID, Executive Director, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, TX 78711-2337.

The amendments are proposed pursuant to the Architects' Practice Act, Texas Occupations Code Annotated §§1051.001 - 1051.701.

The proposed amendments do not affect any other statutes.

§1.177. Administrative Penalty Schedule.

If the Board determines that an administrative penalty is the appropriate sanction for a violation of any of the statutory provisions or rules enforced by the Board, the following guidelines shall be applied to guide the Board's assessment of an appropriate [~~determine the amount of the~~] administrative penalty:

(1) The Board shall consider the following factors to determine whether the violation is minor, moderate, or major:

(A) Seriousness of misconduct and efforts to correct the ground for sanction:

(i) Minor--the respondent has demonstrated that he/she was unaware that his/her conduct was prohibited and unaware that the conduct was reasonably likely to cause the harm that resulted from the conduct or the respondent has demonstrated that there were significant extenuating circumstances or intervening causes for the violation; and the respondent has demonstrated that he/she provided a satisfactory remedy that alleviated or eliminated any harm or threat to the health or safety of the public.

(ii) Moderate--the violation shows that the respondent knowingly disregarded a standard or practice normally followed by a reasonably prudent person under the same or similar circumstances. A violation of a Board order shall constitute, at a minimum, a moderate violation.

(iii) Major--the conduct [~~this is a violation of an order of the Board or a violation that~~] demonstrates gross negligence or recklessness or resulted in a threat to the health or safety of the public and the respondent, after being notified of the alleged violation intentionally refused or failed to take prompt and remedial action. [~~; or the conduct posed a serious threat to the health or safety of the public; or, after being notified of the alleged violation and the harm or threat to the health or safety of the public, the respondent intentionally refused or failed to provide an available remedy to alleviate or eliminate the harm or threat to the health or safety of the public.~~]

(B) Economic harm: [damage to property:]

(i) Minor--there was no apparent economic damage to property or monetary loss to the project owner or other involved persons and entities.

(ii) Moderate--economic damage to property or monetary harm to other persons or entities did not exceed $1,000, or damage exceeding $1,000 was reasonably unforeseeable.

(iii) Major--economic damage to property or economic injury to other persons or entities exceeded $1,000.

(C) Sanction history:

(i) Minor--[this is the first time an administrative penalty or other sanction has been imposed against the respondent, and] the respondent has not previously received a written warning, [or] advisory notice or been subject to other enforcement proceedings from the Board [regarding the law's restrictions which was directed to the respondent].

(ii) Moderate--[this is the second time an administrative penalty or other sanction has been imposed against the respondent; or] the respondent was previously [was] subject to an order of the Board or other enforcement proceedings which resulted in a finding of a violation of the laws or rules over which the TBAE has jurisdiction. [through which the Board could have imposed an administrative penalty; or the respondent previously received a written warning or advisory notice from the Board regarding the law's restrictions which was directed to the respondent.]

(iii) Major--the respondent has received at least two prior written notices or has been subject to two disciplinary actions for violation of the rules and laws over which the TBAE has jurisdiction. [this is at least the third time an administrative penalty or other sanction has been imposed against the respondent or the respondent has been subject to an order of the Board through which the Board could have imposed an administrative penalty.]

(2) After determining whether the violation is minor, moderate, or major, the Board shall impose an administrative penalty as follows:

(A) Minor violations--if the violation is minor in every category described in paragraph [subsection] (1) of this section, an administrative penalty of not more than $500 [$350] shall be imposed.

(B) Moderate violations--if the violation is moderate in any category described in paragraph [subsection] (1) of this section, an administrative penalty of not [less than $351 and not] more than $2,000 [$1,200] shall be imposed.

(C) Major violations--if the violation is major in any category described in paragraph [subsection] (1) of this section or if the Board determines that the facts of the case indicate a higher penalty is necessary in order to deter similar misconduct in the future, an administrative penalty of [not less than $1,201 and] not more than $5,000 shall be imposed.

(D) Because of the threat to human health, safety and well-being which necessarily arises out of a nonregistrant preparing and issuing architectural plans and specifications the Board possesses a compelling interest in ensuring that architectural plans and specifications are prepared and issued only by a registered architect or by a person who is working under the active and documented Supervision and Control of a registered Architect when required by law. If the evidence establishes that Architectural plans and specifications for a project that is not exempt from the Architects' Practice Act were prepared by a person who is not registered to engage in the Practice of Architecture and was not working under the active and documented Supervision and Control of an Architect the violation shall be presumed to be a major violation and each sheet of architectural plans or separate section of the specifications shall be considered a separate violation for purposes of calculating and imposing administrative penalties.

(E) Because of the threat to human health, safety and welfare which necessarily arises from nonregistrants engaging in the Practice of Architecture the Board has a compelling interest in ensuring that only those persons who are registered to engage in the Practice of Architecture or whose work is conducted under the active and documented Supervision and Control of a registered architect engage in the Practice of Architecture. If the evidence establishes that an Architect has sealed architectural plans and separately numbered section of the specifications without having exercised active and documented Supervision and Control of the Nonregistrants's activities the Board shall presume such conduct by the sealing architect to be a major violation and each sheet of architectural plans or separate section of the specifications shall be considered a separate violation for purposes of calculating and imposing administrative penalties.

(F) The agency is responsible for protecting the public's health, safety and welfare by interpreting and enforcing the Architects' Practice Act. In fulfilling this statutory duty the Board depends upon, and expects, that registrants and Applicants will provide complete, truthful and accurate information to the Board upon request. This prompt and accurate provision of information is essential to protecting the public's health, safety and welfare.

(G) An Architect, Candidate, or Applicant who fails, without good cause, to provide information to the Board under provision of §1.171 of this subchapter (relating to Responding to Request for Information) is presumed to be interfering with and preventing the Board from fulfilling its responsibilities. For these reasons a violation of §1.171 of this subchapter shall be considered a moderate violation if a complete response is received within 30 days after receipt of the Board's written inquiry. Any further delay constitutes a major violation. Each 15 day delay thereafter shall be considered a separate violation of these rules.

(3) In order to determine the appropriate amount in a penalty range described in paragraph [subsection] (2) of this section, the Board shall consider the factors described in paragraph [subsection] (1) of this section.

(4) If the facts of a case are unique or unusual, the Board may suspend the guidelines described in this section.

§1.178. Reinstatement Following Suspension or Revocation.

If the Board suspends or revokes a person's certificate of registration as a result of disciplinary action, the person may not reinstate the certificate of registration or obtain a new certificate of registration unless the person:

(1) demonstrates that he/she has taken reasonable steps to correct the misconduct or deficiency that led to the suspension or revocation;

(2) demonstrates that reinstatement or issuance of the certificate of registration is not inconsistent with the Board's duty to protect the public by ensuring that registrants are duly qualified and fit for registration; and

(3) pays all fees and costs incurred by the Board as a result of any proceeding that led to the suspension or revocation. This shall include, but not be limited to, attorney's fees and all costs associated with the need to prosecute a Contested Case proceeding at the State Office of Administrative Hearings and subsequent activities including administrative and judicial appeals.

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 11, 2009.

TRD-200901785
Cathy L. Hendricks, RID
Executive Director
Texas Board of Architectural Examiners
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 305-8544

CHAPTER 3. LANDSCAPE ARCHITECTS

SUBCHAPTER C. EXAMINATION

22 TAC §3.43

The Texas Board of Architectural Examiners proposes an amendment to §3.43, Reexamination of Chapter 3, Subchapter I, concerning Examination. Under the rule, a candidate must pass all sections of the registration examination within a 5-year which begins upon passage of a section of the examination. The amendment allows a candidate to obtain an extension of up to 6 months on the 5-year deadline if the candidate becomes a parent through the birth or adoption of a child. The amendment also deletes an obsolete "grandfather" provision that preserved pre-existing grades when the rule was initially adopted.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five-year period the amended rule is in effect, there will be no fiscal impact on state or local governments.

Ms. Hendricks also has determined that for the first five-year period the amended rule is in effect the public benefits expected as a result of the amended rule are as follows: candidates who become parents during the examination period will not forfeit passing grades due to the disruptions and distractions of parenting. The amendment would encourage parents to continue the examination process and become registered. The rule will have no impact on small business and therefore no alternative impact statement is required.

There will not be a change in the cost to persons required to comply with the section.

There may be a positive fiscal impact upon certain persons required to comply with the section to the extent they would otherwise forfeit passing grades and would incur costs to re-take sections of the examination.

Comments may be submitted to Cathy L. Hendricks, RID, Executive Director, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, TX 78711-2337.

The amendment is proposed pursuant to §1051.202, Texas Occupations Code, which grants the board authority to adopt rules to administer Chapters 1051 and 1052, including rules relating to the regulation of the practice of landscape architecture. The amendment is also adopted pursuant to §1052.153, Texas Occupations Code, which requires the board to prescribe the scope of the examination and the method of procedure for the examination.

The proposed amendment does not affect any other statutes.

§3.43. Reexamination.

(a) A [~~Effective January 1, 2002, a~~] Candidate's passing grade for any section of the examination is valid for five (5) years. Each Candidate [~~who, after December 31, 2001, is approved for examination by the Board~~] must pass all sections of the examination within five (5) years after the date the Candidate passes a section of the examination. A Candidate [~~approved for examination by the Board after December 31, 2001,~~] who does not pass all sections of the examination within five (5) years after passing a section of the examination will forfeit credit for the section of the examination passed and must pass that section of the examination again.

(b) The Board may grant one extension to the 5-year period for completion of the examination if a Candidate is unable to pass all sections of the examination within that period because of the adoption or birth of a child within that 5-year period. A Candidate may request one extension of up to 6 months by filing a written application with the Board together with any corroborating evidence immediately after the Candidate learns of the impending adoption or birth. [~~Each Candidate approved for examination by the Board prior to January 1, 2002, must pass all sections of the examination no later than December 31, 2006. A Candidate approved for examination by the Board prior to January 1, 2002, who does not pass all sections of the examination by December 31, 2006, will forfeit credit for each section of the examination the candidate passed before January 1, 2002, and must pass each of those sections again. The Candidate's passing grade for any section of the examination taken after January 1, 2002, is valid for five (5) years.~~]

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

Filed with the Office of the Secretary of State on May 11, 2009.

TRD-200901799
Cathy L. Hendricks
Executive Director, RID
Texas Board of Architectural Examiners
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 305-8544

SUBCHAPTER I. DISCIPLINARY ACTION

22 TAC §3.161, §3.162

The Texas Board of Architectural Examiners proposes amendments to §3.161, Purpose and Scope and §3.162, Computation of Time of Chapter 3, Subchapter I, concerning Disciplinary Action.

The proposed changes to §3.161 will have no substantive or procedural effect upon Board enforcement actions or persons within the jurisdiction of the Texas Board of Architectural Examiners but are intended merely to simplify and modernize existing regulatory language.

The proposed changes to §3.162 will have no substantive or procedural effect upon Board enforcement actions except to create a rebuttable presumption that materials which have been sent by the Board to a person's last known address have been received by that person, or his or her agent, not less than eight (8) days after the materials have been properly deposited into the United States mail, first class postage paid. This presumption allows increased use by first class mail and conforms the agency's practice to that utilized at the State Office of Administrative Hearings which permits the use of first class mail in serving documents.

See, 1 TAC §155.103. This change is expected to result in cost savings to the agency without the loss of legal rights to those persons with whom the agency is seeking to communicate. This change is also expected to make correspondence more effective because many times individuals will refuse to sign for a piece of mail which is sent by certified mail and will not retrieve it from the Post Office if delivery was attempted when the person was not present.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five-year period the amended rules are in effect, there will be no fiscal consequences to state or local governments upon implementation of either rule apart from the cost savings which will result from increased use of "regular" mail.

Ms. Hendricks also has determined that for the first five-year period the amended rules are in effect the public benefits expected as a result of the amended rule are as follows:

The simplification of language as proposed for §3.161 will result in greater comprehension of the rule's text. The proposed change will not have an impact on small businesses and there will be no change in cost to persons required to comply with this rule.

The proposed changes to §3.162 will benefit the public by decreasing agency mailing costs and making receipt of documents more certain than by exclusive reliance upon certified mail. The proposed change will not have an impact on small businesses and there will be no change in cost to persons required to comply with this rule.

Comments may be submitted to Cathy L. Hendricks, RID, Executive Director, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, TX 78711-2337.

The amendments are proposed pursuant to the Architects' Practice Act, Texas Occupations Code Annotated, §§1051.001 - 1051.701 and the Landscape Architects' Practice Act, Id., §§1052.003 - 1052.252 which authorize the Texas Board of Architectural Examiners to promulgate rules relating to the practice of landscape architecture and enforcement proceedings arising out of such regulation.

The proposed amendments do not affect any other statutes.

§3.161. Purpose and Scope.

This chapter shall provide a system of procedures for the initiation, investigation, prosecution, hearing and resolution of disciplinary matters and allegations involving persons who are subject to the jurisdiction of the Texas Board of Architectural Examiners.

[~~(a) Unless specifically indicated in the Rules and Regulations of the Board, this subchapter governs the procedure followed by the Board in a Contested Case against a Landscape Architect, in the informal disposition of a Contested Case against a Landscape Architect, or in an informal conference with a Landscape Architect. Unless specifically indicated, the Landscape Architects' Registration Law, the Administrative Procedure Act, and the Rules of Practice and Procedure of the State Office of Administrative Hearings, as appropriate, also govern the procedure followed by the Board in a Contested Case against a Landscape Architect.~~]

[~~(b) The Landscape Architects' Registration Law and Sections 3.162, 3.163, 3.164, 3.167, 3.172, and 3.173 of this subchapter govern disciplinary action against a person who is not a Landscape Architect. If the person is an Applicant, Section 3.151 of Subchapter H also governs disciplinary action against him/her.~~]

§3.162. Computation of Time.

(a) (No change.)

(b) A person shall be presumed to have received all pleadings and other notices upon a showing that such materials were sent to the respondent's last known address; the materials were sent by United States mail, first class postage prepaid; a return address was affixed to the exterior of the mailing materials and the materials were not returned; and in excess of seven days has elapsed from placement of the materials into the United States mail. [~~For purposes of this subchapter, a Landscape Architect is presumed to have received a notice from the Board on the fifth day after the date the Board sent the notice to the Landscape Architect's current address of record via certified mail, return receipt requested.~~]

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 11, 2009.

TRD-200901786
Cathy L. Hendricks, RID
Executive Director
Texas Board of Architectural Examiners
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 305-8544

22 TAC §3.163

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

The Texas Board of Architectural Examiners proposes the repeal of §3.163, Ex Parte Communication of Chapter 3, Subchapter I, concerning Disciplinary Action.

This rule is redundant of prohibitions already found at §2001.061 of the Texas Government Code. This section will be reserved for expansion.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five-year period after the rule is repealed there will be no fiscal implications to state or local governments.

Ms. Hendricks also has determined that for the first five-year period after the repeal of §3.163 the public benefits expected as a result of the repealed rule will be to minimize regulations which merely restate existing law.

There will not be a change in the cost to persons required to comply with the section.

Comments may be submitted to Cathy L. Hendricks, RID, Executive Director, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, TX 78711-2337.

The repeal is proposed under authority of Texas Occupations Code Annotated, §1051.202 which enables the Texas Board of Architectural Examiners to adopt reasonable rules in order to administer or enforce the laws governing the practice of architecture, landscape architecture and interior design.

The proposed repeal does not affect any other statutes.

§3.163. Ex Parte Communication.

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 11, 2009.

TRD-200901787

Cathy L. Hendricks, RID

Executive Director

Texas Board of Architectural Examiners

Earliest possible date of adoption: June 21, 2009

For further information, please call: (512) 305-8544

22 TAC §3.164, §3.165

The Texas Board of Architectural Examiners proposes amendments to §3.164, Initiating a Contested Case, and §3.165, Informal Disposition of a Contested Case of Chapter 3, Subchapter I, concerning Disciplinary Action.

The proposed changes to §3.164 remove the requirement that a notarized complaint is required in order to commence contested case proceedings and investigations. In order to make the process simpler and more accessible a member of the public may now file a complaint without the need to have it notarized. The other proposed change would remove language which permits the Board to refuse to disclose certain information. This change brings the Board rule into alignment with the Texas Public Information Act and does not waive any rights to information as permitted by TPIA.

The proposed changes to §3.165 simplify the overall language and would make two modifications to the present rule. Subsection (e) permits the agency to move for entry of a default judgment in those instances when a respondent, after receiving legally required notice of the docketing of a contested case proceeding alleging a violation of any law or rule over which TBAE possesses jurisdiction at the State Office of Administrative Hearings (SOAH), fails to file a written answer or other written response with SOAH. Default is also permitted if a Respondent fails to appear at a scheduled hearing of which he or she has received legally required notice.

It has been the experience of enforcement staff that individuals who, after receiving notice of the commencement of contested case proceedings, choose not to make any written reply do not generally seek or otherwise avail themselves of the due process and evidentiary protections to which they are entitled. Similarly, a person who fails after legally required notice to appear for a contested case hearing has knowingly waived due process rights. Permitting default fault under such circumstances increases efficiency in the prosecution of cases and rendition of a final agency ruling without sacrificing or prejudicing any legal rights to which respondents are entitled.

The proposed changes to §3.165(f) develop and specify those factors which the Board and the Executive Director are to consider in fixing an administrative penalty pursuant to Texas Occupations Code Annotated, §1051.452. However, rather than merely tracking the statutory language the Board proposes to more exactly detail the relevant factors which it and the Executive Director will evaluate and includes consideration of the public welfare, evaluating any harm resulting from sanctioned conduct (not simply 'economic harm'), taking into account both the specific and general deterrent value of a penalty and whether or not the Respondent has taken prompt remedial action. These changes provide greater notice to those who are subject to the Board's jurisdiction of the criteria which will be used to determine an administrative penalty and serve to prevent the Executive Director or the Board from the unbridled exercise of authority.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five-year period the amended rules are in effect there will be no fiscal implications to state or local governments.

Ms. Hendricks also has determined that for the first five-year period the amended rules are in effect the public benefits which will be realized are more efficient resolution of contested cases without any loss of due process rights and more certain criteria upon which administrative penalties may be assessed and evaluated. The rules will not have any impact on small businesses and there will be no change in cost to those persons required to comply with the proposed changes.

Comments may be submitted to Cathy L. Hendricks, RID, Executive Director, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, TX 78711-2337.

The amendments are proposed pursuant to Texas Occupations Code Annotated, §1051.202 which authorizes the Board to adopt reasonable rules to administer and enforce Subtitle B of the Architects' Practice Act including the practice of architecture, landscape architecture and interior design.

The proposed amendments do not affect any other statutes.

§3.164. Initiating a Contested Case.

(a) The Board may initiate a Contested Case proceeding in response to:

(1) a [~~notarized~~] written complaint filed by a member of the public;

(2) information provided in a registration application or renewal form; or

(3) other information known to the Board which establishes probable cause.

(b) The Board shall not act on a written complaint filed by a member of the public unless the allegations in the complaint[~~, if proven,~~] describe conduct that violates a rule or statutory provision enforceable by the Board.

(c) (No change.)

[~~(d) The Board may refuse to disclose the identity of a person who furnishes information regarding an alleged violation of a rule or statutory provision enforceable by the Board.~~]

(d) [~~(e)~~] The Board shall not act on a written complaint filed by a member of the public if the complaint is filed later than ten (10) years after the date of the act(s) or omission(s) described in the complaint.

§3.165. Informal Disposition of a Contested Case.

(a) A Contested Case may be resolved informally at any time [~~after the Contested Case is initiated by the Board~~].

(b) If the respondent agrees in writing to a settlement agreement [~~arising out of the proposed informal disposition of a Contested Case~~] and the Executive Director executes the written settlement agreement, the settlement agreement shall be presented to the Board for approval or rejection. The settlement agreement must include written findings of fact and conclusions of law and may be in the form of a consent order, letter of reprimand, or other format approved by the Executive Director.

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

(e) An informal disposition may be made of a Contested Case by default. Default occurs whenever a respondent neither answers nor makes other written response to the filing of a Complaint or Petition at the State Office of Administrative Hearings alleging a violation of any law or Rule over which TBAE possesses jurisdiction. Default also occurs if the respondent fails to appear at a scheduled and properly noticed hearing to be conducted by the State Office of Administrative Hearings. [~~Default shall occur when a respondent neither responds in writing nor appears at a scheduled hearing related to a disciplinary matter.~~]

(f) The Board and the Executive Director shall take into account the following factors when considering a proposed settlement agreement:

[~~(1) the seriousness of the conduct that is the source of the allegation(s) against the respondent, including consideration of:~~]

(1) [~~(A)~~] the nature, circumstances, extent, and gravity of any relevant act or omission; [~~, and~~]

(2) [~~(B)~~] the hazard or potential hazard to the health, safety or welfare [~~health or safety~~] of the public;

(3) [~~(2)~~] the economic harm resulting from the conduct [~~damage to property caused by the conduct~~];

(4) [~~(3)~~] the respondent's history concerning any previous ground for sanction;

(5) [~~(4)~~] the severity of penalty necessary to effectuate specific and general deterrence [~~deter a future ground for sanction~~];

(6) [~~(5)~~] any effort by the respondent to take prompt remedial action; [~~to correct the ground for sanction~~];

(7) [~~(6)~~] the economic benefit gained by the respondent as a result of the conduct; [~~and~~]

(8) [~~(7)~~] any other matter justice may require; and

(9) [~~(8)~~] When considering a referral from the Texas Department of Licensing and Regulation, in addition to the factors described in this subsection, the Board shall consider the actual number of days that the submission was late.

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 11, 2009.

TRD-200901788
Cathy L. Hendricks, RID
Executive Director
Texas Board of Architectural Examiners
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 305-8544

22 TAC §3.167

The Texas Board of Architectural Examiners proposes amendments to §3.167, Publication of Disciplinary Action of Chapter 3, Subchapter I, concerning Disciplinary Action.

The proposed changes to §3.167 is in order to obtain greater clarification concerning the Board's directive that persons who have "received" disciplinary action will have their names published. While this has been the Board's practice it was felt that present language, which requires persons who are "the subject" of disciplinary proceedings to have their names publicized, is overly broad.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five-year period the amended rule is in effect there will be no fiscal implications to state or local governments.

Ms. Hendricks also has determined that for the first five-year period the amended rule is in effect the public benefit will result from a clearer understanding of the rule. The rule will not have any impact on small businesses and there will be no change in cost to those persons required to comply with the proposed changes.

Comments may be submitted to Cathy L. Hendricks, RID, Executive Director, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, TX 78711-2337.

The amendments are proposed pursuant to Texas Occupations Code Annotated, §1051.202 which authorizes the Board to adopt reasonable rules to administer and enforce Subtitle B of the Architects' Practice Act including the practice of architecture, landscape architecture and interior design.

The proposed amendments do not affect any other statutes.

§3.167. Publication of Disciplinary Action.

(a) The Board shall cause to be published in the Board's official newsletter, on the Board's Web site, in a newspaper, or in another publication the name of any person who has received [~~is the subject of~~] disciplinary action by the Board. The publication may include a narrative summary of the facts giving rise to disciplinary action and a description of the action taken.

(b) (No change.)

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

Filed with the Office of the Secretary of State on May 11, 2009.

TRD-200901789
Cathy L. Hendricks, RID
Executive Director
Texas Board of Architectural Examiners
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 305-8544

22 TAC §§3.170 - 3.175

The Texas Board of Architectural Examiners proposes amendments to §3.170, Referrals from the Texas Department of Licensing and Regulation; §3.171, Responding to Request for Information; §3.172, Continuing Violation; §3.173, Violation By One Not a Landscape Architect; §3.174, Complaint Process, and §3.175, Evaluation of Evidence by Expert of Chapter 3, Subchapter I, concerning Disciplinary Action.

Section 3.170 requires Landscape Architects to submit certain plans and specifications to the Texas Department of Licensing and Regulation for accessibility review not later than the fifth day after issuance. Architectural Barriers Act, Texas Government Code Annotated §469.101. If a landscape architect fails to do so, the TDLR reports the legal violation to the Texas Board of Architectural Examiners. Id., §469.101. The Texas Board of

Architectural Examiners will, upon confirmation of a violation, take appropriate disciplinary action in order to further the policy of this state which is to eliminate, to the extent possible, unnecessary barriers encountered by persons with disabilities whose ability to achieve maximum personal independence is needlessly restricted. Texas Occupations Code Annotated §1051.702(2) (West 2005 & Supp. 2008).

The Board proposes minor changes to §3.170 which result in greater certainty regarding the enforcement action which will be taken by directing the Executive Director to issue a written warning upon a first violation and requiring the imposition of an administrative penalty for all subsequent violations.

Section 3.171 requires certain persons to respond to a request for information from the Board. It is the mission of the Texas board of Architectural examiners to ensure a safe built environment for Texas. In order to effectively and efficiently investigate and prosecute instances of statutory or regulatory violation it is essential that the Board be able to acquire information expeditiously; the use of investigatory letters as permitted by §3.171 has proven effective in these efforts.

The Board proposes to expand the class of persons who are responsible for responding to letters of inquiry to include candidates and applicants as well as registrants. These persons are often in a position to provide vital information concerning matters within the Board's jurisdictions and relevant to enforcement proceedings. In proposed change will, if adopted, permit agency staff to request that a registrant, candidate or applicant provide records and documents in response to a request.

The proposed changes permit a failure to respond to be treated as a distinct disciplinary infraction from the underlying matter being investigated, and, in order to stress the importance of a candidate's, applicant's or registrant's cooperation with a Board inquiry, state that a failure to respond within 30 days may constitute grounds for the Board to impose suspension or revocation of a registration.

Section 3.172 will be amended to include a new subsection (b) which expressly classifies each sheet of plans and each separate section of specifications which are prepared, modified or issued in violation of applicable statutory and regulatory requirements to constitute discreet and independent legal violations each of which provides a basis for the imposition of an administrative penalty. The Texas Board of Architectural Examiners proposes this addition in recognition of the fact that plans and specifications which are issued in violation of law present an unacceptable risk of significant bodily harm and economic injury to the citizens of Texas. It is anticipated that registrants and nonregistrants will be deterred from issuing plans and specifications in violation of the law.

The amendment to §3.173 bring the rule into conformity with Subtitle B of the Texas Occupations Code as well as the Administrative Procedure Act (Title 10, Texas Government Code) by deleting references to Section 8 of the Landscape Architects' Registration Law (Art. 294a, Vernon's Texas Civil Statutes). The rule implements the practice of the Texas Board of Architectural Examiners to refer all contested case hearings to the State Office of Administrative Hearings (SOAH) for issuance of a proposal for decision regardless of whether the case involves a registrant or a nonregistrant. Because the Board no longer conducts contested case hearings, subsection (d)(3), (4) and (5) of the original rule are no longer necessary. In place of procedural rules governing a contested case hearings the proposed rules would set forth the procedural sets to be taken by the Executive Director once an investigation determined that a nonregistrant has engaged in a legal violation including methods of settlement and notification of rights to a hearing at SOAH. The proposed amendment will make it clear that a recommended settlement or other informal disposition presented to the Board by the Executive Director may, but need not be, approved by the Board. This is consistent with well established law that only a Board may act on behalf of the agency in such instances.

The proposed amendment to §3.174 permits the agency to provide a copy of its policies and procedures to a complainant and/or a respondent by providing information which will allow review of the policies on the internet or, if requested by a party, by mailing a copy of the policies and procedures upon request. The changes to §3.174 also establish "probable cause" as the investigatory standard required to proceed with investigation and settlement/prosecution of a disciplinary matter. This standard has a clear legal definition and is readily applicable to agency investigations. This does not, however, diminish the agency's responsibility to prove a case by the customary "preponderance of the evidence" standard when prosecuting cases through contested case proceedings before the State Office of Administrative Hearings. The final substantive change proposed for §3.174 authorizes, but does not require, the Executive Director to respond to a request for reconsideration if a complaint is dismissed because of lack of probable cause to continue the investigation and refer a matter for prosecution.

Section 3.175 requires that any case involving professional competency or honesty be evaluated by a landscape architect to ensure that professional standards applicable to the profession be objectively reviewed by a peer prior to the docketing of a case at the State Office of Administrative Hearings. The proposed amendment expands this to include 'candidate' along with registrants or applicants as persons whose conduct may be subject to peer review and strikes as unnecessary the entirety of subsection (c). The Board believes that while the qualifications of an expert are very important to valid and reliable case evaluation, there is no need to establish the thresholds and automatic disqualifications which presently exist.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five-year period the amended rules are in effect, there will be no fiscal implications to state or local governments.

Ms. Hendricks also has determined that for the first five-year period the amended rules are in effect the public benefits expected as a result of the amended rules are to cause greater compliance by those within the jurisdiction of the agency and to increase efficiencies in acquiring information necessary for thorough investigation and prosecution of enforcement matters. The rules will not have an impact on small businesses.

There will not be a change in the cost to persons required to comply with the sections.

Comments may be submitted to Cathy L. Hendricks, RID, Executive Director, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, TX 78711-2337.

The amendments are proposed pursuant to the Architects' Practice Act, Texas Occupations Code Annotated §1051.202 which authorizes the Board to adopt reasonable rules as necessary to administer and enforce the Architects' Practice Act, the landscape Architects' Practice Act and the Interior Designers' Title Act.

The proposed amendments do not affect any other statutes.

§3.170. Referrals from the Texas Department of Licensing and Regulation.

(a) If a Landscape Architect fails to submit any document to the Texas Department of Licensing and Regulation as required by the Architectural Barriers Act, or a rule or procedure enacted pursuant to the Architectural Barriers Act, the Board may take disciplinary action against the Landscape Architect.

(b) A Landscape Architect's failure to submit documents to the Texas Department of Licensing and Regulation as required by subsection (a) of this section shall, result in a written warning from the Executive Director. An administrative penalty shall be imposed upon second and subsequent failures. [If a Landscape Architect submits a document described by subsection (a) of this section no more than fifteen (15) days following the deadline for submission of the document, the Executive Director may issue an informal reprimand to the Landscape Architect. It shall not be necessary for the informal reprimand to be presented to or approved by the Board.]

(c) When considering potential disciplinary action, including imposition of an administrative penalty [pursuant to subsection (a) of this section], the Board and the Executive Director shall take into account the number of previous incidents involving a registrant's failure to timely submit documents to the Texas Department of Licensing and Regulation and the length of the delay in making the present submission. [the factors listed in Subsection 3.165(f) of this subchapter.]

§3.171. Responding to Request for Information.

A Landscape Architect, a Candidate or an Applicant shall answer an inquiry or produce requested documents to the Board concerning any matter under the jurisdiction of the Board within thirty (30) days after the date the person receives the inquiry. [Landscape Architect receives notice of the inquiry. A Landscape Architect's failure] Failure to respond within thirty (30) days may [to an inquiry concerning any matter under the jurisdiction of the Board shall] constitute a separate violation subject to disciplinary action by the Board up to and including suspension or revocation of a registration.

§3.172. Continuing Violation.

(a) Each day a violation of any statutory provision or rule enforced by the Board occurs or continues may be considered a separate violation subject to disciplinary action by the Board.

(b) Each sheet of landscape architectural plans and each separate section of the specifications which are prepared, modified or issued in violation of these rules or any laws over which the Board has jurisdiction shall each be considered an independent violation of applicable rules and laws.

§3.173. Violation By One Not a Landscape Architect.

(a) A person who is not a Landscape Architect who violates any of the laws or rules over which the Board has jurisdiction is [title or practice restrictions of the Landscape Architects' Registration Law may be] subject to any or all of the following:

(1) judicial proceedings for injunctive relief; [injunctive action; and/or]

(2) criminal prosecution in a court of appropriate jurisdiction;

(3) [(2)] imposition of an administrative penalty;

(4) issuance of a cease and desist order from the Board.

(b) In taking action against a person who is not a Landscape Architect, the Board may be represented by agency staff, the Texas Attorney General, by a county or district attorney, or by other counsel as necessary.

(c) The Executive Director may recommend and the Board may, after notice and an opportunity for hearing, impose an administrative penalty in the manner prescribed in Subchapter I of the Architects' Practice Act and otherwise as permitted by law and Board rules [Section 8 of the Landscape Architects' Registration Law.]

(d) A person charged with a violation may request a hearing to contest a proposed administrative penalty that has been recommended by the Executive Director:

(1) A request for a hearing must be received in the Board's office no later than the 20th day after the date the person receives notice that the Executive Director has recommended the imposition of an administrative penalty.

(2) The hearing shall be conducted by an Administrative Law Judge at the State Office of Administrative Hearings under provision of the Administrative Procedure Act, Texas Government Code Annotated, Chapter 2001, and this subchapter. [The Board shall preside over a hearing held pursuant to this section. The Board shall send notice of the date, time, and location of the hearing to the person charged with a violation. During the hearing, the Board's staff and the person charged with a violation or the person's authorized representative shall have the opportunity to present testimony and other evidence and make legal arguments regarding the alleged violation and the amount of the proposed administrative penalty.]

[(3) During a hearing on a proposed administrative penalty, the Board shall have the authority and duty to:]

[(A) conduct a full, fair, and impartial hearing;]

[(B) take action to avoid unnecessary delay in the disposition of the proceeding;]

[(C) maintain order; and]

[(D) regulate the conduct of the parties and their authorized representatives, including the authority and duty to limit irrelevant, immaterial, and unduly repetitious testimony and reasonably limit the time for presentations.]

[(4) After a hearing on a proposed administrative penalty, the Board's chair shall issue a written order stating the Board's findings regarding the occurrence of a ground for sanction and the amount of the penalty, if any. In determining the amount of the penalty, if any, the Board shall consider the factors listed in Subsection 8(j) of the Landscape Architects' Registration Law.]

[(5) The Board may stop a hearing on a proposed administrative penalty in order to consult privately with legal counsel regarding any matter related to the hearing.]

(e) If a person charged with a violation agrees to a proposed administrative penalty recommended by the Executive Director, the Board may [shall] approve the Executive Director's recommendation and order payment of the proposed penalty without a hearing.

(f) Within thirty (30) days after the date on which the Board's order imposing an administrative penalty or taking other final agency action in a contested case proceeding becomes final, the person charged must pay the administrative penalty and otherwise ensure compliance with the terms set forth in the Board's Final Order [in full] or file a petition for judicial review with a district court in Travis County as provided by Subchapter G, Chapter 2001, Government Code.

(g) If the Executive Director determines that a Nonregistrant is violating, or has violated, a statutory provision or rule enforced by the Board, the Executive Director may:

(1) issue to the Nonregistrant a written notice describing the alleged violation and the Executive Director's intention [intent] to request that the Board impose administrative penalties and issue a cease and desist order. The written notice shall offer the Nonregistrant an opportunity to resolve all matters contained in the written notice by means of an agreed order or other instrument deemed appropriate by the Executive Director and of the Nonregistrant's ability to request an informal conference as well as of his or her right to request a hearing before an Administrative Law Judge at the State Office of Administrative Hearings; and [and offering an opportunity for a hearing regarding the alleged violation pursuant to Section 1051.504 of the Texas Occupations Code.]

[(2) request that the Board, after providing an opportunity for a hearing as described in subsection (g)(1) of this section, issue a cease and desist order to the Nonregistrant prohibiting the Nonregistrant's misconduct; and]

(2) [(3)] take any other action and impose any other penalty described in this section or permitted [provided] by [other] law.

§3.174. Complaint Process.

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

(c) Once a complaint has been received, the Board's enforcement staff shall:

[(1) provide the complainant and respondent with copies of the Board's policies and procedures regarding complaint investigation and resolution;]

(1) [(2)] conduct a preliminary evaluation of the complaint within thirty (30) days to determine:

(A) Jurisdiction: whether the complaint provides information sufficient to establish probable cause for the Board's staff to believe an actionable violation might have occurred;

(B) Disciplinary History: whether there has been previous enforcement activity involving the person against whom the complaint has been filed; and

(C) Priority Level: the seriousness of the complaint relative to other pending enforcement matters;

(2) provide the complainant and respondent with information which will permit review of the Board's policies and procedures from the Board's web site regarding complaint investigation and resolution. If the complainant or respondent requests a copy of the policies and procedures in written format a copy shall be mailed upon request.

(3) notify the complainant and respondent of the status of the investigation at least quarterly unless providing notice would jeopardize an investigation; and

(4) maintain a complaint file that includes at least:

(A) the name of the person who filed the complaint unless the complaint was filed anonymously;

(B) the date the complaint was received by the Board's staff;

(C) a description of the subject matter of the complaint;

(D) the name of each person contacted in relation to the complaint;

(E) a summary of the results of the review and investigation of the complaint; and

(F) an explanation for the reason the complaint was dismissed if the complaint was dismissed without action other than the investigation of the complaint.

(d) - (e) (No change.)

(f) If the Board's staff proceeds with an investigation, the staff shall:

(1) investigate the complaint according to the priority level assigned to the complaint;

(2) notify the complainant and respondent that, as a result of the staff's preliminary evaluation of the complaint, the staff has determined that the Board has jurisdiction over the allegations(s) described in the complaint and has decided to proceed with an investigation of the allegation(s) against the respondent; and

(3) gather sufficient information and evidence to determine whether there is probable cause to believe that a violation of a statutory provision or rule enforced by the Board has occurred.

(g) (No change.)

(h) If the information and evidence gathered during an investigation are insufficient to establish probable cause to believe [prove] that a violation has occurred, the Board's staff shall:

(1) dismiss the complaint;

(2) send notices to the complainant and respondent regarding the dismissal;

(3) if warranted, include in the respondent's notice a recommendation or warning regarding the respondent's future conduct; and

(4) if a complaint is determined to be unfounded, state in the respondent's notice that no violation was found.

(i) If the information and evidence gathered during an investigation are sufficient to establish probable cause to believe [prove] that a violation has occurred, the Board's staff shall:

(1) seek to resolve the matter pursuant to §§3.165, 3.166 [section 3.165] or [section] 3.173 of this subchapter; or

(2) issue a warning to the respondent if the violation is the respondent's first violation and:

(A) the respondent has not received a written warning or advisory notice from the Board [regarding the law's restrictions which was directed to the respondent];

(B) the respondent provided a satisfactory remedy which has [that alleviated or] eliminated any harm or threat to the health or safety of the public; and

(C) the guidelines for determining an appropriate penalty for the violation recommend an administrative penalty or a reprimand as an appropriate sanction for the violation.

(j) (No change.)

(k) If a complaint is dismissed, the complainant may submit to the Executive Director a written request for reconsideration. The written request must explain why the complaint should not have been dismissed. The Executive Director may, but is not required to, respond to the request for reconsideration.

§3.175. Evaluation of Evidence by Expert.

(a) If the Board's staff determines that a respondent who is a Registrant, Candidate, or Applicant appears to have engaged in the Practice of Landscape Architecture [~~acted~~] in a manner that was Reckless, Grossly [~~reckless, grossly~~] incompetent, or dishonest, the matter may not be docketed at [~~presented to the Board or referred to~~] the State Office of Administrative Hearings for a formal hearing unless the evidence and information gathered during the investigation have been reviewed by a member of the Board or the Board's staff or a consultant who is registered as a Landscape Architect.

(b) The purpose of the review [~~described in subsection (a) of this section~~] shall be to confirm, prior to the commencement of formal disciplinary proceedings, that the respondent's professional conduct did not satisfy the requisite standard of care which should be applied by a reasonably prudent Landscape Architect under similar circumstances.

[~~(c) In order to act as a consultant for the purposes of subsection (a) of this section, a person must:~~]

[~~(1) have been actively registered as a Landscape Architect for at least five (5) years;~~]

[~~(2) have significant experience in the area(s) relevant to the issue(s) to be considered by the consultant; and~~]

[~~(3) not have been the subject of disciplinary action by the Board at any time.~~]

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 11, 2009.

TRD-200901790
Cathy L. Hendricks, RID
Executive Director
Texas Board of Architectural Examiners
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 305-8544

22 TAC §3.177, §3.178

The Texas Board of Architectural Examiners proposes amendments to §3.177, Administrative Penalty Schedule, and §3.178, Reinstatement Following Suspension or Revocation, of Chapter 3, Subchapter I, concerning Disciplinary Action.

The Texas Board of Architectural Examiners ("Board") is responsible for enforcing the Architects' Practice Act, Texas Occupations Code Annotated §§1051.001 - 1051.701 (West 2004 & Supp. 2008) and the landscape Architects' Practice Act, Id., §§1052.003 - 1052.155. Upon a finding that disciplinary action is warranted the Board is permitted by statute to impose administrative penalties as well as suspend or revoke the certificate of registration of a registered landscape architect. Id., §§1051.451, 1051.751, 1052.251 - 1052.252. In conjunction with this authority the Board is required by statute to adopt an administrative penalty schedule and may reinstate a certificate of registration which has been suspended or revoked. Id., §1051.403, §1051.452(c).

The Board proposes changes to the present administrative penalty schedule for violations of the Landscape Architects' Practice Act as set forth in §3.177 and to amend §3.178. The proposed changes to §3.178 will implement statutory language which permits the board to assess "all fees and costs incurred by the Board as the result of any proceeding that led to the denial, revocation or suspension [of the certificate of registration]." Texas Occupations Code Annotated §1051.403(1) (West 2004 & Supp. 2008).

The newly stated purpose of the penalty schedule found in §3.177 is to "guide the Board's assessment of an appropriate administrative penalty." The Texas Board of Architectural Examiners recognizes that uniformity in the application of a penalty schedule is necessary to ensure that similar situated individuals are treated in a consistent manner and to thereby avoid even the appearance of unbridled agency discretion.

Equally important, however, is the Board's recognition that each case must be evaluated based upon the unique facts and the underlying equities of any given situation. In order to treat similarly situated individuals in a consistent manner the proposed rule incorporates concrete criteria and finite rages of penalty in conjunction with a recognition that the regulatory criteria are to "guide the Board's assessment" rather than compel the imposition of a specific administrative penalty.

The administrative penalty schedule presently classifies violation(s) as "minor", "moderate" or "major." The proposed amendments would continue this classification system, add clarifying language and allow consideration of relevant factors which are not expressly set forth in the rule as it now exists but which the Board feels to be significant for determining an appropriate administrative penalty for each of the three classifications. Making these criteria express will give notice of those factors upon which the Board will place primary reliance.

The proposed amendments will increase the penalties which the Board may impose within each of the three classifications and expand the type of legally recognized harm which the Board may consider beyond simply "economic damage to property" to include the broader concept of "monetary loss to the project owner or other involved persons and entities" as well as other "economic injury."

The resulting administrative penalty associated with each of the three classifications has been increased. A minor violation may result in an administrative penalty of not more than $500.00. Previously the amount was $350.00. A moderate violation may result in an administrative penalty of not more than $2,000.00. Previously a moderate violation was subject to a penalty of between $351.00 and $1,200.00. A major violation may not exceed $5,000.00. Many of the criteria, as well as the maximum administrative penalty amount of $5,000.00, reflect statutory language contained at Texas Occupations Code Annotated, §§1051.451 - 1051.452.

These changes reflect enforcement experience encountered by the agency and the need to consider unique circumstances of each case while also serving as a general and specific deterrent to violations. Enforcement history has shown that effective deterrent is as essential to the Board's mission of ensuring a safe built environment as is aggressive investigation and prosecution of legal violations.

The proposed rules would, for three defined types of statutory violations, implement specific penalty ranges for the violations. The Board has determined that these violations present significant risk of injury and are so fundamental to the practice of landscape architecture that they should presumptively be classified as 'major' violations.

The first violation involves the situation in which construction documents for nonexempt work are prepared and/or issued by persons who are not landscape architects.

The second specific violation addressed by the proposed rules changes involves the signing and sealing of construction documents by a landscape architect who is under a duty to exercise supervision and control over the work of a nonregistrant. "Supervision and Control" is defined in 22 TAC §3.5(54). The Board will evaluate evidence, including correspondence, to ensure that the supervision and control exercised by a registrant over the work of a nonregistrant is active, affirmative and superior rather than passive and subservient during the entire design process.

The third violation which will be presumed to be a 'major' violation for calculation of an administrative penalty results from failure to respond to a Board inquiry made under authority of 22 TAC §3.171.

The Board has determined that the risk to the health, safety and welfare of citizens is always put at an unacceptable risk of harm when persons who lack the education, training and experience of registered landscape architects engage in the practice of landscape architecture and it therefore possesses a compelling interest in deterring and sanctioning the unauthorized practice of landscape architecture. This interest is furthered by a presumption that unauthorized practice is always a 'major' violation.

The Board has, within the proposed rule change, made it clear that each individual document and separately numbered section of the landscape architectural specifications prepared by a nonregistrant will be treated as a separate violation. As an example, an unregistered person who prepares and issues five (5) sheets of landscape architectural plans in violation of the Landscape Architects' Practice Act will be considered to have engaged in five (5) separate legal violations each of which may be classified as a "major" administrative penalty, i.e., warranting a penalty up to $5,000.00 or, under these facts, $25,000 in the aggregate.

It is the expectation of the Board that significant deterrent value will be recognized from the combined effect of the proposed changes to §3.177 and that acquisition of information in response to Board inquiry made under authority of 22 TAC §3.171 will become more efficient and effective for the prompt investigation of cases.

The Board has also determined that the failure of a registrant to actively and affirmatively exercise "supervision and control" over the work of a nonregistrant when such a duty exists likewise presents unacceptable risks of harm and, for the same policy reasons as detailed above, has classified such a failure as a "major" violation. Similarly, each sheet of landscape architectural plans and separately numbered section of the specifications will be deemed separate violations.

The efficient investigative functions of the Board requires that accurate information be provided when sought under authority of 22 TAC §3.171. The proposed rule change would place a failure to timely respond within the administrative penalty schedule as a "moderate" violation if the response is received within 60 days of receipt of the inquiry or, to put it differently, if the response is no more than 30 days late. However, any delay beyond 30 days is considered a "major" violation with each 15 day period constituting a separate penalty.

The proposed changes to the administrative penalty schedule would add content which strengthens the enforcement mechanisms available to TBAE and gives more precise notice to stakeholders and other interested parties of which criteria will be evaluated in order to (a) classify a violation as "minor", "moderate" or "major" and (b) the consequences of such classification.

The Board believes that there will be substantial deterrent effect resulting from adoption of the proposed changes to §3.177 which will result in increased compliance by those under the agency's jurisdiction.

The Board also proposes to change §3.178 which addresses the reinstatement of a registrant after his or her certificate of registration has been suspended or revoked. The proposed change is based upon the statutory language found in Texas Occupations Code Annotated §1051.403(1) (West 2004 & Supp. 2008) (Board may assess "all fees and costs incurred by the Board as the result of any proceeding that led to the denial, revocation or suspension [of the certificate of registration].") The proposed change makes clear that the Board, as a condition of issuance or reissuance of a certificate of registration, may require that attorney's fees and other costs directly associated with a prior contested case proceeding resulting in "the denial, revocation or suspension" of a registration be paid to the agency.

Those who seek to have their certificates of registration reinstated will be now be aware that the privilege of reinstatement will require, among other things reimbursement to the agency. This is not a rule which seeks to impose attorney's fees and related costs by the prevailing party but, rather, a condition precedent to the reinstatement of a certificate of registration which was suspended or revoked through contested case proceedings.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five-year period the amended rules are in effect, there will be no fiscal implications to state or local governments. While penalties may be increased to serve the desired deterrent purposes the number of violations will decrease.

Ms. Hendricks also has determined that for the first five-year period the amended rules are in effect the public benefits expected as a result of the amended rules are to cause greater compliance by those within the jurisdiction of the agency and to increase efficiencies in acquiring information necessary for thorough investigation and prosecution of enforcement matters. The rules will not have an impact on small businesses.

There will not be a change in the cost to persons required to comply with the sections except that those individuals who have had their certificates of registration revoked or suspended by previous contested case proceedings will be required to pay the fees and costs arising out of those proceedings.

Comments may be submitted to Cathy L. Hendricks, RID, Executive Director, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, TX 78711-2337.

The amendments are proposed pursuant to the Landscape Architects' Practice Act, Texas Occupations Code Annotated §1052.202.

The proposed amendments do not affect any other statutes.

§3.177. Administrative Penalty Schedule.

If the Board determines that an administrative penalty is the appropriate sanction for a violation of any of the statutory provisions or rules enforced by the Board, the following guidelines shall be applied to guide the Board's assessment of an appropriate [~~determine the amount of the~~] administrative penalty:

(1) The Board shall consider the following factors to determine whether the violation is minor, moderate, or major:

(A) Seriousness of misconduct and efforts to correct the ground for sanction:

(i) Minor--the respondent has demonstrated that he/she was unaware that his/her conduct was prohibited and unaware that the conduct was reasonably likely to cause the harm that resulted from the conduct or the respondent has demonstrated that there were significant extenuating circumstances or intervening causes for the violation; and the respondent has demonstrated that he/she provided a satisfactory remedy that alleviated or eliminated any harm or threat to the health or safety of the public.

(ii) Moderate--the violation shows that the respondent knowingly disregarded a standard or practice normally followed by a reasonably prudent person under the same or similar circumstances. A violation of a Board order shall constitute, at a minimum, a moderate violation.

(iii) Major--the conduct [this is a violation of an order of the Board or a violation that] demonstrates gross negligence or recklessness or resulted in a threat to the health or safety of the public and the respondent, after being notified of the alleged violation intentionally refused or failed to take prompt and remedial action. [; or the conduct posed a serious threat to the health or safety of the public; or, after being notified of the alleged violation and the harm or threat to the health or safety of the public, the respondent intentionally refused or failed to provide an available remedy to alleviate or eliminate the harm or threat to the health or safety of the public.]

(B) Economic harm: [damage to property:]

(i) Minor--there was no apparent economic damage to property or monetary loss to the project owner or other involved persons and entities.

(ii) Moderate--economic damage to property or monetary harm to other persons or entities did not exceed $1,000, or damage exceeding $1,000 was reasonably unforeseeable.

(iii) Major--economic damage to property or economic injury to other persons or entities exceeded $1,000.

(C) Sanction history:

(i) Minor--[this is the first time an administrative penalty or other sanction has been imposed against the respondent, and] the respondent has not previously received a written warning, [or] advisory notice or been subject to other enforcement proceedings from the Board [regarding the law's restrictions which was directed to the respondent].

(ii) Moderate--[this is the second time an administrative penalty or other sanction has been imposed against the respondent; or] the respondent was previously [was] subject to an order of the Board or other enforcement proceedings which resulted in a finding of a violation of the laws or rules over which the TBAE has jurisdiction. [through which the Board could have imposed an administrative penalty; or the respondent previously received a written warning or advisory notice from the Board regarding the law's restrictions which was directed to the respondent.]

(iii) Major--the respondent has received at least two prior written notices or has been subject to two disciplinary actions for violation of the rules and laws over which the TBAE has jurisdiction. [this is at least the third time an administrative penalty or other sanction has been imposed against the respondent or the respondent has been subject to an order of the Board through which the Board could have imposed an administrative penalty.]

(2) After determining whether the violation is minor, moderate, or major, the Board shall impose an administrative penalty as follows:

(A) Minor violations--if the violation is minor in every category described in paragraph [subsection] (1) of this section, an administrative penalty of not more than $500 [$350] shall be imposed.

(B) Moderate violations--if the violation is moderate in any category described in paragraph [subsection] (1) of this section, an administrative penalty of not [less than $351 and not] more than $2,000 [$1,200] shall be imposed.

(C) Major violations--if the violation is major in any category described in paragraph [subsection] (1) of this section or if the Board determines that the facts of the case indicate a higher penalty is necessary in order to deter similar misconduct in the future, an administrative penalty of [not less than $1,201 and] not more than $5,000 shall be imposed.

(D) Because of the threat to human health, safety and well-being which necessarily arises out of a nonregistrant preparing and issuing landscape architectural plans and specifications the Board possesses a compelling interest in ensuring that landscape architectural plans and specifications are prepared and issued only by a registered landscape architect or by a person who is working under the active and documented Supervision and Control of a registered Landscape Architect when required by law. If the evidence establishes that Landscape Architectural plans and specifications for a project that is not exempt from the Landscape Architects' Practice Act were prepared by a person who is not registered to engage in the Practice of Landscape Architecture and was not working under the active and documented Supervision and Control of a Landscape Architect the violation shall be presumed to be a major violation and each sheet of landscape architectural plans or separate section of the specifications shall be considered a separate violation for purposes of calculating and imposing administrative penalties.

(E) Because of the threat to human health, safety and welfare which necessarily arises from nonregistrants engaging in the Practice of Landscape Architecture the Board has a compelling interest in ensuring that only those persons who are registered to engage in the Practice of Landscape Architecture or whose work is conducted under the active and documented Supervision and Control of a registered landscape architect engage in the Practice of Landscape Architecture. If the evidence establishes that a Landscape Architect has sealed landscape architectural plans and separately numbered section of the specifications without having exercised active and documented Supervision and Control of the Nonregistrants's activities the Board shall presume such conduct by the sealing landscape architect to be a major violation and each sheet of landscape architectural plans or separate section of the specifications shall be considered a separate violation for purposes of calculating and imposing administrative penalties.

(F) The agency is responsible for protecting the public's health, safety and welfare by interpreting and enforcing the Landscape Architects' Practice Act. In fulfilling this statutory duty the Board depends upon, and expects, that registrants and Applicants will provide complete, truthful and accurate information to the Board upon request. This prompt and accurate provision of information is essential to protecting the public's health, safety and welfare.

(G) A Landscape Architect, Candidate, or Applicant who fails, without good cause, to provide information to the Board under provision of §3.171 of this subchapter (relating to Responding to

Request for Information) is presumed to be interfering with and preventing the Board from fulfilling its responsibilities. For these reasons a violation of §3.171 of this subchapter shall be considered a moderate violation if a complete response is received within 30 days after receipt of the Board's written inquiry. Any further delay constitutes a major violation. Each 15 day delay thereafter shall be considered a separate violation of these rules.

(3) In order to determine the appropriate amount in a penalty range described in paragraph [subsection] (2) of this section, the Board shall consider the factors described in paragraph [subsection] (1) of this section.

(4) If the facts of a case are unique or unusual, the Board may suspend the guidelines described in this section.

§3.178. Reinstatement Following Suspension or Revocation.

If the Board suspends or revokes a person's certificate of registration as a result of disciplinary action, the person may not reinstate the certificate of registration or obtain a new certificate of registration unless the person:

(1) demonstrates that he/she has taken reasonable steps to correct the misconduct or deficiency that led to the suspension or revocation;

(2) demonstrates that reinstatement or issuance of the certificate of registration is not inconsistent with the Board's duty to protect the public by ensuring that Registrants are duly qualified and fit for registration; and

(3) pays all fees and costs incurred by the Board as a result of any proceeding that led to the suspension or revocation. This shall include, but not be limited to, attorney's fees and all costs associated with the need to prosecute a Contested Case proceeding at the State Office of Administrative Hearings and subsequent activities including administrative and judicial appeals.

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 11, 2009.

TRD-200901791
Cathy L. Hendricks, RID
Executive Director
Texas Board of Architectural Examiners
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 305-8544

CHAPTER 5. INTERIOR DESIGNERS
SUBCHAPTER C. EXAMINATION

22 TAC §5.53

The Texas Board of Architectural Examiners proposes an amendment to §5.53, Reexamination of Chapter 5, Subchapter I, concerning Examination. The amendment modifies the requirement that a candidate for licensure must pass all sections of the licensing examination within a 5-year period which commences upon passing a section of the examination. The amendment allows the board to grant a candidate one extension of up to six months due the candidate's becoming a parent through birth or adoption. The amendment also repeals obsolete provisions that were in place to "grandfather" previous examinees when the rule was initially adopted.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five-year period the amended rule is in effect, there will be no fiscal implications for state or local governments.

Ms. Hendricks also has determined that for the first five-year period the amended rule is in effect the public benefits expected as a result of the amended rule are as follows: the rule will allow candidates who become parents to complete the examination without forfeiting passing grades earned outside of the 5-year examination period. The amendment will have a positive fiscal impact upon certain candidates who will be able to complete the examination without repeating sections which would otherwise expire due to the 5-year deadline. The rule will have no negative impact on small business and therefore no analysis is necessary to determine if a less restrictive alternative amendment is necessary.

There will be no change in the cost to persons required to comply with the section, except for the positive fiscal impact for the persons who would otherwise incur the cost of repeating a section of the examination.

Comments may be submitted to Cathy L. Hendricks, RID, Executive Director, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, TX 78711-2337.

The amendment is proposed pursuant to §1051.202, Texas Occupations Code which provides the Texas Board of Architectural Examiners authority to promulgate rules, including rules regulating the practice of interior design. The amendment is also proposed pursuant to §1053.152, Texas Occupations Code, which requires the board to establish qualifications for the issuance of a certificate of registration as an interior designer, including examination requirements.

The proposed amendment does not affect any other statutes.

§5.53. Reexamination.

(a) A [Effective January 1, 2002, a] Candidate's passing grade for any section of the examination is valid for five (5) years. Each Candidate [who, after December 31, 2001, is approved for examination by the Board] must pass all sections of the examination within five (5) years after the date the Candidate passes a section of the examination. A Candidate [approved for examination by the Board after December 31, 2001,] who does not pass all sections of the examination within five (5) years after passing a section of the examination will forfeit credit for the section of the examination passed and must pass that section of the examination again.

(b) The Board may grant one extension to the 5-year period for completion of the examination if a Candidate is unable to pass all sections of the examination within that period because of the adoption or birth of a child within that 5-year period. A Candidate may request one extension of up to 6 months by filing a written application with the board together with any corroborating evidence immediately after the Candidate learns of the impending adoption or birth. [Each Candidate approved for examination by the Board prior to January 1, 2002, must pass all sections of the examination no later than December 31, 2006. A Candidate approved for examination by the Board prior to January 1, 2002, who does not pass all sections of the examination by December 31, 2006, will forfeit credit for each section of the examination the candidate passed before January 1, 2002, and must pass each of those sections again. The Candidate's passing grade for any section of the examination taken after January 1, 2002, is valid for five (5) years.]

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

Filed with the Office of the Secretary of State on May 11, 2009.

TRD-200901800
Cathy L. Hendricks, RID
Executive Director
Texas Board of Architectural Examiners
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 305-8544

SUBCHAPTER I. DISCIPLINARY ACTION

22 TAC §5.171, §5.172

The Texas Board of Architectural Examiners proposes amendments to §5.171, Purpose and Scope and §5.172, Computation of Time of Chapter 5, Subchapter I, concerning Disciplinary Action.

The proposed changes to §5.171 will have no substantive or procedural effect upon Board enforcement actions or persons within the jurisdiction of the Texas Board of Architectural Examiners but are intended merely to simplify and modernize existing regulatory language.

The proposed changes to §5.172 will have no substantive or procedural effect upon Board enforcement actions except to create a rebuttable presumption that materials which have been sent by the Board to a person's last known address have been received by that person, or his or her agent, not less than eight (8) days after the materials have been properly deposited into the United States mail, first class postage paid. This presumption allows increased use by first class mail and conforms the agency's practice to that utilized at the State Office of Administrative Hearings which permits the use of first class mail in serving documents. See, 1 TAC §155.103. This change is expected to result in cost savings to the agency without the loss of legal rights to those persons with whom the agency is seeking to communicate. This change is also expected to make correspondence more effective because many times individuals will refuse to sign for a piece of mail which is sent by certified mail and will not retrieve it from the Post Office if delivery was attempted when the person was not present.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five-year period the amended rules are in effect, there will be no fiscal consequences to state or local governments upon implementation of either rule apart from the cost savings which will result from increased use of "regular" mail.

Ms. Hendricks also has determined that for the first five-year period the amended rules are in effect the public benefits expected as a result of the amended rule are as follows:

The simplification of language as proposed for §5.171 will result in greater comprehension of the rule's text. The proposed change will not have an impact on small businesses and there will be no change in cost to persons required to comply with this rule.

The proposed changes to §5.172 will benefit the public by decreasing agency mailing costs and making receipt of documents more certain than by exclusive reliance upon certified mail. The proposed change will not have an impact on small businesses and there will be no change in cost to persons required to comply with this rule.

Comments may be submitted to Cathy L. Hendricks, RID, Executive Director, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, TX 78711-2337.

The amendments are proposed pursuant to the Architects' Practice Act, Texas Occupations Code Annotated, §1051.202 which authorizes the Texas Board of Architectural Examiners to promulgate rules in order to administer and enforce the Interior Designers' Title Act.

The proposed amendments do not affect any other statutes.

§5.171. Purpose and Scope.

This chapter shall provide a system of procedures for the initiation, investigation, prosecution, hearing and resolution of disciplinary matters and allegations involving persons who are subject to the jurisdiction of the Texas Board of Architectural Examiners.

[(a) Unless specifically indicated in the Rules and Regulations of the Board, this subchapter governs the procedure followed by the Board in a Contested Case against an Interior Designer, in the informal disposition of a Contested Case against an Interior Designer, or in an informal conference with an Interior Designer. Unless specifically indicated, the Interior Designers' Registration Law, the Administrative Procedure Act, and the Rules of Practice and Procedure of the State Office of Administrative Hearings, as appropriate, also govern the procedure followed by the Board in a Contested Case against an Interior Designer.]

[(b) The Interior Designers' Registration Law and Sections 5.172, 5.173, 5.174, 5.177, 5.182, and 5.183 of this subchapter govern disciplinary action against a person who is not an Interior Designer. If the person is an Applicant, Section 5.160 of Subchapter H also governs disciplinary action against him/her.]

§5.172. Computation of Time.

(a) (No change.)

(b) A person shall be presumed to have received all pleadings and other notices upon a showing that such materials were sent to the respondent's last known address; the materials were sent by United States mail, first class postage prepaid; a return address was affixed to the exterior of the mailing materials and the materials were not returned; and in excess of seven days has elapsed from placement of the materials into the United States mail. [For purposes of this subchapter, an Interior Designer is presumed to have received a notice from the Board on the fifth day after the date the Board sent the notice to the Interior Designer's current address of record via certified mail, return receipt requested.]

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 11, 2009.

TRD-200901792
Cathy L. Hendricks, RID
Executive Director
Texas Board of Architectural Examiners
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 305-8544

22 TAC §5.173

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

The Texas Board of Architectural Examiners proposes the repeal of §5.173, Ex Parte Communication of Chapter 5, Subchapter I, concerning Disciplinary Action.

This rule was redundant of prohibitions already found at §2001.061 of the Texas Government Code. This section will be reserved for expansion.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five-year period after the rule is repealed there will be no fiscal implications to state or local governments.

Ms. Hendricks also has determined that for the first five-year period after the repeal of §5.173 the public benefits expected as a result of the repealed rule will be to minimize regulations which merely restate existing law.

There will not be a change in the cost to persons required to comply with the section.

Comments may be submitted to Cathy L. Hendricks, RID, Executive Director, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, TX 78711-2337.

The repeal is proposed under authority of Texas Occupations Code Annotated §1051.202 which enables the Texas Board of Architectural Examiners to adopt reasonable rules in order to administer or enforce the laws governing the practice of architecture, landscape architecture and interior design.

The proposed repeal does not affect any other statutes.

§5.173. Ex Parte Communication.

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 11, 2009.

TRD-200901793
Cathy L. Hendricks, RID
Executive Director
Texas Board of Architectural Examiners
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 305-8544

22 TAC §5.174, §5.175

The Texas Board of Architectural Examiners proposes amendments to §5.174, Initiating a Contested Case, and §5.175, Informal Disposition of a Contested Case of Chapter 5, Subchapter I, concerning Disciplinary Action.

The proposed changes to §5.174 remove the requirement that a notarized complaint is required in order to commence contested case proceedings and investigations. In order to make the process simpler and more accessible a member of the public may now file a complaint without the need to have it notarized. The other proposed change would remove language which permits to Board to refuse to disclose certain information. This change brings the Board rule into alignment with the Texas Public Information Act and does not waive any rights to without information as permitted by TPIA.

The proposed changes to §5.175 simplify the overall language and would make two modifications to the present rule. Subsection (e) permits the agency to move for entry of a default judgment in those instances when a respondent, after receiving legally required notice of the docketing of a contested case proceeding alleging a violation of any law or rule over which TBAE possesses jurisdiction at the State Office of Administrative Hearings (SOAH), fails to file a written answer or other written response with SOAH. Default is also permitted if a Respondent fails to appear at a scheduled hearing of which he or she has received legally required notice.

It has been the experience of enforcement staff that individuals who, after receiving notice of the commencement of contested case proceedings, choose not to make any written reply do not generally seek or otherwise avail themselves of the due process and evidentiary protections to which they are entitled. Similarly, a person who fails after legally required notice to appear for a contested case hearing has knowingly waived due process rights. Permitting default fault under such circumstances increases efficiency in the prosecution of cases and rendition of a final agency ruling without sacrificing or prejudicing any legal rights to which respondents are entitled.

The proposed changes to §5.175(f) develop and specify those factors which the Board and the Executive Director are to consider in fixing an administrative penalty pursuant to Texas Occupations Code Annotated, §1051.452. However, rather than merely tracking the statutory language the Board proposes to more exactly detail the relevant factors which it and the Executive Director will evaluate and includes consideration of the public welfare, evaluating any harm resulting from sanctioned conduct (not simply 'economic harm'), taking into account both the specific and general deterrent value of a penalty and whether or not the Respondent has taken prompt remedial action. These changes provide greater notice to those who are subject to the Board's jurisdiction of the criteria which will be used to determine an administrative penalty and serve to prevent the Executive Director or the Board from the unbridled exercise of authority.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five-year period the amended rules are in effect there will be no fiscal implications to state or local governments.

Ms. Hendricks also has determined that for the first five-year period the amended rules are in effect the public benefits which will be realized are more efficient resolution of contested cases without any loss of due process rights and more certain criteria upon which administrative penalties may be assessed and evaluated. The rules will not have any impact on small businesses and there will be no change in cost to those persons required to comply with the proposed changes.

Comments may be submitted to Cathy L. Hendricks, RID, Executive Director, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, TX 78711-2337.

The amendments are proposed pursuant to Texas Occupations Code Annotated, §1051.202 which authorizes the Board to adopt reasonable rules to administer and enforce Subtitle B of the Architects' Practice Act including rules regulating and enforcing the Interior Designers' Registration Act, Texas Occupations Code Annotated, Chapter 1053.

The proposed amendments do not affect any other statutes.

§5.174. Initiating a Contested Case.

(a) The Board may initiate a Contested Case proceeding in response to:

(1) a [~~notarized~~] written complaint filed by a member of the public;

(2) information provided in a registration application or renewal form; or

(3) other information known to the Board which establishes probable cause.

(b) The Board shall not act on a written complaint filed by a member of the public unless the allegations in the complaint[~~, if proven,~~] describe conduct that violates a rule or statutory provision enforceable by the Board.

(c) (No change.)

[~~(d) The Board may refuse to disclose the identity of a person who furnishes information regarding an alleged violation of a rule or statutory provision enforceable by the Board.~~]

(d) [~~(e)~~] The Board shall not act on a written complaint filed by a member of the public if the complaint is filed later than ten (10) years after the date of the act(s) or omission(s) described in the complaint.

§5.175. Informal Disposition of a Contested Case.

(a) A Contested Case may be resolved informally at any time [~~after the Contested Case is initiated by the Board~~].

(b) If the respondent agrees in writing to a settlement agreement [~~arising out of the proposed informal disposition of a Contested Case~~] and the Executive Director executes the written settlement agreement, the settlement agreement shall be presented to the Board for approval or rejection. The settlement agreement must include written findings of fact and conclusions of law and may be in the form of a consent order, letter of reprimand, or other format approved by the Executive Director.

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

(e) An informal disposition may be made of a Contested Case by default. Default occurs whenever a respondent neither answers nor makes other written response to the filing of a Complaint or Petition at the State Office of Administrative Hearings alleging a violation of any law or Rule over which TBAE possesses jurisdiction. Default also occurs if the respondent fails to appear at a scheduled and properly noticed hearing to be conducted by the State Office of Administrative Hearings. [~~Default shall occur when a respondent neither responds in writing nor appears at a scheduled hearing related to a disciplinary matter.~~]

(f) The Board and the Executive Director shall take into account the following factors when considering a proposed settlement agreement:

[~~(1) the seriousness of the conduct that is the source of the allegation(s) against the respondent, including consideration of:~~]

(1) [~~(A)~~] the nature, circumstances, extent, and gravity of any relevant act or omission; [~~, and~~]

(2) [~~(B)~~] the hazard or potential hazard to the health, safety or welfare [~~health or safety~~] of the public;

(3) [~~(2)~~] the economic harm resulting from the conduct [~~damage to property caused by the conduct~~];

(4) [~~(3)~~] the respondent's history concerning any previous ground for sanction;

(5) [~~(4)~~] the severity of penalty necessary to effectuate specific and general deterrence [~~deter a future ground for sanction~~];

(6) [~~(5)~~] any effort by the respondent to take prompt remedial action [~~to correct the ground for sanction~~];

(7) [~~(6)~~] the economic benefit gained by the respondent as a result of the conduct; [~~and~~]

(8) [~~(7)~~] any other matter justice may require; and

(9) [~~(8)~~] When considering a referral from the Texas Department of Licensing and Regulation, in addition to the factors described in this subsection, the Board shall consider the actual number of days that the submission was late.

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 11, 2009.

TRD-200901794
Cathy L. Hendricks, RID
Executive Director
Texas Board of Architectural Examiners
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 305-8544

22 TAC §5.177

The Texas Board of Architectural Examiners proposes amendments to §5.177, Publication of Disciplinary Action of Chapter 5, Subchapter I, concerning Disciplinary Action.

The proposed changes to §5.177 is in order to obtain greater clarification concerning the Board's directive that persons who have "received" disciplinary action will have their names published. While this has been the Board's practice it was felt that present language, which requires persons who are "the subject" of disciplinary proceedings to have their names publicized, is overly broad.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five-year period the amended rule is in effect there will be no fiscal implications to state or local governments.

Ms. Hendricks also has determined that for the first five-year period the amended rule is in effect the public benefit will result from a clearer understanding of the rule. The rule will not have any impact on small businesses and there will be no change in cost to those persons required to comply with the proposed changes.

Comments may be submitted to Cathy L. Hendricks, RID, Executive Director, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, TX 78711-2337.

The amendments are proposed pursuant to Texas Occupations Code Annotated, §1051.202 which authorizes the Board to adopt reasonable rules to administer and enforce Subtitle B of the Architects' Practice Act including the practice of architecture, landscape architecture and interior design.

The proposed amendments do not affect any other statutes.

§5.177. Publication of Disciplinary Action.

(a) The Board shall cause to be published in the Board's official newsletter, on the Board's Web site, in a newspaper, or in another

publication the name of any person who has received [~~is the subject of~~] disciplinary action by the Board. The publication may include a narrative summary of the facts giving rise to disciplinary action and a description of the action taken.

(b) (No change.)

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

Filed with the Office of the Secretary of State on May 11, 2009.

TRD-200901795
Cathy L. Hendricks, RID
Executive Director
Texas Board of Architectural Examiners
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 305-8544

22 TAC §§5.180 - 5.185

The Texas Board of Architectural Examiners proposes amendments to §5.180, Referrals from the Texas Department of Licensing and Regulation; §5.181, Responding to Request for Information; §5.182, Continuing Violation; §5.183, Violation By One Not an Interior Designer; §5.184, Complaint Process, and §5.185, Evaluation of Evidence by Expert of Chapter 5, Subchapter I, concerning Disciplinary Action.

Section 5.180 requires Interior designers to submit certain plans and specifications to the Texas Department of Licensing and Regulation for accessibility review not later than the fifth day after issuance. Architectural Barriers Act, Texas Government Code Annotated §469.101. If an interior designer fails to do so, the TDLR reports the legal violation to the Texas Board of Architectural Examiners. Id., §469.101. The Texas Board of Architectural Examiners will, upon confirmation of a violation, take appropriate disciplinary action in order to further the policy of this state which is to eliminate, to the extent possible, unnecessary barriers encountered by persons with disabilities whose ability to achieve maximum personal independence is needlessly restricted. Texas Occupations Code Annotated §1051.702(2) (West 2005 & Supp. 2008).

The Board proposes minor changes to §5.180 which result in greater certainty regarding the enforcement action which will be taken by directing the Executive Director to issue a written warning upon a first violation and requiring the imposition of an administrative penalty for all subsequent violations.

Section 5.181 requires certain persons to respond to a request for information from the Board. It is the mission of the Texas Board of Architectural Examiners to ensure a safe built environment for Texas. In order to effectively and efficiently investigate and prosecute instances of statutory or regulatory violation it is essential that the Board be able to acquire information expeditiously; the use of investigatory letters as permitted by §5.181 has proven effective in these efforts.

The Board proposes to expand the class of persons who are responsible for responding to letters of inquiry to include candidates and applicants as well as registrants. These persons are often in a position to provide vital information concerning matters within the Board's jurisdictions and relevant to enforcement proceedings. In proposed change will, if adopted, permit agency staff to request that a registrant, candidate or applicant provide records and documents in response to a request.

The proposed changes permit a failure to respond to be treated as a distinct disciplinary infraction from the underlying matter being investigated, and, in order to stress the importance of a candidate's, applicant's or registrant's cooperation with a Board inquiry, state that a failure to respond within 30 days may constitute grounds for the Board to impose suspension or revocation of a registration.

Section 5.182 will be amended to include a new subsection (b) which expressly classifies each sheet of plans and each separate section of specifications which are prepared, modified or issued in violation of applicable statutory and regulatory requirements to constitute discreet and independent legal violations each of which provides a basis for the imposition of an administrative penalty. The Texas Board of Architectural Examiners proposes this addition in recognition of the fact that plans and specifications which are issued in violation of law present an unacceptable risk of significant bodily harm and economic injury to the citizens of Texas. It is anticipated that registrants and non-registrants will be deterred from issuing plans and specifications in violation of the law.

The amendment to §5.183 brings the rule into conformity with Subtitle B of the Texas Occupations Code as well as the Administrative Procedure Act (Title 10, Texas Government Code) by deleting references to Section 17 of the Interior Designers' Registration Law (Art. 294a, Vernon's Texas Civil Statutes). The rule implements the practice of the Texas Board of Architectural Examiners to refer all contested case hearings to the State Office of Administrative Hearings (SOAH) for issuance of a proposal for decision regardless of whether the case involves a registrant or a nonregistrant. Because the Board no longer conducts contested case hearings, subsection (d)(3), (4) and (5) of the original rule are no longer necessary. In place of procedural rules governing a contested case hearings the proposed rules would set forth the procedural sets to be taken by the Executive Director once an investigation determined that a nonregistrant has engaged in a legal violation including methods of settlement and notification of rights to a hearing at SOAH. The proposed amendment will make it clear that a recommended settlement or other informal disposition presented to the Board by the Executive Director may, but need not be, approved by the Board. This is consistent with well established law that only a Board may act on behalf of the agency in such instances.

The proposed amendment to §5.184 permits the agency to provide a copy of its policies and procedures to a complainant and/or a respondent by providing information which will allow review of the policies on the internet or, if requested by a party, by mailing a copy of the policies and procedures upon request. The changes to §5.184 also establish "probable cause" as the investigatory standard required to proceed with investigation and settlement/prosecution of a disciplinary matter. This standard has a clear legal definition and is readily applicable to agency investigations. This does not, however, diminish the agency's responsibility to prove a case by the customary "preponderance of the evidence" standard when prosecuting cases through contested case proceedings before the State Office of Administrative Hearings. The final substantive change proposed for §5.184 authorizes, but does not require, the Executive Director to respond to a request for reconsideration if a complaint is dismissed because of lack of probable cause to continue the investigation and refer a matter for prosecution.

Section 5.185 requires that any case involving professional competency or honesty be evaluated by an interior designer to ensure that professional standards applicable to the profession be objectively reviewed by a peer prior to the docketing of a case at the State Office of Administrative Hearings. The proposed amendment expands this to include 'candidate' along with registrants or applicants as persons whose conduct may be subject to peer review and strikes as unnecessary the entirety of subsection (c). The Board believes that while the qualifications of an expert are very important to valid and reliable case evaluation, there is no need to establish the thresholds and automatic disqualifications which presently exist.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five-year period the amended rules are in effect, there will be no fiscal implications to state or local governments.

Ms. Hendricks also has determined that for the first five-year period the amended rules are in effect the public benefits expected as a result of the amended rules are to cause greater compliance by those within the jurisdiction of the agency and to increase efficiencies in acquiring information necessary for thorough investigation and prosecution of enforcement matters. The rules will not have an impact on small businesses.

There will not be a change in the cost to persons required to comply with the sections.

Comments may be submitted to Cathy L. Hendricks, RID, Executive Director, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, TX 78711-2337.

The amendments are proposed pursuant to the Architects' Practice Act, Texas Occupations Code Annotated, §1051.202 which authorizes the Board to adopt reasonable rules as necessary to administer and enforce the Architects' Practice Act, the interior designers' Practice Act and the Interior Designers' Title Act.

§5.180. Referrals from the Texas Department of Licensing and Regulation.

(a) If an Interior Designer fails to submit any document to the Texas Department of Licensing and Regulation as required by the Architectural Barriers Act, or a rule or procedure enacted pursuant to the Architectural Barriers Act, the Board may take disciplinary action against the Interior Designer.

(b) An Interior Designer's failure to submit documents to the Texas Department of Licensing and Regulation as required by subsection (a) of this section, shall result in a written warning from the Executive Director. An administrative penalty shall be imposed upon second and subsequent failures. [If an Interior Designer submits a document described by subsection (a) of this section no more than fifteen (15) days following the deadline for submission of the document, the Executive Director may issue an informal reprimand to the Interior Designer. It shall not be necessary for the informal reprimand to be presented to or approved by the Board.]

(c) When considering potential disciplinary action, including imposition of an administrative penalty [pursuant to subsection (a) of this section], the Board and the Executive Director shall take into account the number of previous incidents involving a registrant's failure to timely submit documents to the Texas Department of Licensing and Regulation and the length of the delay in making the present submission. [the factors listed in Subsection 5.175(f) of this subchapter.]

§5.181. Responding to Request for Information.

An Interior Designer, a Candidate or an Applicant shall answer an inquiry or produce requested documents to the Board concerning any matter under the jurisdiction of the Board within thirty (30) days after the date the person [Interior Designer] receives [notice of] the inquiry. Failure [An Interior Designer's failure] to respond within thirty (30) days may [to an inquiry concerning any matter under the jurisdiction of the Board shall] constitute a separate violation subject to disciplinary action by the Board up to and including suspension or revocation of a registration.

§5.182. Continuing Violation.

(a) Each day a violation of any statutory provision or rule enforced by the Board occurs or continues may be considered a separate violation subject to disciplinary action by the Board.

(b) Each sheet of interior design plans and each separate section of the specifications which are prepared, modified or issued in violation of these rules or any laws over which the Board has jurisdiction shall each be considered an independent violation of applicable rules and laws.

§5.183. Violation By One Not an Interior Designer.

(a) A person who is not an Interior Designer who violates any of the laws or rules over which the Board has jurisdiction is [title restrictions of the Interior Designers' Registration Law may be] subject to any or all of the following:

(1) judicial proceedings for injunctive relief; [injunctive action;]

(2) criminal prosecution in a court of appropriate jurisdiction; [and/or]

(3) imposition of an administrative penalty; [.]

(4) issuance of a cease and desist order from the Board.

(b) In taking action against a person who is not an Interior Designer, the Board may be represented by agency staff, the Texas Attorney General, by a county or district attorney, or by other counsel as necessary.

(c) The Executive Director may recommend and the Board may, after notice and an opportunity for hearing, impose an administrative penalty in the manner prescribed in Subchapter I of the Architects' Practice Act and otherwise as permitted by law and Board rules. [Section 17 of the Interior Designers' Registration Law.]

(d) A person charged with a violation may request a hearing to contest a proposed administrative penalty that has been recommended by the Executive Director:

(1) A request for a hearing must be received in the Board's office no later than the 20th day after the date the person receives notice that the Executive Director has recommended the imposition of an administrative penalty.

(2) The hearing shall be conducted by an Administrative Law Judge at the State Office of Administrative Hearings under provision of the Administrative Procedure Act, Texas Government Code Annotated, Chapter 2001, and this subchapter. [The Board shall preside over a hearing held pursuant to this section. The Board shall send notice of the date, time, and location of the hearing to the person charged with a violation. During the hearing, the Board's staff and the person charged with a violation or the person's authorized representative shall have the opportunity to present testimony and other evidence and make legal arguments regarding the alleged violation and the amount of the proposed administrative penalty.]

[(3) During a hearing on a proposed administrative penalty, the Board shall have the authority and duty to:]

[(A) conduct a full, fair, and impartial hearing;]

~~[(B) take action to avoid unnecessary delay in the disposition of the proceeding;]~~

~~[(C) maintain order; and]~~

~~[(D) regulate the conduct of the parties and their authorized representatives, including the authority and duty to limit irrelevant, immaterial, and unduly repetitious testimony and reasonably limit the time for presentations.]~~

~~[(4) After a hearing on a proposed administrative penalty, the Board's chair shall issue a written order stating the Board's findings regarding the occurrence of a ground for sanction and the amount of the penalty, if any. In determining the amount of the penalty, if any, the Board shall consider the factors listed in Subsection 17(g) of the Interior Designers' Registration Law.]~~

~~[(5) The Board may stop a hearing on a proposed administrative penalty in order to consult privately with legal counsel regarding any matter related to the hearing.]~~

(e) If a person charged with a violation agrees to a proposed administrative penalty recommended by the Executive Director, the Board may [~~shall~~] approve the Executive Director's recommendation and order payment of the proposed penalty without a hearing.

(f) Within thirty (30) days after the date on which the Board's order imposing an administrative penalty or taking other final agency action in a contested case proceeding becomes final, the person charged must pay the administrative penalty and otherwise ensure compliance with the terms set forth in the Board's Final Order [~~in full~~] or file a petition for judicial review with a district court in Travis County as provided by Subchapter G, Chapter 2001, Government Code.

(g) If the Executive Director determines that a Nonregistrant is violating, or has violated, a statutory provision or rule enforced by the Board, the Executive Director may:

(1) issue to the Nonregistrant a written notice describing the alleged violation and the Executive Director's intention [~~intent~~] to request that the Board impose administrative penalties and issue a cease and desist order. The written notice shall offer the Nonregistrant an opportunity to resolve all matters contained in the written notice by means of an agreed order or other instrument deemed appropriate by the Executive Director and of the Nonregistrant's ability to request an informal conference as well as of his or her right to request a hearing before an Administrative Law Judge at the State Office of Administrative Hearings; and [~~offering an opportunity for a hearing regarding the alleged violation pursuant to Section 1051.504 of the Texas Occupations Code.~~]

~~[(2) request that the Board, after providing an opportunity for a hearing as described in subsection (g)(1) of this section, issue a cease and desist order to the Nonregistrant prohibiting the Nonregistrant's misconduct; and]~~

(2) [~~(3)~~] take any other action and impose any other penalty described in this section or permitted [~~provided~~] by [~~other~~] law.

§5.184. Complaint Process.

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

(c) Once a complaint has been received, the Board's enforcement staff shall:

~~[(1) provide the complainant and respondent with copies of the Board's policies and procedures regarding complaint investigation and resolution;]~~

(1) [~~(2)~~] conduct a preliminary evaluation of the complaint within thirty (30) days to determine:

(A) Jurisdiction: whether the complaint provides information sufficient to establish probable cause for the Board's staff to believe an actionable violation might have occurred;

(B) Disciplinary History: whether there has been previous enforcement activity involving the person against whom the complaint has been filed; and

(C) Priority Level: the seriousness of the complaint relative to other pending enforcement matters;

(2) provide the complainant and respondent with information which will permit review of the Board's policies and procedures from the Board's web site regarding complaint investigation and resolution. If the complainant or respondent requests a copy of the policies and procedures in written format a copy shall be mailed upon request.

(3) notify the complainant and respondent of the status of the investigation at least quarterly unless providing notice would jeopardize an investigation; and

(4) maintain a complaint file that includes at least:

(A) the name of the person who filed the complaint unless the complaint was filed anonymously;

(B) the date the complaint was received by the Board's staff;

(C) a description of the subject matter of the complaint;

(D) the name of each person contacted in relation to the complaint;

(E) a summary of the results of the review and investigation of the complaint; and

(F) an explanation for the reason the complaint was dismissed if the complaint was dismissed without action other than the investigation of the complaint.

(d) - (e) (No change.)

(f) If the Board's staff proceeds with an investigation, the staff shall:

(1) investigate the complaint according to the priority level assigned to the complaint;

(2) notify the complainant and respondent that, as a result of the staff's preliminary evaluation of the complaint, the staff has determined that the Board has jurisdiction over the allegations(s) described in the complaint and has decided to proceed with an investigation of the allegation(s) against the respondent; and

(3) gather sufficient information and evidence to determine whether there is probable cause to believe that a violation of a statutory provision or rule enforced by the Board has occurred.

(g) (No change.)

(h) If the information and evidence gathered during an investigation are insufficient to establish probable cause to believe [~~prove~~] that a violation has occurred, the Board's staff shall:

(1) dismiss the complaint;

(2) send notices to the complainant and respondent regarding the dismissal;

(3) if warranted, include in the respondent's notice a recommendation or warning regarding the respondent's future conduct; and

(4) if a complaint is determined to be unfounded, state in the respondent's notice that no violation was found.

(i) If the information and evidence gathered during an investigation are sufficient to establish probable cause to believe [~~prove~~] that a violation has occurred, the Board's staff shall:

(1) seek to resolve the matter pursuant to §§5.175, 5.176 [~~section 5.175~~] or 5.183 of this subchapter; or

(2) issue a warning to the respondent if the violation is the respondent's first violation and:

(A) the respondent has not received a written warning or advisory notice from the Board [~~regarding the law's restrictions which was directed to the respondent~~];

(B) the respondent provided a satisfactory remedy which has [~~that alleviated or~~] eliminated any harm or threat to the health or safety of the public; and

(C) the guidelines for determining an appropriate penalty for the violation recommend an administrative penalty or a reprimand as an appropriate sanction for the violation.

(j) (No change.)

(k) If a complaint is dismissed, the complainant may submit to the Executive Director a written request for reconsideration. The written request must explain why the complaint should not have been dismissed. The Executive Director may, but is not required to, respond to the request for reconsideration.

§5.185. Evaluation of Evidence by Expert.

(a) If the Board's staff determines that a respondent who is a Registrant, Candidate, or Applicant appears to have engaged in the Practice of Interior Design [~~acted~~] in a manner that was Reckless, Grossly [~~reckless, grossly~~] incompetent, or dishonest, the matter may not be docketed at [~~presented to the Board or referred to~~] the State Office of Administrative Hearings for a formal hearing unless the evidence and information gathered during the investigation have been reviewed by a member of the Board or the Board's staff or a consultant who is registered as an Interior Designer.

(b) The purpose of the review [~~described in subsection (a) of this section~~] shall be to confirm, prior to the commencement of formal disciplinary proceedings, that the respondent's professional conduct did not satisfy the requisite standard of care which should be applied by a reasonably prudent Interior Designer under similar circumstances.

[~~(c) In order to act as a consultant for the purposes of subsection (a) of this section, a person must:~~]

[~~(1) have been actively registered as an Interior Designer for at least five (5) years;~~]

[~~(2) have significant experience in the area(s) relevant to the issue(s) to be considered by the consultant; and~~]

[~~(3) not have been the subject of disciplinary action by the Board at any time.~~]

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 11, 2009.

TRD-200901796

Cathy L. Hendricks, RID
Executive Director
Texas Board of Architectural Examiners
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 305-8544

22 TAC §5.187, §5.188

The Texas Board of Architectural Examiners proposes amendments to §5.187, Administrative Penalty Schedule, and §5.188, Reinstatement Following Suspension or Revocation, of Chapter 5, Subchapter I, concerning Disciplinary Action.

The Texas Board of Architectural Examiners ("Board") is responsible for enforcing the Architects' Practice Act, Texas Occupations Code Annotated §§1051.001 - 1051.701 (West 2004 & Supp. 2008). Upon a finding that disciplinary action is warranted the Board is permitted by statute to impose administrative penalties as well as suspend or revoke the certificate of registration of a registered interior designer. Id., §1051.451, §1051.751. In conjunction with this authority the Board is required by statute to adopt an administrative penalty schedule and may reinstate a certificate of registration which has been suspended or revoked. Id., §1051.403, §1051.452(c).

The Board proposes changers to the present administrative penalty schedule for violations of the Architects' Practice Act as set forth in §5.187 and to amend §5.188. The proposed changes to §5.188 will implement statutory language which permits the board to assess "all fees and costs incurred by the Board as the result of any proceeding that led to the denial, revocation or suspension [of the certificate of registration]." Texas Occupations Code Annotated §1051.403(1) (West 2004 & Supp. 2008).

The newly stated purpose of the penalty schedule found in §5.187 is to "guide the Board's assessment of an appropriate administrative penalty." The Texas Board of Architectural Examiners recognizes that uniformity in the application of a penalty schedule is necessary to ensure that similar situated individuals are treated in a consistent manner and to thereby avoid even the appearance of unbridled agency discretion.

Equally important, however, is the Board's recognition that each case must be evaluated based upon the unique facts and the underlying equities of any given situation. In order to treat similarly situated individuals in a consistent manner the proposed rule incorporates concrete criteria and finite rages of penalty in conjunction with a recognition that the regulatory criteria are to "guide the Board's assessment" rather than compel the imposition of a specific administrative penalty.

The administrative penalty schedule presently classifies violation(s) as "minor", "moderate" or "major." The proposed amendments would continue this classification system, add clarifying language and allow consideration of relevant factors which are not expressly set forth in the rule as it now exists but which the Board feels to be significant for determining an appropriate administrative penalty for each of the three classifications. Making these criteria express will give notice of those factors upon which the Board will place primary reliance.

The proposed amendments will increase the penalties which the Board may impose within each of the three classifications and expand the type of legally recognized harm which the Board may consider beyond simply "economic damage to property" to in-

clude the broader concept of "monetary loss to the project owner or other involved persons and entities" as well as other "economic injury."

The resulting administrative penalty associated with each of the three classifications has been increased. A minor violation may result in an administrative penalty of not more than $500.00. Previously the amount was $350.00. A moderate violation may result in an administrative penalty of not more than $2,000.00. Previously a moderate violation was subject to a penalty of between $351.00 and $1,200.00. A major violation may not exceed $5,000.00. Many of the criteria, as well as the maximum administrative penalty amount of $5,000.00, reflect statutory language contained at Texas Occupations Code Annotated, §§1051.451 - 1051.452.

These changes reflect enforcement experience encountered by the agency and the need to consider unique circumstances of each case while also serving as a general and specific deterrent to violations. Enforcement history has shown that effective deterrent is as essential to the Board's mission of ensuring a safe built environment as is aggressive investigation and prosecution of legal violations.

The proposed rules would, for three defined types of statutory violations, implement specific penalty ranges for the violations. The Board has determined that these violations present significant risk of injury and are so fundamental to the practice of interior design that they should presumptively be classified as 'major' violations.

The first violation involves the situation in which construction documents for nonexempt work are prepared and/or issued by persons who are not interior designers.

The second specific violation addressed by the proposed rules changes involves the signing and sealing of construction documents by an interior designer who is under a duty to exercise supervision and control over the work of a nonregistrant. "Supervision and Control" is defined in 22 TAC §5.5(50). The Board will evaluate evidence, including correspondence, to ensure that the supervision and control exercised by a registrant over the work of a nonregistrant is active, affirmative and superior rather than passive and subservient during the entire design process.

The third violation which will be presumed to be a 'major' violation for calculation of an administrative penalty results from failure to respond to a Board inquiry made under authority of 22 TAC §5.181.

The Board has determined that the risk to the health, safety and welfare of citizens is always put at an unacceptable risk of harm when persons who lack the education, training and experience of registered interior designers engage in the practice of interior design and it therefore possesses a compelling interest in deterring and sanctioning the unauthorized practice of interior design. This interest is furthered by a presumption that unauthorized practice is always a 'major' violation.

The Board has, within the proposed rule change, made it clear that each individual document and separately numbered section of the interior design specifications prepared by a nonregistrant will be treated as a separate violation. As an example, an unregistered person who prepares and issues five (5) sheets of interior design plans in violation of the Architects' Practice Act will be considered to have engaged in five (5) separate legal violations each of which may be classified as a "major" administrative penalty, i.e., warranting a penalty up to $5,000.00 or, under these facts, $25,000 in the aggregate.

It is the expectation of the Board that significant deterrent value will be recognized from the combined effect of the proposed changes to §5.187 and that acquisition of information in response to Board inquiry made under authority of §5.187 will become more efficient and effective for the prompt investigation of cases.

The Board has also determined that the failure of a registrant to actively and affirmatively exercise "supervision and control" over the work of a nonregistrant when such a duty exists likewise presents unacceptable risks of harm and, for the same policy reasons as detailed above, has classified such a failure as a "major" violation. Similarly, each sheet of interior design plans and separately numbered section of the specifications will be deemed separate violations.

The efficient investigative functions of the Board requires that accurate information be provided when sought under authority of 22 TAC §5.181. The proposed rule change would place a failure to timely respond within the administrative penalty schedule as a "moderate" violation if the response is received within 60 days of receipt of the inquiry or, to put it differently, if the response is no more than 30 days late. However, any delay beyond 30 days is considered a "major" violation with each 15 day period constituting a separate penalty.

The proposed changes to the administrative penalty schedule would add content which strengthens the enforcement mechanisms available to TBAE and gives more precise notice to stakeholders and other interested parties of which criteria will be evaluated in order to (a) classify a violation as "minor", "moderate" or "major" and (b) the consequences of such classification.

The Board believes that there will be substantial deterrent effect resulting from adoption of the proposed changes to §5.187 attributable to increased compliance by those under the agency's jurisdiction.

The Board also proposes to change §5.188 which addresses the reinstatement of a registrant after his or her certificate of registration has been suspended or revoked. The proposed change is based upon the statutory language found in Texas Occupations Code Annotated, §1051.403(1) (West 2004 & Supp. 2008) (Board may assess "all fees and costs incurred by the Board as the result of any proceeding that led to the denial, revocation or suspension [of the certificate of registration].") The proposed change makes clear that the Board, as a condition of issuance or reissuance of a certificate of registration, may require that attorney's fees and other costs directly associated with a prior contested case proceeding resulting in "the denial, revocation or suspension" of a registration be paid to the agency.

Those who seek to have their certificates of registration reinstated will be now be aware that the privilege of reinstatement will require, among other things reimbursement to the agency. This is not a rule which seeks to impose attorney's fees and related costs by the prevailing party but, rather, a condition precedent to the reinstatement of a certificate of registration which was suspended or revoked through contested case proceedings.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five-year period the amended rules are in effect, there will be no fiscal implications to state or local governments. While penalties may be in-

creased to serve the desired deterrent purposes the number of violations will decrease.

Ms. Hendricks also has determined that for the first five-year period the amended rules are in effect the public benefits expected as a result of the amended rule are to cause greater compliance by those within the jurisdiction of the agency and to increase efficiencies in acquiring information necessary for thorough investigation and prosecution of enforcement matters. The rules will not have an impact on small businesses.

There will not be a change in the cost to persons required to comply with the sections except that those individuals who have had their certificates of registration revoked or suspended by previous contested case proceedings will be required to pay the fees and costs arising out of those proceedings.

Comments may be submitted to Cathy L. Hendricks, RID, Executive Director, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, TX 78711-2337.

The amendments are proposed pursuant to the Architects' Practice Act, Texas Occupations Code Annotated, §§1051.001 - 1051.701.

The proposed amendments do not affect any other statutes.

§5.187. Administrative Penalty Schedule.

If the Board determines that an administrative penalty is the appropriate sanction for a violation of any of the statutory provisions or rules enforced by the Board, the following guidelines shall be applied to guide the Board's assessment of an appropriate [~~determine the amount of the~~] administrative penalty:

(1) The Board shall consider the following factors to determine whether the violation is minor, moderate, or major:

(A) Seriousness of misconduct and efforts to correct the ground for sanction:

(i) Minor--the respondent has demonstrated that he/she was unaware that his/her conduct was prohibited and unaware that the conduct was reasonably likely to cause the harm that resulted from the conduct or the respondent has demonstrated that there were significant extenuating circumstances or intervening causes for the violation; and the respondent has demonstrated that he/she provided a satisfactory remedy that alleviated or eliminated any harm or threat to the health or safety of the public.

(ii) Moderate--the violation shows that the respondent knowingly disregarded a standard or practice normally followed by a reasonably prudent person under the same or similar circumstances. A violation of a Board order shall constitute, at a minimum, a moderate violation.

(iii) Major--the conduct [~~this is a violation of an order of the Board or a violation that~~] demonstrates gross negligence or recklessness or resulted in a threat to the health or safety of the public and the respondent, after being notified of the alleged violation intentionally refused or failed to take prompt and remedial action. [~~; or the conduct posed a serious threat to the health or safety of the public; or, after being notified of the alleged violation and the harm or threat to the health or safety of the public, the respondent intentionally refused or failed to provide an available remedy to alleviate or eliminate the harm or threat to the health or safety of the public.~~]

(B) Economic harm: [~~damage to property:~~]

(i) Minor--there was no apparent economic damage to property or monetary loss to the project owner or other involved persons and entities.

(ii) Moderate--economic damage to property or monetary harm to other persons or entities did not exceed $1,000, or damage exceeding $1,000 was reasonably unforeseeable.

(iii) Major--economic damage to property or economic injury to other persons or entities exceeded $1,000.

(C) Sanction history:

(i) Minor--[~~this is the first time an administrative penalty or other sanction has been imposed against the respondent, and~~] the respondent has not previously received a written warning, [~~or~~] advisory notice or been subject to other enforcement proceedings from the Board [~~regarding the law's restrictions which was directed to the respondent~~].

(ii) Moderate--[~~this is the second time an administrative penalty or other sanction has been imposed against the respondent; or~~] the respondent was previously [~~was~~] subject to an order of the Board or other enforcement proceedings which resulted in a finding of a violation of the laws or rules over which the TBAE has jurisdiction. [~~through which the Board could have imposed an administrative penalty; or the respondent previously received a written warning or advisory notice from the Board regarding the law's restrictions which was directed to the respondent.~~]

(iii) Major--the respondent has received at least two prior written notices or has been subject to two disciplinary actions for violation of the rules and laws over which the TBAE has jurisdiction. [~~this is at least the third time an administrative penalty or other sanction has been imposed against the respondent or the respondent has been subject to an order of the Board through which the Board could have imposed an administrative penalty.~~]

(2) After determining whether the violation is minor, moderate, or major, the Board shall impose an administrative penalty as follows:

(A) Minor violations--if the violation is minor in every category described in paragraph [~~subsection~~] (1) of this section, an administrative penalty of not more than $500 [~~$350~~] shall be imposed.

(B) Moderate violations--if the violation is moderate in any category described in paragraph [~~subsection~~] (1) of this section, an administrative penalty of not [~~less than $351 and not~~] more than $2,000 [~~$1,200~~] shall be imposed.

(C) Major violations--if the violation is major in any category described in paragraph [~~subsection~~] (1) of this section or if the Board determines that the facts of the case indicate a higher penalty is necessary in order to deter similar misconduct in the future, an administrative penalty of [~~not less than $1,201 and~~] not more than $5,000 shall be imposed.

(D) Because of the threat to human health, safety and well-being which necessarily arises from a nonregistrant representing himself or herself to be registered as an Interior Designer the Board possesses a compelling interest in ensuring that only those persons who are permitted by statute and rule to use the title "interior designer" or to offer "interior designer" services do so. If the evidence establishes that a person not registered as an interior designer has represented himself or herself as a registrant or has offered "interior design" services, the violation shall be classified as a major violation and each sheet of interior design plans or separate section of the specifications shall be considered a separate violation for purposes of calculating and imposing administrative penalties.

(E) The agency is responsible for protecting the public's health, safety and welfare by interpreting and enforcing the Interior Designers' Title Act. In fulfilling this statutory duty the Board

depends upon, and expects, that registrants, Candidates and Applicants will provide complete, truthful and accurate information to the Board upon request. This prompt and accurate provision of information is essential to protecting the public's health, safety and welfare.

(F) An Interior Designer, a Candidate, or an Applicant who fails, without good cause, to provide information to the Board under provision of §5.181 of this subchapter (relating to Responding to Request for Information) is presumed to be interfering with and preventing the Board from fulfilling its responsibilities. For these reasons a violation of §5.181 of this subchapter shall be considered a moderate violation if a complete response is received within 30 days after receipt of the Board's written inquiry. Any further delay constitutes a major violation. Each 15 day delay thereafter shall be considered a separate violation of these rules.

(3) In order to determine the appropriate amount in a penalty range described in paragraph [~~subsection~~] (2) of this section, the Board shall consider the factors described in paragraph [~~subsection~~] (1) of this section.

(4) If the facts of a case are unique or unusual, the Board may suspend the guidelines described in this section.

§5.188. Reinstatement Following Suspension or Revocation.

If the Board suspends or revokes a person's certificate of registration as a result of disciplinary action, the person may not reinstate the certificate of registration or obtain a new certificate of registration unless the person:

(1) demonstrates that he/she has taken reasonable steps to correct the misconduct or deficiency that led to the suspension or revocation;

(2) demonstrates that reinstatement or issuance of the certificate of registration is not inconsistent with the Board's duty to protect the public by ensuring that Registrants are duly qualified and fit for registration; and

(3) pays all fees and costs incurred by the Board as a result of any proceeding that led to the suspension or revocation. This shall include, but not be limited to, attorney's fees and all costs associated with the need to prosecute a Contested Case proceeding at the State Office of Administrative Hearings and subsequent activities including administrative and judicial appeals.

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 11, 2009.

TRD-200901797
Cathy L. Hendricks, RID
Executive Director
Texas Board of Architectural Examiners
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 305-8544

TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 305. CONSOLIDATED PERMITS

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes amendments to §§305.42, 305.45, 305.50, 305.64 - 305.66, 305.69, 305.144, 305.150, 305.172, 305.175, 305.571, and 305.572; and proposes new §§305.650 - 305.661.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

The federal hazardous waste program is authorized under the Resource Conservation and Recovery Act (RCRA), §3006. States may obtain authorization from the United States Environmental Protection Agency (EPA) to administer the hazardous waste program at the state level. State authorization is a rulemaking process through which EPA delegates the primary responsibility of implementing the RCRA hazardous waste program to individual states in lieu of EPA. This process ensures national consistency and minimum standards while providing flexibility to states in implementing rules. State RCRA programs must always be at least as stringent as the federal requirements.

Since the beginning of the federal hazardous waste program, the State of Texas has continuously participated in the EPA's authorization program. To maintain RCRA authorization, the commission must adopt regulations to meet the minimum standards of federal programs administered by EPA. Because the federal regulations undergo regular revision, the commission adopts new regulations periodically to meet the changing federal regulations.

Texas received authorization of its hazardous waste "base program" under RCRA on December 26, 1984. Texas received authorization for revisions to its base hazardous waste program on February 17, 1987 (Clusters I and II). Texas submitted further revisions to its hazardous waste program and received final authorization of those revisions on March 15, 1990, July 23, 1990, October 21, 1991, December 4, 1992, June 27, 1994, November 26, 1997, October 18, 1999, September 11, 2000 and June 14, 2005 (Clusters III - X). A RCRA authorization rule package for parts of RCRA Rule Clusters XI - XV was submitted to EPA Region VI on July 25, 2007. Texas is currently waiting on authorization of these clusters. (A cluster is a grouping of federal RCRA amendments during a one-year period.)

The commission proposes in this rule package to adopt parts of RCRA Rule Clusters XIV, XV, XVI, XVII and XVIII that implement revisions to the federal hazardous waste program which were made by EPA between July 1, 2005 and June 30, 2008. Both mandatory and optional federal rule changes in these clusters are proposed to be adopted. Adoption of two of the federal rule changes is mandatory in order to maintain RCRA authorization. EPA also recommends that the optional federal rule changes be incorporated into the state rules, but are not necessary in order to maintain authorization. Establishing equivalency with federal regulations will enable the State of Texas to operate all aspects of the federal hazardous waste program in lieu of the EPA. All proposed rule changes are discussed below in the SECTION BY SECTION DISCUSSION.

The Hazardous Waste Combustion Maximum Achievable Control Technology (MACT) regulations are multi-media at the federal and state level, affecting both air quality and hazardous waste management. The TCEQ has already adopted certain parts of 40 Code of Federal Regulations (CFR) Part 63, Subpart EEE (i.e., the Hazardous Waste Combustion MACT rules) prior to this proposed rulemaking under air quality regulations at 30 TAC Chapter 113. The purpose of this proposed rulemaking is to propose adoption of other parts of the federal combustion

MACT program in 40 CFR Parts 264 - 266 and 270. This proposed rulemaking would incorporate those aspects of the combustion MACT rules that affect hazardous waste management as part of the changes to 30 TAC Chapters 305 and 335.

A corresponding rulemaking is published in this issue of the *Texas Register* and includes changes to 30 TAC Chapter 335, Industrial Solid Waste and Municipal Hazardous Waste.

SECTION BY SECTION DISCUSSION

The commission proposes administrative changes throughout the proposed rulemaking to reflect the agency's current practices and to conform to Texas Register and agency guidelines. These changes include updating references to Texas State Agencies, updating cross-references, and correcting typographical, spelling, and grammatical errors.

§305.42, Application Required

The commission proposes amending §305.42 to conform to federal regulations promulgated in the September 8, 2005 issue of the *Federal Register* (70 *Federal Register* (FR) 53420). This amendment would incorporate application requirements for a standard permit. Specifically, this amendment would incorporate the availability of a standard permit to RCRA treatment, storage, and disposal facilities otherwise subject to RCRA permitting that generate and then store or non-thermally treat hazardous waste on site in tanks, containers and containment buildings. To be eligible for a standard permit, facilities must manage hazardous waste on site in tanks, container storage areas or containment buildings. Standardizing this aspect of the permitting process will reduce the amount of agency technical review and processing time required by the traditional RCRA permit process. In addition, the standard permit will streamline the permitting process by allowing facilities to obtain and modify permits more easily, while still achieving the same level of environmental protection as individual permits. For a proposed facility, an applicant may submit a standard permit application in lieu of a Part B application for those units that qualify for a standard permit. If additional hazardous waste units that do not qualify for a standard permit are to be permitted at the same facility, a Part B application must be submitted. A permittee may choose to apply for a standard permit in lieu of submitting a Part B permit renewal application for a tank, container storage area or containment building. If the current authorization also contains other hazardous waste management units not eligible for a standard permit, a Part B permit renewal application must be submitted for those units. A contested case hearing for a standard permit may be requested by the executive director, applicant or Office of the Public Interest Council. The term limit for a standard permit is ten years. Because facility storage units must meet the same technical standards as units permitted under a traditional permit, the proposed amendment is more flexible but equivalent to the current state rules. This amendment is recommended by EPA to be adopted into state rules, but is not required to maintain authorization.

§305.45, Contents of Application for Permit

The commission proposes amending §305.45(a)(6) to update language to an existing requirement that specifies that documents submitted in a Part B permit application must be signed and sealed by a Texas licensed professional engineer and/or Texas licensed professional geoscientist. This revised language would replace outdated language adopted from 40 CFR Part 264 previously that states that documents must be signed and sealed by a "registered professional engineer." The new language specifically states that documents must be signed and sealed by a "Texas licensed professional engineer and/or Texas licensed professional geoscientist." This amendment is as stringent as the current state rules. This amendment is not required to maintain authorization.

§305.50, Additional Requirements for an Application for a Hazardous or Industrial Solid Waste Permit and for a Post-Closure Order

The commission proposes amending §305.50 to conform to federal regulations promulgated in the October 12, 2005 issue of the *Federal Register* (70 FR 59402). This amendment would incorporate final national emission standards for hazardous air pollutants (NESHAP) for hazardous waste combustors. These standards implement Section 112(d) of the Clean Air Act by requiring hazardous waste combustors to meet hazardous air pollutants (HAP) emission standards reflecting the performance of the MACT. The proposed amendment allows the executive director to request additional information to assess the protectiveness of any facility subject to MACT EEE. This proposed amendment also allows the executive director to add additional requirements, including lowering emission limits, if in response to the information requested, it is necessary to protect human health and the environment. The proposed amendment is as stringent as the current state rules. This amendment is recommended by EPA to be adopted into state rules, but is not required to maintain authorization.

The commission proposes amending §305.50(a)(4)(F), (6), and (7) to update current language that would clarify the existing requirement that specific documents submitted in a Part B permit application must be signed and sealed by a Texas licensed professional engineer. This revised language would replace outdated language adopted from 40 CFR previously that states that documents must be signed and sealed by a "registered professional engineer." The new language specifically states that documents must be signed and sealed by a "Texas licensed professional engineer". The proposed amendment is as stringent as the current state rules. This amendment is not required to maintain authorization.

The commission also proposes amending §305.50 to conform to federal regulations promulgated in the July 14, 2006 issue of the *Federal Register* (71 FR 40254). This amendment would incorporate by reference corrections to typographical errors found in 40 CFR §§270.13 - 270.27. This amendment does not create new regulatory requirements. This amendment is recommended by EPA to be adopted into state rules, but is not required to maintain authorization.

§305.64, Transfer of Permits

The commission proposes amending §305.64 to conform to federal regulations promulgated in the September 8, 2005 issue of the *Federal Register* (70 FR 53420). This amendment would incorporate application requirements for transfer of a standard permit. Because facility storage units must meet the same technical standards as units permitted under a traditional permit, the proposed amendment is more flexible but equivalent to the current state rules. This amendment is recommended by EPA to be adopted into state rules, but is not required to maintain authorization.

§305.65, Renewal

The commission proposes amending §305.65 to conform to federal regulations promulgated in the September 8, 2005 issue of

the *Federal Register* (70 FR 53420). This amendment would incorporate application requirements for renewal of a standard permit. Specifically, this proposed amendment would provide when a permit is subject to renewal, the permittee may file a standard permit application instead of a renewal application for those units eligible for a standard permit. The permittee must file a renewal application for all remaining permitted units. The renewal of a standard permit will follow the same processes as a permit in §305.65. Because facility storage units must meet the same technical standards as units permitted under a traditional permit, the proposed amendment is more flexible but equivalent to the current state rules. This amendment is recommended by EPA to be adopted into state rules, but is not required to maintain authorization.

§305.66, Permit Denial, Suspension, and Revocation

The commission proposes amending §305.66 to conform to federal regulations promulgated in the September 8, 2005 issue of the *Federal Register* (70 FR 53420). This amendment would incorporate permit denial, suspension and revocation requirements for a standard permit. Specifically, this proposed amendment would add to the list for good cause to deny, suspend, or revoke a permit or order, if the executive director has received notification of intent to obtain a standard permit. Because facility storage units must meet the same technical standards as units permitted under a traditional permit, the proposed amendment is more flexible but equivalent to the current state rules. This amendment is recommended by EPA to be adopted into state rules, but is not required to maintain authorization.

§305.69, Solid Waste Permit Modification at the Request of the Permittee

The commission proposes amending §305.69(l)(l)(10) to conform to federal regulations promulgated in the October 12, 2005 issue of the *Federal Register* (70 FR 59402). This amendment would incorporate Part B permit modification requirements that would allow facility owners or operators to request that specific RCRA operating and emissions limits be waived by submitting a Class 1 permit modification request for combustion facility changes. Specifically, the amendment would waive RCRA operating and emissions limits in the Part B permit if they are included in the MACT provisions of an air quality permit. The operating and emissions limits would be waived through modification of the Part B permit. The proposed amendment is as stringent as the current state rules. This amendment is recommended by EPA to be adopted into state rules, but is not required to maintain authorization.

§305.144, Certification and Inspection

The commission proposes amending §305.144 to update current language that would clarify the existing requirement that specific documents submitted in a Part B permit application must be signed and sealed by a Texas licensed professional engineer. This revised language would replace outdated language adopted from 40 CFR previously that states that documents must be signed and sealed by a "registered professional engineer." The new language specifically states that documents must be signed and sealed by a "Texas licensed professional engineer." The proposed amendment is as stringent as the current state rules. This amendment is not required to maintain authorization.

§305.150, Incorporation of References

The commission proposes amending §305.150 to conform to federal regulations promulgated in the October 12, 2005 issue of the *Federal Register* (70 FR 59402). This amendment would incorporate final NESHAP for hazardous waste combustors. These standards implement Section 112(d) of the Clean Air Act by requiring hazardous waste combustors to meet HAP emission standards reflecting the performance of the MACT. The proposed amendment is as stringent as the current state rules. This amendment is recommended by EPA to be adopted into state rules, but is not required to maintain authorization.

§305.172, Determining Feasibility of Compliance and Adequate Operating Conditions

The commission proposes amending §305.172 to conform to federal regulations promulgated in the June 14, 2005 issue of the *Federal Register* (70 FR 34538) and as amended in the August 1, 2005 issue of the *Federal Register* (70 FR 44150). This amendment would revise §305.172(2)(A)(iii) and (iv) to remove the requirement to use, "'Test Methods for Evaluating Solid Waste, Physical/Chemical Methods,' EPA Publication SW-846" and replace it with "appropriate analytical techniques" in the case of §305.172(2)(A)(iii) and "appropriate analytical methods" in the case of §305.172(2)(A)(iv). This amendment would eliminate the requirement that facility owners and operators use SW-846 methods but would not eliminate the requirement that facility owners and operators receive prior approval for specific analytical methods from the executive director through approval of a sampling and analysis plan. This amendment is more flexible but equivalent to the current state rules. This amendment is recommended by EPA to be adopted into state rules, but is not required to maintain authorization.

§305.175, Conditional Exemption for Demonstrating Compliance with Certain Air Standards

The commission proposes amending §305.175 to conform to federal regulations promulgated in the October 12, 2005 issue of the *Federal Register* (70 FR 59402). This amendment would add language that specifies information requirements for Part B of the application for a hazardous waste permit found in 40 CFR §270.19 for air emission controls for incinerators. Specifically this amendment would incorporate Part B permit requirements that would allow facility owners or operators of incinerators to request that specific RCRA operating and emissions limits be waived from the permit. The rule change would waive RCRA operating and emissions limits in the Part B permit if they are included in the MACT provisions of an air quality permit. The proposed amendment is as stringent as the current state rules. This amendment is recommended by EPA to be adopted into state rules, but is not required to maintain authorization.

§305.571, Applicability

The commission proposes amending §305.571(b) to conform to federal regulations promulgated in the October 12, 2005 issue of the *Federal Register* (70 FR 59402). This amendment would add language that specifies information requirements for Part B of the application for a hazardous waste permit found in 40 CFR §270.22 for air emission controls for cement kilns, lightweight aggregate kilns, solid fuel boilers, liquid fuel boilers, or hydrochloric acid production furnaces burning hazardous waste. Specifically this amendment would incorporate Part B permit requirements that would allow facility owners or operators of boilers and industrial furnaces to request specific RCRA operating and emissions limits be waived from the permit. The rule change would waive RCRA operating and emissions limits in the Part B permit if they are included in the MACT provisions of an air quality permit. The proposed amendment is as stringent as the current state rules.

This amendment is recommended by EPA to be adopted into state rules, but is not required to maintain authorization.

§305.572, Permit and Trial Burn Requirements

The commission proposes amending §305.572(a) to conform to federal regulations promulgated in the June 14, 2005 issue of the *Federal Register* (70 FR 34538) as amended in the August 1, 2005 issue of the *Federal Register* (70 FR 44150). This amendment would allow those seeking permits or amendments to permits for boilers and industrial furnaces in which hazardous waste is burned to conduct trial burns using "appropriate analytical techniques" and "appropriate analytical methods" instead of SW-846 methods. This amendment provides more flexibility but is equivalent to the current rules. This amendment is recommended by EPA to be adopted into state rules, but is not required to maintain authorization.

The commission also proposes amending §305.572(a)(6) to conform to federal regulations promulgated in the October 12, 2005 issue of the *Federal Register* (70 FR 59402). This amendment would adopt by reference revisions to the options found in 40 CFR §270.235(a) and (b) for incinerators, cement kilns, lightweight aggregate kilns, solid fuel boilers, liquid fuel boilers, and hydrochloric acid production furnaces to minimize air emissions from startup, shutdown and malfunction events. This proposed amendment requires that incinerators, cement kilns, lightweight aggregate kilns, solid fuel boilers, liquid fuel boilers and hydrochloric acid production furnaces that become subject to RCRA permit requirements after October 12, 2005 control emissions of toxic compounds during startup, shutdown and malfunction events. The proposed amendment is as stringent as the current state rules. This amendment is recommended by EPA to be adopted into state rules, but is not required to maintain authorization.

§§305.650 - 305.661, Subchapter R: Resource Conservation and Recovery Act Standard Permits for Storage and Treatment Units

The commission proposes new sections §§305.650 - 305.661 to conform to federal regulations promulgated in the September 8, 2005 issue of the *Federal Register* (70 FR 53420). These proposed new sections would incorporate application requirements for a standard permit. A RCRA standard permit will be available to RCRA treatment, storage, and disposal facilities otherwise subject to RCRA permitting that generate and then store or non-thermally treat hazardous waste on site in tanks, containers and containment buildings. The standard permit will also be available to facilities which receive hazardous waste generated off site by a generator under the same ownership as the receiving facility, and which then store or non-thermally treat the hazardous waste in containers, tanks or containment buildings. Standardizing this aspect of the permitting process will reduce the amount of agency technical review and processing time required by the traditional RCRA permit process. In addition, the standard permit will streamline the permitting process by allowing facilities to obtain and modify permits more easily, while still achieving the same level of environmental protection as individual permits. For a proposed facility, an applicant may submit a standard permit application in lieu of a Part B application for those units that qualify for a standard permit. If additional hazardous waste units that do not qualify for a standard permit are to be permitted at the same facility, a Part B application must be submitted. If a permittee chooses to apply for a standard permit in lieu of submitting a Part B permit renewal application for a tank, container storage area or containment building, a standard permit application must be submitted. If the current authorization also contains other hazardous waste management units not eligible for a standard permit, a Part B permit renewal application must be submitted for those units. A contested case hearing for a standard permit may be requested by the executive director, applicant or Office of the Public Interest Council. The term limit for a standard permit is ten years. Because facility storage units must meet the same technical standards as units permitted under a traditional permit, the proposed amendment is more flexible but equivalent to the current state rules. This amendment is recommended by EPA to be adopted into state rules, but is not required to maintain authorization.

In addition to the changes discussed previously, the commission proposes to make nonsubstantive changes as needed to correct typographical errors, etc.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Nina Chamness, Analyst, Strategic Planning and Assessment, has determined that, for the first five-year period the proposed rules are in effect, no significant fiscal implications are anticipated for the agency as a result of administration or enforcement of the proposed rules. Local governments and businesses that are classified as large quantity generators of hazardous waste could experience cost savings under the proposed rules.

The proposed rules would update Chapter 305 to incorporate federal rule changes to the RCRA hazardous waste program that were adopted by EPA from July 2005 through June 2008. Some of the federal rules incorporated into these proposed rules afford regulated parties more options in complying with the RCRA program. A corresponding rulemaking includes proposed amendments to 30 TAC Chapter 335, and fiscal impacts to Chapter 335 are detailed in a separate fiscal note.

The proposed rules incorporate optional methods of compliance and will remove the requirement to use specific EPA methods when conducting RCRA monitoring programs; correct administrative errors; defer MACT provisions from the RCRA permit to the Air Quality Title V permit; maintain risk-based requirements in the RCRA permit; clarify several NESHAP compliance and monitoring provisions; and allow for a standard permit for units that store or non-thermally treat hazardous waste.

Staff estimates that there may be as many as ten governmental entities that might choose to use the compliance options included in the proposed rules. This includes large airports and military bases which could save from $20 to $100 per sample if they can use less expensive, but equal or more protective monitoring methods. If a governmental facility that stores or non-thermally treats hazardous waste chooses to apply for a standard permit for those units, savings on permit applications could range from $500 to $20,000 per application. Fewer permit modifications may be required, which could save affected governmental entities $500 to $5,000 per modification.

PUBLIC BENEFITS AND COSTS

Nina Chamness also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be compatibility with federal regulations and continued protection of the environment through increased efficiency and innovation in sampling and analysis in detecting releases from waste management units; reduction in risk from spills and emissions from

transporting waste; and a reduction in paperwork if standard permits are utilized.

The RCRA hazardous waste program regulates generators of hazardous waste and facilities that treat, store, or dispose of those wastes. Typically, these are large businesses, and staff estimates that there may be as many as 6,000 generators of hazardous waste registered in Texas and as many as 200 permitted facilities that could be affected by the proposed rules. The proposed rules provide opportunities for cost savings. If less expensive but equally protective monitoring methods can be used, savings could range from $20 to $100 per sample. Facilities that store or non-thermally treat hazardous waste could apply for a standard permit, which could save from $500 to $20,000 in permitting costs and $500 to $5,000 in permit modification requests.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rules. Small businesses are usually exempt from RCRA regulations because they generate very small volumes of hazardous waste. If a small business is classified as a large quantity generator of hazardous waste, it could experience the same cost savings as that of a large business if it chooses to utilize the options afford by the proposed rules.

SMALL BUSINESS REGULATORY FLEXIBILITY ANALYSIS

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

LOCAL EMPLOYMENT IMPACT STATEMENT

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

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute.

Although the intent of the rulemaking is to protect the environment and reduce the risk to human health from environmental exposure, the rulemaking is not a major environmental rule because it will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. There is no adverse effect in a material way on the economy, a sector of the economy, productivity, competition, or jobs of the state or a sector of the state from those revisions under 42 United States Code (USC), §6926(g), which already imposes the more stringent federal requirements on the regulated community under the Hazardous and Solid Waste Amendments of 1984. Likewise, there is no adverse effect in a material way on the economy, a sector of the economy, productivity, competition, or jobs of the state or a sector of the state from those revisions outside 42 USC, §6926(g), because the regulated community benefits from the greater flexibility, reduced recordkeeping, reporting, inspection and sampling requirements. The regulated community must comply with the more stringent federal requirements beginning on the effective date of the federal regulations.

Because the regulated community is already required to comply with the more stringent federal rules, the adopted equivalent state rules will not cause any adverse effects. There is no adverse effect in a material way on the environment, or the public health and safety of the state or a sector of the state because the rulemaking is designed to protect the environment, the public health, and the public safety of the state and all sectors of the state. Because the rulemaking does not have an adverse material impact on the economy, the rulemaking does not meet the definition of a major environmental rule. Furthermore, the rulemaking does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a).

First, the rulemaking does not exceed a standard set by federal law because the commission adopts this rulemaking to implement revisions to the federal hazardous waste program. The commission must meet the minimum standards and mandatory requirements of the federal program to maintain authorization of the state hazardous waste program.

Second, although the rulemaking contains some requirements that are more stringent than existing state rules, federal law requires the commission to promulgate rules that are as stringent as federal law for the commission to maintain authorization of the state hazardous waste program.

Third, the rulemaking does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government, where the delegation agreement or contract is to implement a state and federal program. On the contrary, the commission must undertake the rulemaking to maintain authorization of the state hazardous waste program.

And fourth, the rulemaking does not seek to adopt a rule solely under the general powers of the agency instead of under a specific state law. The commission adopts this rulemaking under Texas Water Code, §5.103 and §5.105 and under Texas Health and Safety Code, §361.017 and §361.024.

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

TAKINGS IMPACT ASSESSMENT

The commission evaluated the rulemaking and performed a preliminary assessment of whether Texas Government Code, Chapter 2007 applies. The commission's preliminary assessment indicates that Texas Government Code, Chapter 2007 does not apply to the rulemaking because this action is reasonably taken to fulfill an obligation mandated by federal law; therefore, this action is exempt under Texas Government Code, §2007.003(b)(4).

The specific purpose of the rulemaking is to maintain state RCRA authorization by proposing state hazardous waste rules that are equivalent to the federal regulations. The rulemaking will substantially advance this purpose by adopting rules that incorporate and refer to the federal regulations.

Promulgation and enforcement of the rules will not be a statutory or constitutional taking of private real property. Specifically, the rulemaking does not affect a landowner's rights in private real property because this rulemaking does not constitutionally bur-

den the owner's right to property; does not restrict or limit the owner's right to property; and does not reduce the value of property by 25% or more beyond that which would otherwise exist in the absence of the regulations.

The rulemaking seeks to meet the minimum standards of federal RCRA regulations that are already in place. 42 USC, §6926(g) imposes on the regulated community any federal requirements that are more stringent than current state rules. The regulated community must already have complied with the more stringent federal requirements as of the effective date of the federal regulations. Because the regulated community is already required to comply with the more stringent federal regulations, promulgating equivalent state rules will not burden, restrict or limit the owner's right to property and will not reduce the value of property by 25% or more. Likewise, the regulated community is not unduly burdened by those revisions providing greater flexibility, reduced recordkeeping, reporting, inspection and sampling requirements.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rulemaking and found that the proposal is subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act, Texas Natural Resources Code, §§33.201 *et seq.*, and therefore must be consistent with all applicable CMP goals and policies. The commission conducted a consistency determination for the proposed rules in accordance with Coastal Coordination Act Implementation Rules, 31 TAC §505.22 and found the proposed rulemaking is consistent with the applicable CMP goals and policies. The CMP goal applicable to the rulemaking is to protect, preserve, restore and enhance the diversity, quality, quantity, functions and values of coastal natural resource areas (CNRAs). Applicable policies are construction and operation of solid waste treatment, storage, and disposal facilities, such that new solid waste facilities and areal expansions of existing solid waste facilities shall be sited, designed, constructed and operated to prevent releases of pollutants that may adversely affect CNRAs and, at a minimum, comply with standards established under the Solid Waste Disposal Act, 42 USC, §§6901 *et seq.* Promulgation and enforcement of these rules are consistent with the applicable CMP goals and policies because the rule amendments will update and enhance the commission's rules concerning hazardous waste facilities. In addition, the rules do not violate any applicable provisions of the CMP's stated goals and policies.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

ANNOUNCEMENT OF HEARING

A public hearing on this proposal will be held in Austin on June 16, 2009, at 10:00 a.m. at the Texas Commission on Environmental Quality complex located at 12100 Park 35 Circle in Building B, Room 201A. The hearing will be structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. There will be no open discussion during the hearing; however, an agency staff member will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Devon Ryan, Office of Legal Services, at (512) 239-6090. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Written comments may be submitted to Devon Ryan, MC 205, Office of Legal Services, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at *http://www5.tceq.state.tx.us/rules/ecomments/*. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2008-024-335-PR. The comment period closes June 22, 2009. Copies of the proposed rule can be obtained from the commission's Web site at *http://www.tceq.state.tx.us/nav/rules/propose_adopt.html*. For further information, please contact Cynthia Palomares, Waste Permits Division, (512) 239-6079.

SUBCHAPTER C. APPLICATION FOR PERMIT OR POST-CLOSURE ORDER

30 TAC §§305.42, 305.45, 305.50

STATUTORY AUTHORITY

The amendments are proposed under Texas Water Code (TWC), §5.103 and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the TWC or other laws of this state; and under Texas Health and Safety Code (THSC), §361.017 and §361.024, which authorize the commission to regulate industrial solid waste and hazardous waste and to adopt rules consistent with the general intent and purposes of the THSC.

The proposed amendments implement THSC, Chapter 361.

§305.42. Application Required.

(a) Any person who is required to obtain a permit, or who requests an amendment, modification, or renewal of a permit, or who requests a post-closure order, or who is required to obtain a post-closure order shall complete, sign, and submit an application to the executive director, according to the provisions of this chapter.

(b) For applications involving hazardous waste, persons currently authorized to continue hazardous waste management under interim status in compliance with §335.2(c) of this title (relating to Permit Required) and Texas Health and Safety Code (THSC), §361.082(e), shall apply for permits when required by the executive director. Owners or operators shall be allowed at least six months from the date of request to submit a Part B permit application. Owners or operators of existing hazardous waste management facilities may voluntarily submit Part B of the application at any time. However, owners or operators of existing hazardous waste management facilities must submit Part B permit applications in accordance with the dates specified in 40 Code of Federal Regulations (CFR) §270.73. Owners or operators of land disposal facilities in existence on the effective date of statutory or regulatory amendments under THSC, Chapter 361, or the Resource Conservation and Recovery Act of l976, as amended, 42 United States Code, §§6901 *et seq.*, that render the facility subject to the requirement to have a hazardous waste permit must submit a Part B permit application in accordance with the dates specified in 40 CFR §270.73 and certify that such a facility is in compliance with all applicable groundwater monitoring and financial responsibility requirements.

(c) An application for a new, amended, or renewed radioactive material license under Chapter 336 of this title (relating to Radioactive Substance Rules) shall consist of one signed original and five copies. The executive director may request additional copies. Copies of an application for a low-level radioactive waste disposal license un-

der Chapter 336, Subchapter H of this title (relating to Licensing Requirements for Near-Surface Land Disposal of Low-Level Radioactive Waste) shall be retained by the applicant for distribution in accordance with written instructions from the executive director.

(d) For applications involving hazardous waste management facilities for which the owner or operator has submitted Part A of the permit application and has not yet filed Part B, the owner or operator is subject to the requirements for updating the Part A application under 40 CFR §270.10(g), as amended and adopted in the CFR through June 29, 1995, as published in the *Federal Register* (60 FR 33911).

(e) Applications for hazardous and nonhazardous disposal well permits shall be processed in accordance with this chapter for the benefit of the state and the preservation of its natural resources.

(f) For applications involving a standard permit, the procedures for application and issuance are found in Subchapter R of this chapter (relating to Resource Conservation and Recovery Act Standard Permits for Storage and Treatment Units).

§305.45. Contents of Application for Permit.

(a) Forms for permit applications will be made available by the executive director. Each application for permit must include the following:

(1) the name, mailing address, and location of the facility for which the application is submitted;

(2) the ownership status as federal, state, private, public, or other entity;

(3) the applicant's name, mailing address, and telephone number;

(4) a brief description of the nature of the business;

(5) the activities conducted by the applicant which require a permit;

(6) a topographic map, ownership map, county highway map, or a map prepared by a Texas licensed professional engineer, Texas licensed professional geoscientist [~~registered professional engineer~~] or a registered surveyor which shows the facility and each of its intake and discharge structures and any other structure or location regarding the regulated facility and associated activities. Maps must be of material suitable for a permanent record, and shall be on sheets 8-1/2 inches by 14 inches or folded to that size, and shall be on a scale of not less than one inch equals one mile. The map shall depict the approximate boundaries of the tract of land owned or to be used by the applicant and shall extend at least one mile beyond the tract boundaries sufficient to show the following:

(A) each well, spring, and surface water body or other water in the state within the map area;

(B) the general character of the areas adjacent to the facility, including public roads, towns and the nature of development of adjacent lands such as residential, commercial, agricultural, recreational, undeveloped, and so forth;

(C) the location of any waste disposal activities conducted on the tract not included in the application;

(D) the ownership of tracts of land adjacent to the facility and within a reasonable distance from the proposed point or points of discharge, deposit, injection, or other place of disposal or activity; and

(E) such other information that reasonably may be requested by the executive director;

(7) a listing of all permits or construction approvals received or applied for under any of the following programs:

(A) Hazardous Waste Management Program under the Texas Solid Waste Disposal Act;

(B) Underground Injection Control Program under the Texas Injection Well Act;

(C) National Pollutant Discharge Elimination System Program under the Clean Water Act and Waste Discharge Program under Texas Water Code, Chapter 26;

(D) Prevention of Significant Deterioration Program under the Federal Clean Air Act (FCAA);

(E) Nonattainment Program under the FCAA;

(F) national emission standards for hazardous air pollutants preconstruction approval under the FCAA;

(G) ocean dumping permits under the Marine Protection Research and Sanctuaries Act;

(H) dredge or fill permits under the FCAA;

(I) licenses under the Texas Radiation Control Act;

(J) subsurface area drip dispersal system permits under Texas Water Code, Chapter 32; and

(K) other environmental permits; and

(8) a supplementary technical report submitted in connection with an application. The report shall be prepared either by a Texas licensed professional engineer, a Texas licensed professional geoscientist, or by a qualified person who is competent and experienced in the field to which the application relates and thoroughly familiar with the operation or project for which the application is made. The report must include the following:

(A) a general description of the facilities and systems used for or in connection with the collection, transportation, treatment, and disposal of waste, or used in connection with an injection activity;

(B) for each outfall, injection well, place of deposit, or place of disposal:

(i) the volume and rate of disposal of the defined waste or of fluid injection, including appropriate averages, the maximum rates of disposal or injection over representative periods of time, and detailed information regarding patterns of disposal or injection; and

(ii) the physical, chemical, and radiological properties of the defined waste or the injection fluids; the characteristics of the waste or the injection fluid; the chemical, physical, thermal, organic, bacteriological, or radiological properties or characteristics, as applicable, described in enough detail to allow evaluation of the water and environmental quality considerations involved; and

(C) such other information as reasonably may be required by the executive director for an adequate understanding of the project or operation, and which is necessary to provide the commission an adequate opportunity to make the considerations required by §331.121 of this title (relating to Class I Wells), §331.122 of this title (relating to Class III Wells), §305.50 of this title (relating to Additional Requirements for an Application for a Hazardous or Industrial Solid Waste Permit and for a Post-Closure Order), §305.48 of this title (relating to Additional Contents for Applications for Wastewater Discharge Permits), §305.54 of this title (relating to Additional Requirements for Radioactive Material Licenses), §336.207 of this title (relating to General Requirements for Issuance of a License), §336.513 of this title (re-

lating to Technical Requirements for Active Disposal Sites), §336.617 of this title (relating to Technical Requirements for Inactive Disposal Sites), §336.705 of this title (relating to Content of Application), and Chapter 330, Subchapter E of this title (relating to Operational Standards for Municipal Solid Waste Storage and Processing Units [~~Permit Procedures~~]).

(b) Only one application needs to be filed for each geographical location in which waste is or will be disposed of or discharged from, even though there may be more than one outfall, place of deposit, or other place of disposal covered in the application.

§305.50. Additional Requirements for an Application for a Hazardous or Industrial Solid Waste Permit and for a Post-Closure Order.

(a) Unless otherwise stated, an application for a permit to store, process, or dispose of solid waste must meet the following requirements.

(1) One original and three copies of the permit application shall be submitted on forms provided by or approved by the executive director and shall be accompanied by a like number of originals and copies of all required exhibits.

(2) Plans and specifications for the construction and operation of the facility and the staffing pattern for the facility shall be submitted, including the qualifications of all key operating personnel. Also to be submitted is the closing plan for the solid waste storage, processing, or disposal facility. The information provided must be sufficiently detailed and complete to allow the executive director to ascertain whether the facility will be constructed and operated in compliance with all pertinent state and local air, water, public health, and solid waste statutes. Also to be submitted are listings of sites owned, operated, or controlled by the applicant in the State of Texas. For purposes of this section, the terms "permit holder" and "applicant" include each member of a partnership or association and, with respect to a corporation, each officer and the owner or owners of a majority of the corporate stock, provided such partner or owner controls at least 20% of the permit holder or applicant and at least 20% of another business which operates a solid waste management facility.

(3) Any other information as the executive director may deem necessary to determine whether the facility and the operation thereof will comply with the requirements of the Texas Solid Waste Disposal Act (TSWDA) and Chapter 335 of this title (relating to Industrial Solid Waste and Municipal Hazardous Waste), shall be included, including, but not limited to, the information set forth in the TSWDA, §4(e)(13).

(4) An application for a permit, permit amendment, or permit modification to store, process, or dispose of hazardous waste is subject to the following requirements, as applicable.

(A) In the case of an application for a permit to store, process, or dispose of hazardous waste, the application shall also contain any additional information required by 40 Code of Federal Regulations (CFR) §§270.13 - 270.27 (as amended though July 14, 2006 (71 Federal Register 40254), except that closure cost estimates shall be prepared in accordance with 40 CFR §264.142(a)(1), (3), and (4), as well as §37.131 of this title (relating to Annual Inflation Adjustments to Closure Cost Estimates), §37.141 of this title (relating to Increase in Current Cost Estimate), and §335.178 of this title (relating to Cost Estimate for Closure).

(B) An application for a permit to store, process, or dispose of hazardous waste shall also contain financial information sufficient to demonstrate to the satisfaction of the executive director that the applicant has sufficient financial resources to operate the facility in a safe manner and in compliance with the permit and all applicable rules, including, but not limited to, how an applicant intends to obtain financing for construction of the facility, and to close the facility properly. Financial information submitted to satisfy this subparagraph shall meet the requirements of subparagraph (C) or (D) of this paragraph.

(C) For applicants possessing a resolution from a governing body approving or agreeing to approve the issuance of bonds for the purpose of satisfying the financial assurance requirements of subparagraph (B) of this paragraph, submission of the following information will be an adequate demonstration:

(i) a statement signed by an authorized signatory in accordance with §305.44(a) of this title (relating to Signatories to Applications) explaining in detail how the applicant demonstrates sufficient financial resources to construct, safely operate, properly close, and provide adequate liability coverage for the facility. This statement must also address how the applicant intends to comply with the financial assurance requirements for closure, post-closure, corrective action, and liability coverage in accordance with Chapter 37, Subchapter P of this title (relating to Financial Assurance for Hazardous and Nonhazardous Industrial Solid Waste Facilities);

(ii) a certified copy of the resolution; and

(iii) certification by the governing body of passage of the resolution.

(D) For all applicants not meeting the requirements of subparagraph (C) of this paragraph, financial information submitted to satisfy the requirements of subparagraph (B) of this paragraph must include the applicable items listed under clauses (i) - (vii) of this subparagraph. Financial statements required under clauses (ii) and (iii) of this subparagraph shall be prepared in accordance with generally accepted accounting principles and include a balance sheet, income statement, cash flow statement, notes to the financial statements, and accountant's opinion letter:

(i) a statement signed by an authorized signatory in accordance with §305.44(a) of this title explaining in detail how the applicant demonstrates sufficient financial resources to construct, safely operate, properly close, and provide adequate liability coverage for the facility. This statement must also address how the applicant intends to comply with the financial assurance requirements for closure, post-closure, corrective action, and liability coverage in accordance with Chapter 37, Subchapter P of this title;

(ii) for applicants for which audited financial statements have been prepared the previous two or more years, the following financial statements:

(I) audited financial statements for the previous two years; and

(II) the most current quarterly financial statement prepared according to generally accepted accounting principles;

(iii) for applicants for which audited financial statements have not been prepared the previous two or more years, the following copies of tax returns and financial statements:

(I) copies of tax returns for the previous two years, each certified by original signature of an authorized signatory as being a "true and correct copy of the return filed with the Internal Revenue Service";

(II) financial statements for the previous two years; and

(III) additionally, an audited financial statement for the most recent fiscal year;

(iv) for publicly traded companies, copies of Securities and Exchange Commission Form 10-K for the previous two years and the most current Form 10-Q;

(v) for privately-held companies, written disclosure of the information that would normally be found in Securities and Exchange Commission Form 10-K including, but not limited to, the following:

(I) descriptions of the business and its operations;

(II) identification of any affiliated relationships;

(III) credit agreements and terms;

(IV) any legal proceedings involving the applicant;

(V) contingent liabilities; and

(VI) significant accounting policies;

(vi) for applications encompassing facility expansion, capacity expansion, or new construction, estimates of capital costs for expansion and/or construction;

(vii) if an applicant cannot or chooses not to demonstrate sufficient financial resources through submittal of the financial documentation specified in clauses (i) - (v) of this subparagraph and who must or chooses to obtain additional financing through a new stock offering or new debt issuance for facility expansion, capacity expansion, or new construction; and for safe operation, proper closure, and adequate liability coverage, the following information:

(I) a financial plan sufficiently detailed to clearly demonstrate that the applicant will be in a position to readily secure financing for construction, operation, and closure if the permit is issued. The submitted financial plan must be accompanied by original letters of opinion from two financial experts, not otherwise employed by the applicant, who have the demonstrated ability to either finance the facility or place the required financing. The opinion letters must certify that the financial plan is reasonable; certify that financing is obtainable within 180 days of final administrative and judicial disposition of the permit application; and include the time schedule contingent upon permit finality for securing the financing. Only one opinion letter from a financial expert, not otherwise employed by the applicant, is required if the letter renders a firm commitment to provide all the necessary financing; and

(II) written detail of the annual operating costs of the facility and a projected cash flow statement including the period of construction and first two years of operation. The cash flow statement must demonstrate the financial resources to meet operating costs, debt service, and financial assurance for closure, post-closure care, and liability coverage requirements. A list of the assumptions made to forecast cash flow shall also be provided.

(E) If any of the information required to be disclosed under subparagraph (D) of this paragraph would be considered confidential under applicable law, the information shall be protected accordingly. During hearings on contested applications, disclosure of confidential information may be allowed only under an appropriate protective order.

(F) An application for a modification or amendment of a permit that includes a capacity expansion of an existing hazardous waste management facility must also contain information provided by a Texas licensed professional geoscientist or licensed professional engineer delineating all faults within 3,000 feet of the facility, together with a demonstration, unless previously demonstrated to the commission or the EPA, that:

(i) the fault has not experienced displacement within Holocene time, or if faults have experienced displacement within Holocene time, that no such faults pass within 200 feet of the portion of the surface facility where treatment, storage, or disposal of hazardous wastes will be conducted; and

(ii) the fault will not result in structural instability of the surface facility or provide for groundwater movement to the extent that there is endangerment to human health or the environment.

(G) At any time after the effective date of the requirements contained in Chapter 335, Subchapter F of this title (relating to Permitting Standards for Owners and Operators of Hazardous Waste Treatment, Storage, [~~Processing,~~] or Disposal Facilities), the executive director may require the owner or operator of an existing hazardous waste management facility to submit that portion of his application containing the information specified in 40 CFR §§270.14 - 270.27. Any owner or operator shall be allowed a reasonable period of time from the date of the request to submit the information. An application for a new hazardous waste management facility must be submitted at least 180 days before physical construction of the facility is expected to commence.

(5) An application for a new hazardous waste landfill which is filed after January 1, 1986, must include an engineering report which evaluates the benefits, if any, associated with the construction of the landfill above existing grade at the proposed site, the costs associated with the above-grade construction, and the potential adverse effects, if any, which would be associated with the above-grade construction.

(6) An application for a new hazardous waste landfill, land treatment facility, or surface impoundment that is to be located in the apparent recharge zone of a regional aquifer must include a hydrogeologic report prepared by a Texas licensed professional geoscientist or licensed professional engineer documenting the potential effects, if any, on the regional aquifer in the event of a release from the waste containment system.

(7) Engineering plans and specifications submitted as part of the permit application shall be prepared and sealed by a Texas licensed professional engineer [~~registered professional engineer~~] who is currently registered as required by the Texas Engineering Practice Act.

(8) After August 8, 1985, any Part B permit application submitted by an owner or operator of a facility that stores, processes, or disposes of hazardous waste in a surface impoundment or a landfill must be accompanied by information, reasonably ascertainable by the owner or operator, on the potential for the public to be exposed to hazardous wastes or hazardous constituents through releases related to the unit. By August 8, 1985, owners and operators of a landfill or a surface impoundment who have already submitted a Part B application must submit the exposure information required by this paragraph. At a minimum, such information must address:

(A) reasonably foreseeable potential releases from both normal operations and accidents at the unit, including releases associated with transportation to or from the unit;

(B) the potential pathways of human exposure to hazardous wastes or constituents resulting from documented releases; and

(C) the potential magnitude and nature of the human exposure resulting from such releases.

(9) In the case of an application for a permit to store, process, or dispose of hazardous waste at a new hazardous waste

management facility, or an application for amendment or modification of a solid waste management facility permit to provide for capacity expansion, the application shall also identify the nature of any known specific and potential sources, types, and volumes of waste to be stored, processed, or disposed of by the facility and shall identify any other related information the executive director may require.

(10) In the case of an application for a permit to store, process, or dispose of hazardous waste at a new hazardous waste management facility, the application must also contain the following:

(A) copies of any relevant land use plans, adopted in accordance with the Texas Local Government Code, Chapter 211, which were in existence before publication of the notice of intent to file a solid waste permit application or, if no notice of intent is filed, at the time the permit application is filed;

(B) identification of the names and locations of industrial and other waste-generating facilities within 1/2 mile of the facility in the case of an application for a permit for a new on-site hazardous waste management facility, and within one mile of the facility in the case of an application for a permit for a new commercial hazardous waste management facility;

(C) the approximate quantity of hazardous waste generated or received annually at those facilities described under subparagraph (B) of this paragraph;

(D) descriptions of the major routes of travel in the vicinity of the facility to be used for the transportation of hazardous waste to and from the facility, together with a map showing the land-use patterns, covering at least a five-mile radius from the boundaries of the facility; and

(E) the information and demonstrations concerning faults described under paragraph (4)(F) of this subsection.

(11) In the case of an application for a permit to store, process, or dispose of hazardous waste, the application shall also contain information sufficient to demonstrate to the satisfaction of the commission that a proposed hazardous waste landfill, areal expansion of such landfill, or new commercial hazardous waste land disposal unit is not subject to inundation as a result of a 100-year flood event. An applicant or any other party may not rely solely on floodplain maps prepared by the Federal Emergency Management Agency or a successor agency to determine whether a hazardous waste landfill, areal expansion of such landfill, or commercial hazardous waste land disposal unit is subject to such an inundation.

(12) In the case of an application for a permit to store, process, or dispose of hazardous waste at a new commercial hazardous management facility, the application shall also contain the following:

(A) information sufficient to demonstrate whether a burden will be imposed on public roadways by vehicles traveling to and from the facility, including, at a minimum:

(i) the average gross weight of the various types and sizes of such vehicles to be used for transportation of hazardous waste;

(ii) the average number of such vehicles which would travel the public roadways; and

(iii) identification of the roads to be used by vehicles traveling to and from the facility within a minimum radius of 2 1/2 miles from the facility. Such identification must include the major highways nearest the facility, even if they are located outside the 2 1/2 mile radius;

(B) in addition to the requirements of subparagraph (A) of this paragraph, an applicant may submit a letter from the relevant agency of the state, county, or municipality which has the authority to regulate and maintain roads which states unequivocally that the roads to and from the facility are adequate for the loads to be placed on them by the proposed facility. Such letter will serve as prima facie evidence that the additional loads placed on the roadways caused by the operation of the facility would not constitute a burden and thus would not require that improvements be made to such roadways. Such letter does not, however, obviate the need to submit the information required under subparagraph (A) of this paragraph;

(C) evidence sufficient to demonstrate that:

(i) emergency response capabilities are available or will be available before the facility first receives waste, in the area in which the facility is located or proposed to be located, that has the ability to manage a reasonable worst-case emergency condition associated with the operation of the facility; such evidence may include, but is not limited to, the following:

(I) in addition to the contingency plan required under 40 CFR §270.14(b)(7), provisions specifying procedures and timing of practice facility evacuation drills, where there is a possibility that evacuation of the facility could be necessary;

(II) contracts with any private corporation, municipality, or county to provide emergency response;

(III) weather data which might tend to affect emergency response;

(IV) a definition of worst-case emergencies, e.g., fires, explosions, the Texas Design Hurricane, or the Standard Project Hurricane;

(V) a training program for personnel for response to such emergencies;

(VI) identification of first-responders;

(VII) identification of local or regional emergency medical services and hospitals which have had hazardous materials training;

(VIII) a pre-disaster plan, including drills;

(IX) a mechanism for notifying all applicable government agencies when an incident occurs (i.e., Texas Commission on Environmental Quality, Texas Parks and Wildlife, General Land Office, Texas Department of State Health Services, and Texas Railroad Commission);

(X) a showing of coordination with the local emergency planning committee and any local comprehensive emergency management plan; and

(XI) any medical response capability which may be available on the facility property; or

(ii) the applicant has secured bonding of sufficient financial assurance to fund the emergency response personnel and equipment determined to be necessary by the executive director to manage a reasonable worst-case emergency condition associated with the facility; such financial assurance may be demonstrated by providing information which may include, but is not limited to, the following:

(I) long-term studies using an environmental model which provide the amount of damages for which the facility is responsible; and

(II) costs involved in supplying any of the information included in or satisfying any of the requirements of clause (i)(I) - (XI) of this subparagraph;

(D) if an applicant does not elect to provide its own facilities or secure bonding to ensure sufficient emergency response capabilities in accordance with §335.183 of this title (relating to Emergency Response Capabilities Required for New Commercial Hazardous Waste Management Facilities), the applicant must provide prior to the time the facility first receives waste:

(i) documentation showing agreements with the county and/or municipality in which the facility is located, or documentation showing agreements with an adjoining county, municipality, mutual aid association, or other appropriate entity such as professional organizations regularly doing business in the area of emergency and/or disaster response; or

(ii) demonstration that a financial assurance mechanism in the form of a negotiable instrument, such as a letter of credit, fully paid in trust fund, or an insurance policy, with the limitation that the funds can only be used for emergency response personnel and equipment and made payable to and for the benefit of the county government and/or municipal government in the county in which the facility is located or proposed to be located; and

(E) a written statement signed by an authorized signatory in accordance with §305.44(a) of this title explaining how the applicant intends to provide emergency response financial assurance to meet the requirements of subparagraph (C) or (D) of this paragraph; and

(F) a summary of the applicant's experience in hazardous waste management and in particular the hazardous waste management technology proposed for the application location, and, for any applicant without experience in the particular hazardous waste management technology, a conspicuous statement of that lack of experience.

(13) An application for a boiler or industrial furnace burning hazardous waste at a facility at which the owner or operator uses direct transfer operations to feed hazardous waste from transport vehicles (containers, as defined in 40 CFR §266.111) directly to the boiler or industrial furnace shall submit information supporting conformance with the standards for direct transfer provided by 40 CFR §266.111 and §335.225 of this title (relating to Additional Standards for Direct Transfer).

(14) The executive director may require a permittee or an applicant to submit information in order to establish permit conditions under §305.127(4)(A) and (1)(B)(iii) of this title (relating to Conditions to be Determined for Individual Permits).

(15) If the executive director concludes, based on one or more of the factors listed in subparagraph (A) of this paragraph that compliance with the standards of 40 CFR Part 63, Subpart EEE alone may not be protective of human health or the environment, the executive director shall require the additional information or assessment(s) necessary to determine whether additional controls are necessary to ensure protection of human health and the environment. This includes information necessary to evaluate the potential risk to human health and/or the environment resulting from both direct and indirect exposure pathways. The executive director may also require a permittee or applicant to provide information necessary to determine whether such an assessment(s) should be required. The executive director shall base the evaluation of whether compliance with the standards of 40 CFR Part 63, Subpart EEE alone is protective of human health or the environment on factors relevant to the potential risk from a hazardous waste combustion unit, including, as appropriate, any of the following factors:

(A) particular site-specific considerations such as proximity to receptors (such as schools, hospitals, nursing homes, day-care centers, parks, community activity centers, or other potentially sensitive receptors), unique dispersion patterns, etc.;

(B) identities and quantities of emissions of persistent, bioaccumulative or toxic pollutants considering enforceable controls in place to limit those pollutants;

(C) identities and quantities of nondioxin products of incomplete combustion most likely to be emitted and to pose significant risk based on known toxicities (confirmation of which should be made through emissions testing);

(D) identities and quantities of other off-site sources of pollutants in proximity of the facility that significantly influence interpretation of a facility-specific risk assessment;

(E) presence of significant ecological considerations, such as the proximity of a particularly sensitive ecological area;

(F) volume and types of wastes, for example wastes containing highly toxic constituents;

(G) other on-site sources of hazardous air pollutants that significantly influence interpretation of the risk posed by the operation of the source in question;

(H) adequacy of any previously conducted risk assessment, given any subsequent changes in conditions likely to affect risk; and

(I) such other factors as may be appropriate.

(16) If, as the result of an assessment(s) or other information, the executive director determines that conditions are necessary in addition to those required under 40 CFR Part 63, Subpart EEE, Parts 264 or 266 to ensure protection of human health and the environment, including revising emission limits, he/she shall include those terms and conditions in a Resource Conservation and Recovery Act permit for a hazardous waste combustion unit.

(b) An application specifically for a post-closure permit or for a post-closure order for post-closure care must meet the following requirements, as applicable.

(1) An application for a post-closure permit or a post-closure order shall contain information required by 40 CFR §270.14(b)(1), (4) - (6), (11), (13), (14), (18), and (19), (c), and (d), and any additional information that the executive director determines is necessary from 40 CFR §§270.14, 270.16 - 270.18, 270.20, or 270.21, except that closure cost estimates shall be prepared in accordance with 40 CFR §264.142(a)(1), (3), and (4), as well as §§37.131, 37.141, 335.127, and 335.178 of this title.

(2) An application for a post-closure order shall also contain financial information sufficient to demonstrate to the satisfaction of the executive director that the applicant has sufficient financial resources to operate the facility in a safe manner and in compliance with the post-closure order and all applicable rules. Financial information submitted to satisfy this paragraph shall meet the requirements of Chapter 37, Subchapter P of this title.

(3) An application for a post-closure order or for a post-closure permit must also contain any other information as the executive director may deem necessary to determine whether the facility and the operation thereof will comply with the requirements of the TSWDA

and Chapter 335 of this title including, but not limited to, the information set forth in TSWDA, §361.109.

(4) The executive director may require an applicant for a post-closure order to submit information in order to establish conditions under §305.127(4)(A) of this title.

(5) An application for a post-closure order or for a post-closure permit shall also contain the information listed in §305.45(a)(1) of this title (relating to Contents of Application for Permit).

(6) All engineering and geoscientific information submitted to the agency shall be prepared by, or under the supervision of, a licensed professional engineer or licensed professional geoscientist, and shall be signed, sealed, and dated by qualified professionals as required by the Texas Engineering Practice Act and the Texas Geosciences Practice Act and the licensing and registration boards under these acts.

(7) One original and three copies of an application for a post-closure permit or for a post-closure order shall be submitted on forms provided by, or approved by, the executive director and shall be accompanied by a like number of originals and copies of all required exhibits.

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

Filed with the Office of the Secretary of State on May 8, 2009.

TRD-200901736
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 239-6090

SUBCHAPTER D. AMENDMENTS, RENEWALS, TRANSFERS, CORRECTIONS, REVOCATION, AND SUSPENSION OF PERMITS

30 TAC §§305.64 - 305.66, 305.69

STATUTORY AUTHORITY

The amendments are proposed under Texas Water Code (TWC), §5.103 and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the TWC or other laws of this state; and under Texas Health and Safety Code (THSC), §361.017 and §361.024, which authorize the commission to regulate industrial solid waste and hazardous waste and to adopt rules consistent with the general intent and purposes of the THSC.

The proposed amendments implement THSC, Chapter 361.

§305.64. Transfer of Permits.

(a) A permit is issued in personam and may be transferred only upon approval of the commission. No transfer is required for a corporate name change, as long as the secretary of state can verify that a change in name alone has occurred. An attempted transfer is not effective for any purpose until actually approved by the commission.

(b) Except as provided otherwise in subsection (g) of this section, either the transferee or the permittee shall submit to the executive director an application for transfer at least 30 days before the proposed transfer date. The application shall contain the following:

(1) the name and address of the transferee;

(2) date of proposed transfer;

(3) if the permit requires financial responsibility, the method by which the proposed transferee intends to assume or provide financial responsibility, including proof of such financial responsibility to become effective when the transfer becomes effective;

(4) a fee of $100 to be applied toward the processing of the application, as provided in §305.53(a) of this title (relating to Application Fee [~~Fees~~]);

(5) a sworn statement that the application is made with the full knowledge and consent of the permittee if the transferee is filing the application; and

(6) any other information the executive director may reasonably require.

(c) If no agreement regarding transfer of permit responsibility and liability is provided, responsibility for compliance with the terms and conditions of the permit and liability for any violation associated therewith is assumed by the transferee, effective on the date of the approved transfer. This section is not intended to relieve a transfer or of any liability.

(d) The executive director must be satisfied that proof of any required financial responsibility is sufficient before transmitting an application for transfer to the commission for further proceedings.

(e) If a person attempting to acquire a permit causes or allows operation of the facility before approval is given, such person shall be considered to be operating without a permit or other authorization.

(f) The commission may refuse to approve a transfer where conditions of a judicial decree, compliance agreement, or other enforcement order have not been entirely met. The commission shall also consider the prior compliance record of the transferee, if any.

(g) For permits involving hazardous waste under the Texas Solid Waste Disposal Act, Texas Health and Safety Code Annotated, Chapter 361 changes in the ownership or operational control of a facility may be made as Class 1 modifications with prior written approval of the executive director in accordance with §305.69 of this title (relating to Solid Waste Permit Modification at the Request of the Permittee). The new owner or operator must submit a revised permit application no later than 90 days prior to the scheduled change. A written agreement containing a specific date for transfer of permit responsibility between the current and new permittees must also be submitted to the executive director. When a transfer of ownership or operational control occurs, the old owner or operator shall comply with the requirements of Chapter 37, Subchapter P of this title (relating to Financial Assurance for Hazardous and Nonhazardous Industrial Solid Waste Facilities), until the new owner or operator has demonstrated compliance with the requirements of Chapter 37, Subchapter P of this title. The new owner or operator must demonstrate compliance with the requirements of Chapter 37, Subchapter P of this title within six months of the date of the change of ownership or operational control of the facility. Upon demonstration to the executive director by the new owner or operator of compliance with Chapter 37, Subchapter P of this title, the executive director shall notify the old owner or operator that he no longer needs to comply with Chapter 37, Subchapter P of this title as of the date of demonstration.

(h) The commission may transfer permits to an interim permittee pending an ultimate decision on a permit transfer if it finds one or more of the following:

(1) the permittee no longer owns the permitted facilities;

(2) the permittee is about to abandon or cease operation of the facilities;

(3) the permittee has abandoned or ceased operating the facilities; and

(4) there exists a need for the continued operation of the facility and the proposed interim permittee is capable of assuming responsibility for compliance with the permit.

(i) The commission may transfer a permit involuntarily after notice and an opportunity for hearing, for any of the following reasons:

(1) the permittee no longer owns or controls the permitted facilities;

(2) if the facilities have not been built, and the permittee no longer has sufficient property rights in the site of the proposed facilities;

(3) the permittee has failed or is failing to comply with the terms and conditions of the permit;

(4) the permitted facilities have been or are about to be abandoned;

(5) the permittee has violated commission rules or orders;

(6) the permittee has been or is operating the permitted facilities in a manner which creates an imminent and substantial endangerment to the public health or the environment;

(7) foreclosure, insolvency, bankruptcy, or similar proceedings have rendered the permittee unable to construct the permitted facilities or adequately perform its responsibilities in operating the facilities; or

(8) transfer of the permit would maintain the quality of water in the state consistent with the public health and enjoyment, the propagation and protection of terrestrial and aquatic life, and the operation of existing industries, taking into consideration the economic development of the state and/or would minimize the damage to the environment; and

(9) the transferee has demonstrated the willingness and ability to comply with the permit and all other applicable requirements.

(j) The commission may initiate proceedings in accordance with the Texas Water Code, Chapter 13, for the appointment of a receiver consistent with this section.

(k) For standard permits, changes in the ownership or operational control of a facility may be made as a Class 1 modification to the standard permit with prior approval from the executive director in accordance with §305.69(l)(a)(7) of this title.

§305.65. Renewal.

Any permit renewal application that is declared administratively complete on or after September 1, 1999 is subject to this section. The permittee or the executive director may file an application for renewal of a permit. The application shall be filed with the executive director before the permit expiration date. Any permittee with an effective permit shall submit a new application at least 180 days before the expiration date of the effective permit, unless permission for a later date has been granted by the executive director. The executive director shall not grant permission for applications to be submitted later than the expiration date of the existing permit.

(1) An application for renewal may be in the same form as that required for the original permit application.

(2) An application for renewal shall request continuation of the same requirements and conditions of the expiring permit.

(3) If an application for renewal in fact requests a modification of requirements and conditions of the existing permit, an application for amendment or modification shall also be filed before further action is taken. For applications filed under the Texas Water Code, Chapter 26, if an application for renewal in fact requests a modification of requirements and conditions of the existing permit, an application for amendment shall be filed in place of an application for renewal.

(4) If renewal procedures have been initiated before the permit expiration date, the existing permit will remain in full force and effect and will not expire until commission action on the application for renewal is final.

(5) The commission may deny an application for renewal for the grounds set forth in §305.66 of this title (relating to Permit Denial, Suspension, and Revocation [~~Revocation and Suspension~~]).

(6) During the renewal process, the executive director may make any changes or additions to permits authorized by §50.145 of this title (relating to Corrections of Permits), or §305.62(d) of this title (relating to Amendments [~~Amendment~~]) provided the requirements of §305.62(f) of this title and Chapter 50, Subchapters F and G of this title (relating to Action by the Commission and Action by the Executive Director) [~~§305.96 of this title (relating to Action on Application for Amendment)~~] are satisfied.

(7) The executive director may grant permission for permittees of non-publicly owned treatment works to submit the information required by 40 Code of Federal Regulations (CFR), §122.21(g)(10) after the permit expiration date.

(8) After complying with all applicable rules in Chapters 39, 50 and 55 of this title (relating to Public Notice; Action on Applications and Other Authorizations, and Requests for Reconsideration and Contested Case Hearings; Public Comment), the commission, without providing an opportunity for a contested case hearing, may act on an application to renew a permit for:

(A) storage of hazardous waste in containers, tanks, or other closed vessels if the waste:

(i) was generated on-site; and

(ii) does not include waste generated from other waste transported to the site; or

(B) processing of hazardous waste if:

(i) the waste was generated on-site;

(ii) the waste does not include waste generated from other waste transported to the site; and

(iii) the processing does not include thermal processing.

(9) If the commission determines that an applicant's compliance history for the preceding five years raises an issue regarding the applicant's ability to comply with a material term of its permit, the commission shall provide an opportunity to request a contested case hearing.

(10) An application for a standard permit may be submitted in lieu of a renewal application for those units that qualify for a standard permit. The application must meet the requirements of §305.654 of this title and be submitted at least 180 days before the expiration

date of the effective permit, unless the executive director allows a later date in writing. The executive director may not allow submission of applications or notices of intent later than the expiration date of the existing standard permit, except as allowed by 40 CFR §270.51(e)(2). For those units not eligible for a standard permit, a permit renewal application must be submitted.

(11) The commission may modify, or alternately, revoke and reissue a permit if the executive director has received notification under §305.654 of this title (relating to Information Required) of a facility owner or operator's intent to be covered by a standard permit.

(A) The conditions of an expired permit continue until the effective date of the new permit if all of the following apply:

(i) If a timely and complete application under §305.654 of this title requesting coverage under a standard permit has been submitted; and

(ii) If the executive director does not issue the standard permit before the previous permit expires.

(B) If the executive director determines that an owner or operator is not eligible for a standard permit, the conditions of the expired permit will continue if the owner or operator submits the information required in paragraphs (1) - (3) of this section within 60 days of notification that a standard permit is not allowed.

(12) A standard permit shall be renewed pursuant to this section.

§305.66. Permit Denial, Suspension, and Revocation.

(a) A permit or other order of the commission does not become a vested right and may be suspended or revoked for good cause at any time by order of the commission after opportunity for a public hearing is given. Good cause includes, but is not limited to, the following:

(1) the permittee has failed or is failing to comply with the conditions of the permit or a commission order, including failure to construct, during the life of the permit, facilities necessary to conform with the terms and conditions of the permit;

(2) the permit or the operations thereunder have been abandoned;

(3) the permit or other order is no longer needed by the permittee;

(4) the permittee's failure in the application or hearing process to disclose fully all relevant facts, or the permittee's misrepresentation of relevant facts at any time;

(5) a determination that the permitted activity endangers human health or safety or the environment to such an extent that permit termination is necessary to prevent further harm;

(6) the facility is being operated by a transferee before commission approval of the transfer;

(7) for underground injection wells, a determination that the waste being injected is a hazardous waste as defined under §335.1 of this title (relating to Definitions) either because the definition has been revised, or because a previous determination has been changed;

(8) for Class III injection wells, failure to achieve satisfactory restoration progress;

(9) for radioactive material licenses, any violation of the Texas Radiation Control Act or Chapter 336 of this title (relating to Radioactive Substance Rules), or when conditions are revealed by an application, statement of fact, report, record, inspection, or other means, which would have warranted the commission's refusal to issue a license on an original application; or

(10) such other cause sufficient to warrant termination or suspension of the authorization.

(11) the executive director has received notification under §305.42 and §305.653 of this title (relating to Application Required; and Applying for a Standard Permit) of a facility owner or operator's intent to be covered by a standard permit.

(b) The authority to discharge waste into or adjacent to the water in the state under a waste discharge permit is subject to cancellation or suspension under the Texas Water Code, §26.084.

(c) The commission may, for good cause, deny, amend, revoke, or suspend, after notice and hearing according to §305.68 of this title (relating to Action and Notice on Petition for Revocation and Suspension), any permit it issues or has authority to issue for a solid waste storage, processing, or disposal facility, for good cause, for reasons pertaining to public health, air or water pollution, land use, or for violations of the Texas Solid Waste Disposal Act, or any other applicable laws or rules controlling the management of solid waste.

(d) When the executive director determines revocation or suspension proceedings are warranted, a petition requesting appropriate action may be filed by the executive director with the commission. A person affected by the issuance of a permit or other order of the commission may initiate proceedings for revocation or suspension by forwarding a petition to the executive director to be filed with the commission.

(e) If the executive director or an affected person intends to file a petition to revoke or suspend a permit, notice of the intention and a copy of the petition to be filed shall be personally served on or sent by registered or certified mail to the permittee at the last address of record with the commission. This notice shall be given at least 15 days before a petition for revocation or suspension is submitted to the executive director or filed with the commission for further proceedings. Failure to provide such notice shall not be jurisdictional. For radioactive material licenses issued under Chapter 336 of this title (relating to Radioactive Substance Rules), only the executive director may file a petition to revoke or suspend a license.

(f) The commission may deny, suspend for not more than 90 days, or revoke an original or renewal permit if the commission finds after notice and hearing, that:

(1) the permit holder has a record of environmental violations in the preceding five years at the permitted site;

(2) the applicant has a record of environmental violations in the preceding five years at any site owned, operated, or controlled by the applicant;

(3) the permit holder or applicant made a false or misleading statement in connection with an original or renewal application, either in the formal application or in any other written instrument relating to the application submitted to the commission, its officers, or its employees;

(4) the permit holder or applicant is indebted to the state for fees, payment of penalties, or taxes imposed by Title 5, Sanitation and Environmental Quality, of the Texas Health and Safety Code (Vernon 1991) or by a rule of the commission;

(5) the permit holder or applicant is unable to ensure that the management of the hazardous waste management facility conforms or will conform to this title and the rules of the commission.

(g) Before denying, suspending, or revoking a permit under this section, the commission must find:

(1) that a violation or violations are significant and that the permit holder or applicant has not made a substantial attempt to correct the violations; or

(2) that the permit holder or applicant is indebted to the state for fees, payment of penalties, or taxes imposed by Title 5, Sanitation and Environmental Quality, of the Texas Health and Safety Code (Vernon 1991) or by rule of the commission.

(h) The commission may not suspend a new commercial hazardous waste management permit on the basis of a failure of a county or a municipality to accept the funds and make the roadway improvements pursuant to §335.182 of this title (relating to Burden on Public Roadways by a New Commercial Hazardous Waste Management Facility).

(i) For applications for new hazardous waste management facility permits, the commission may deny such an application if it determines that the facility is not compatible with local land use pursuant to §335.180 of this title (relating to Impact of New Hazardous Waste Management Facilities on Local Land Use).

(j) For applications for new commercial hazardous waste management facility permits, the commission may not deny such an application on the basis of a failure of a county or a municipality to accept the funds and make the roadway improvements pursuant to §335.182 of this title [~~(relating to Burden on Public Roadways by a New Commercial Hazardous Waste Management Facility)~~].

(k) For applications for any new commercial hazardous waste management facility permits, the commission shall not grant such an application if the applicant is without experience in the particular hazardous waste management technology and has not conspicuously stated that lack of experience in the application, and the commission shall not grant such an application unless the applicant provides a summary of its experience, pursuant to §305.50(12)(D) of this title (relating to Additional Requirements for an Application for a Hazardous or Industrial Solid Waste Permit and for a Post-Closure Order). The commission may not deny an application for a new commercial hazardous waste management facility permit solely on the basis of lack of experience of the applicant.

(l) For purposes of this section, the terms "permit holder" and "applicant" include each member of a partnership or association and, with respect to a corporation, each officer and the owner or owners of a majority of the corporate stock, provided such partner or owner controls at least 20% of the permit holder or applicant and at least 20% of another business which operates a solid waste management facility.

§305.69. Solid Waste Permit Modification at the Request of the Permittee.

(a) Applicability. This section applies only to modifications to industrial and hazardous solid waste permits. Modifications to municipal solid waste permits are covered in §305.70 of this title (relating to Municipal Solid Waste Permit and Registration Modifications).

(b) Class I modifications of solid waste permits.

(1) Except as provided in paragraph (2) of this subsection, the permittee may put into effect Class 1 modifications listed in Appendix I of subsection (k) of this section [~~subchapter~~] under the following conditions:

(A) the permittee must notify the executive director concerning the modification by certified mail or other means that establish proof of delivery within seven calendar days after the change is put into effect. This notification must specify the changes being made to permit conditions or supporting documents referenced by the permit and must explain why they are necessary. Along with the notification, the permittee must provide the applicable information in the form and manner specified in §1.5(d) of this title (relating to Records of the Agency), §§305.41 - 305.45 and 305.47 - 305.53 of this title (relating to Applicability; Application Required; Who Applies; Signatories to Applications; Contents of Application for Permit; Retention of Application Data; Additional Contents of Applications for Wastewater Discharge Permits; Additional Contents of Application for an Injection Well Permit; Additional Requirements for an Application for a Hazardous or Industrial Solid Waste Permit and for a Post-Closure Order; Revision of Applications for Hazardous Waste Permits; Waste Containing Radioactive Materials; and Application Fee), Subchapter I of this chapter (relating to Hazardous Waste Incinerator Permits), and Subchapter J of this chapter (relating to Permits for Land Treatment Demonstrations Using Field Tests or Laboratory Analyses);

(B) the permittee must send notice of the modification request by first-class mail to all persons listed in §39.13 of this title (relating to Mailed Notice). This notification must be made within 90 calendar days after the change is put into effect. For the Class 1 modifications that require prior executive director approval, the notification must be made within 90 calendar days after the executive director approves the request; and

(C) any person may request the executive director to review, and the executive director may for cause reject, any Class 1 modification. The executive director must inform the permittee by certified mail that a Class 1 modification has been rejected, explaining the reasons for the rejection. If a Class 1 modification has been rejected, the permittee must comply with the original permit conditions.

(2) Class 1 permit modifications identified in Appendix I of subsection (k) of this section by a superscript 1 may be made only with the prior written approval of the executive director.

(3) For a Class 1 permit modification, the permittee may elect to follow the procedures in subsection (c) of this section for Class 2 modifications instead of the Class 1 procedures. The permittee must inform the executive director of this decision in the notification required in subsection (c)(1) of this section.

(c) Class 2 modifications of solid waste permits.

(1) For Class 2 modifications, which are listed in Appendix I of subsection (k) of this section [~~subchapter~~], the permittee must submit a modification request to the executive director that:

(A) describes the exact change to be made to the permit conditions and supporting documents referenced by the permit;

(B) identifies the modification as a Class 2 modification;

(C) explains why the modification is needed; and

(D) provides the applicable information in the form and manner specified in §1.5(d) of this title and [~~(relating to Records of the Agency),~~] §§305.41 - 305.45 and 305.47 - 305.53 of this title [~~(relating to Applicability; Application Required; Who Applies; Signatories to Applications; Contents of Application for Permit; Retention of Application Data; Additional Contents of Applications for Wastewater Discharge Permits; Additional Contents of Application for an Injection Well Permit; Additional Requirements for an Application for a Hazardous or Industrial Solid Waste Permit and for a Post-Closure Order; Revision of Applications for Hazardous Waste Permits; Waste Containing Radioactive Materials; and Application Fee), Subchapter I of this chapter (relating to Hazardous Waste Incinerator Permits), and~~

~~Subchapter J of this chapter (relating to Permits for Land Treatment Demonstrations Using Field Tests or Laboratory Analyses)~~];

(2) The permittee must send a notice of the modification request by first-class mail to all persons listed in §39.13 of this title [~~(relating to Mailed Notice)~~] and must cause this notice to be published in a major local newspaper of general circulation. This notice must be mailed and published within seven days before or after the date of submission of the modification request, and the permittee must provide to the executive director evidence of the mailing and publication. The notice must include:

(A) announcement of a 60-day comment period, in accordance with paragraph (5) of this subsection, and the name and address of an agency contact to whom comments must be sent;

(B) announcement of the date, time, and place for a public meeting to be held in accordance with paragraph (4) of this subsection;

(C) name and telephone number of the permittee's contact person;

(D) name and telephone number of an agency contact person;

(E) location where copies of the modification request and any supporting documents can be viewed and copied; and

(F) the following statement: "The permittee's compliance history during the life of the permit being modified is available from the agency contact person."

(3) The permittee must place a copy of the permit modification request and supporting documents in a location accessible to the public in the vicinity of the permitted facility.

(4) The permittee must hold a public meeting no earlier than 15 days after the publication of the notice required in paragraph (2) of this subsection and no later than 15 days before the close of the 60-day comment period. The meeting must be held to the extent practicable in the vicinity of the permitted facility.

(5) The public shall be provided at least 60 days to comment on the modification request. The comment period will begin on the date the permittee publishes the notice in the local newspaper. Comments should be submitted to the agency contact identified in the public notice.

(6) No later than 90 days after receipt of the modification request, subparagraphs (A), (B), (C), (D), or (E) of this paragraph must be met, subject to §50.33 of this title (relating to Executive Director Action on Application), as follows:

(A) the executive director or the commission must approve the modification request, with or without changes, and modify the permit accordingly;

(B) the commission must deny the request;

(C) the commission or the executive director must determine that the modification request must follow the procedures in subsection (d) of this section for Class 3 modifications for either of the following reasons:

(i) there is significant public concern about the proposed modification; or

(ii) the complex nature of the change requires the more extensive procedures of a Class 3 modification; or

(D) the commission must approve the modification request, with or without changes, as a temporary authorization having a term of up to 180 days, in accordance with the following public notice requirements:

(i) notice of a hearing on the temporary authorization shall be given not later than the 20th day before the hearing on the authorization; and

(ii) this notice of hearing shall provide that an affected person may request an evidentiary hearing on issuance of the temporary authorization; or

(E) the executive director must notify the permittee that the executive director or the commission will decide on the request within the next 30 days.

(7) If the executive director notifies the permittee of a 30-day extension for a decision, then no later than 120 days after receipt of the modification request, subparagraphs (A), (B), (C), or (D) of this paragraph must be met, subject to §50.33 of this title [~~(relating to Executive Director Action on Application)~~], as follows:

(A) the executive director or the commission must approve the modification request, with or without changes, and modify the permit accordingly;

(B) the commission must deny the request;

(C) the commission or the executive director must determine that the modification request must follow the procedures in subsection (d) of this section for Class 3 modifications for either of the following reasons:

(i) there is significant public concern about the proposed modification; or

(ii) the complex nature of the change requires the more extensive procedures of a Class 3 modification; or

(D) the commission must approve the modification request, with or without changes, as a temporary authorization having a term of up to 180 days, in accordance with the following public notice requirements:

(i) notice of a hearing on the temporary authorization shall be given not later than the 20th day before the hearing on the authorization; and

(ii) this notice of hearing shall provide that an affected person may request an evidentiary hearing on issuance of the temporary authorization.

(8) If the executive director or the commission fails to make one of the decisions specified in paragraph (7) of this subsection by the 120th day after receipt of the modification request, the permittee is automatically authorized to conduct the activities described in the modification request for up to 180 days, without formal agency action. The authorized activities must be conducted as described in the permit modification request and must be in compliance with all appropriate standards of Chapter 335, Subchapter E of this title (relating to Interim Standards for Owners and Operators of Hazardous Waste Treatment, Storage, or Disposal Facilities). If the commission approves, with or without changes, or denies any modification request during the term of the temporary authorization issued pursuant to paragraph (6) or (7) of this subsection, such action cancels the temporary authorization. The commission is the sole authority for approving or denying the modification request during the term of the temporary authorization. If the executive director or the commission approves, with or without changes, or if the commission denies the modification request during the term of the automatic authorization provided for in this paragraph, such action cancels the automatic authorization.

(9) In the case of an automatic authorization under paragraph (8) of this subsection, or a temporary authorization under paragraph (6)(D) or (7)(D) of this subsection, if the executive director or the commission has not made a final approval or denial of the modification request by the date 50 days prior to the end of the temporary or automatic authorization, the permittee must within seven days of that time send a notification to all persons listed in §39.13 of this title [~~(relating to Mailed Notice)~~], and make a reasonable effort to notify other persons who submitted written comments on the modification request, that:

(A) the permittee has been authorized temporarily to conduct the activities described in the permit modification request; and

(B) unless the executive director or the commission acts to give final approval or denial of the request by the end of the authorization period, the permittee will receive authorization to conduct such activities for the life of the permit.

(10) If the owner/operator fails to notify the public by the date specified in paragraph (9) of this subsection, the effective date of the permanent authorization will be deferred until 50 days after the owner/operator notifies the public.

(11) Except as provided in paragraph (13) of this subsection, if the executive director or the commission does not finally approve or deny a modification request before the end of the automatic or temporary authorization period or reclassify the modification as Class 3 modification, the permittee is authorized to conduct the activities described in the permit modification request for the life of the permit unless amended or modified later under §305.62 of this title (relating to Amendments [~~Amendment~~]) or this section. The activities authorized under this paragraph must be conducted as described in the permit modification request and must be in compliance with all appropriate standards of Chapter 335, Subchapter E of this title [~~(relating to Interim Standards for Owners and Operators of Hazardous Waste Treatment, Storage, or Disposal Facilities)~~].

(12) In the processing of each Class 2 modification request which is subsequently approved or denied by the executive director or the commission in accordance with paragraph (6) or (7) of this subsection, or each Class 2 modification request for which a temporary authorization is issued in accordance with subsection (f) of this section or a reclassification to a Class 3 modification is made in accordance with paragraph (6)(C) or (7)(C) of this subsection, the executive director must consider all written comments submitted to the agency during the public comment period and must respond in writing to all significant comments.

(13) With the written consent of the permittee, the executive director may extend indefinitely or for a specified period the time periods for final approval or denial of a Class 2 modification request or for reclassifying a modification as Class 3.

(14) The commission or the executive director may change the terms of, and the commission may deny a Class 2 permit modification request under paragraphs (6) - (8) of this subsection for any of the following reasons:

(A) the modification request is incomplete;

(B) the requested modification does not comply with the appropriate requirements of Chapter 335, Subchapter F of this title (relating to Permitting Standards for Owners and Operators of Hazardous Waste Treatment, Storage, or Disposal Facilities) or other applicable requirements; or

(C) the conditions of the modification fail to protect human health and the environment.

(15) The permittee may perform any construction associated with a Class 2 permit modification request beginning 60 days after the submission of the request unless the executive director establishes a later date for commencing construction and informs the permittee in writing before the 60th day.

(d) Class 3 modifications of solid waste permits.

(1) For Class 3 modifications listed in Appendix I of subsection (k) of this section [~~subchapter~~], the permittee must submit a modification request to the executive director that:

(A) describes the exact change to be made to the permit conditions and supporting documents referenced by the permit;

(B) identifies that the modification is a Class 3 modification;

(C) explains why the modification is needed; and

(D) provides the applicable information in the form and manner specified in §1.5(d) of this title [~~(relating to Records of the Agency),~~] and §§305.41 - 305.45 and 305.47 - 305.53 of this title [~~(relating to Applicability; Application Required; Who Applies; Signatories to Applications; Contents of Application for Permit; Retention of Application Data; Additional Contents of Applications for Wastewater Discharge Permits; Additional Contents of Application for an Injection Well Permit; Additional Requirements for an Application for a Hazardous or Industrial Solid Waste Permit and for a Post-Closure Order; Revision of Applications for Hazardous Waste Permits; Waste Containing Radioactive Materials; and Application Fee), Subchapter I of this chapter (relating to Hazardous Waste Incinerator Permits), Subchapter J of this chapter (relating to Permits for Land Treatment Demonstrations Using Field Tests or Laboratory Analyses)~~]; and Subchapter Q of this chapter (relating to Permits for Boilers and Industrial Furnaces Burning Hazardous Waste).

(2) The permittee must send a notice of the modification request by first-class mail to all persons listed in §39.13 of this title [~~(relating to Mailed Notice)~~] and must cause this notice to be published in a major local newspaper of general circulation. This notice must be mailed and published within seven days before or after the date of submission of the modification request and evidence of the mailing and publication of the notice shall be provided to the executive director. The notice shall include the following:

(A) all information required by §39.11 of this title (relating to Text of Mailed Notice);

(B) announcement of a 60-day comment period, and the name and address of an agency contact person to whom comments must be sent;

(C) announcement of the date, time, and place for a public meeting on the modification request, to be held in accordance with paragraph (4) of this subsection;

(D) name and telephone number of the permittee's contact person;

(E) name and telephone number of an agency contact person;

(F) identification of the location where copies of the modification request and any supporting documents can be viewed and copied; and

(G) the following statement: "The permittee's compliance history during the life of the permit being modified is available from the agency contact person."

(3) The permittee must place a copy of the permit modification request and supporting documents in a location accessible to the public in the vicinity of the permitted facility.

(4) The permittee must hold a public meeting no earlier than 15 days after the publication of the notice required in paragraph (2) of this subsection and no later than 15 days before the close of the 60-day comment period. The meeting must be held to the extent practicable in the vicinity of the permitted facility.

(5) The public shall be provided at least 60 days to comment on the modification request. The comment period will begin on the date the permittee publishes the notice in the local newspaper. Comments should be submitted to the agency contact person identified in the public notice.

(6) After the conclusion of the 60-day comment period, the permit modification request shall be granted or denied in accordance with the applicable requirements of Chapter 39 of this title (relating to Public Notice), Chapter 50 of this title (relating to Action on Applications and Other Authorizations), and Chapter 55 of this title (relating to Requests for Reconsideration and Contested Case Hearings; Public Comment). When a permit is modified, only the conditions subject to modification are reopened.

(e) Other modifications.

(1) In the case of modifications not explicitly listed in Appendix I of subsection (k) of this section [~~subchapter~~], the permittee may submit a Class 3 modification request to the agency, or the permittee may request a determination by the executive director that the modification should be reviewed and approved as a Class 1 or Class 2 modification. If the permittee requests that the modification be classified as a Class 1 or Class 2 modification, the permittee must provide the agency with the necessary information to support the requested classification.

(2) The executive director shall make the determination described in paragraph (1) of this subsection as promptly as practicable. In determining the appropriate class for a specific modification, the executive director shall consider the similarity of the modification to other modifications codified in Appendix I of subsection (k) of this section and the following criteria.

(A) Class 1 modifications apply to minor changes that keep the permit current with routine changes to the facility or its operation. These changes do not substantially alter the permit conditions or reduce the capacity of the facility to protect human health or the environment. In the case of Class 1 modifications, the executive director may require prior approval;

(B) Class 2 modifications apply to changes that are necessary to enable a permittee to respond, in a timely manner, to:

(i) common variations in the types and quantities of the wastes managed under the facility permit;

(ii) technological advancements; and

(iii) changes necessary to comply with new regulations, where these changes can be implemented without substantially changing design specifications or management practices in the permit; and

(C) Class 3 modifications reflect a substantial alteration of the facility or its operations.

(f) Temporary authorizations.

(1) Upon request of the permittee, the commission may grant the permittee a temporary authorization having a term of up to 180 days, in accordance with this subsection, and in accordance with the following public notice requirements:

(A) notice of a hearing on the temporary authorization shall be given not later than the 20th day before the hearing on the authorization; and

(B) this notice of hearing shall provide that an affected person may request an evidentiary hearing on issuance of the temporary authorization.

(2) The permittee may request a temporary authorization for:

(A) any Class 2 modification meeting the criteria in paragraph (5)(B) of this subsection; and

(B) any Class 3 modification that meets the criteria in paragraph (5)(B)(i) or (ii) of this subsection, or that meets any of the criteria in paragraph (5)(B)(iii) - (v) of this subsection and provides improved management or treatment of a hazardous waste already listed in the facility permit.

(3) The temporary authorization request must include:

(A) a specific description of the activities to be conducted under the temporary authorization;

(B) an explanation of why the temporary authorization is necessary and reasonably unavoidable; and

(C) sufficient information to ensure compliance with the applicable standards of Chapter 335, Subchapter F of this title [~~(relating to Permitting Standards for Owners and Operators of Hazardous Waste Treatment, Storage, or Disposal Facilities)~~] and 40 Code of Federal Regulations (CFR) Part 264.

(4) The permittee must send a notice about the temporary authorization request by first-class mail to all persons listed in §39.13 of this title [~~(relating to Mailed Notice)~~]. This notification must be made within seven days of submission of the authorization request.

(5) The commission shall approve or deny the temporary authorization as quickly as practicable. To issue a temporary authorization, the commission must find:

(A) the authorized activities are in compliance with the applicable standards of Chapter 335, Subchapter F of this title [~~(relating to Permitting Standards for Owners and Operators of Hazardous Waste Treatment, Storage, or Disposal Facilities)~~] and 40 CFR Part 264; and

(B) the temporary authorization is necessary to achieve one of the following objectives before action is likely to be taken on a modification request:

(i) to facilitate timely implementation of closure or corrective action activities;

(ii) to allow treatment or storage in tanks, containers, or containment buildings, of restricted wastes in accordance with Chapter 335, Subchapter O of this title (relating to Land Disposal Restrictions), 40 CFR Part 268, or Section 3004 of the Resource Conservation and Recovery Act (RCRA), 42 United States Code, §6924;

(iii) to prevent disruption of ongoing waste management activities;

(iv) to enable the permittee to respond to sudden changes in the types or quantities of the wastes managed under the facility permit; or

(v) to facilitate other changes to protect human health and the environment.

(6) A temporary authorization may be reissued for one additional term of up to 180 days provided that the permittee has requested a Class 2 or 3 permit modification for the activity covered in the temporary authorization, and:

(A) the reissued temporary authorization constitutes the commission's decision on a Class 2 permit modification in accordance with subsection (c)(6)(D) or (7)(D) of this section; or

(B) the commission determines that the reissued temporary authorization involving a Class 3 permit modification request is warranted to allow the authorized activities to continue while the modification procedures of subsection (d) of this section are conducted.

(g) Public notice and appeals of permit modification decisions.

(1) The commission shall notify all persons listed in §39.13 of this title [(relating to Mailed Notice)] within ten working days of any decision under this section to grant or deny a Class 2 or 3 permit modification request. The commission shall also notify such persons within ten working days after an automatic authorization for a Class 2 modification goes into effect under subsection (c)(8) or (11) of this section.

(2) The executive director's or the commission's decision to grant or deny a Class 3 permit modification request under this section may be appealed under the appropriate procedures set forth in the commission's rules and in the Administrative Procedure Act, Texas Government Code, Chapter 2001.

(h) Newly regulated wastes and units.

(1) The permittee is authorized to continue to manage wastes listed or identified as hazardous under 40 CFR Part 261, or to continue to manage hazardous waste in units newly regulated as hazardous waste management units if:

(A) the unit was in existence as a hazardous waste facility unit with respect to the newly listed or characteristic waste or newly regulated waste management unit on the effective date of the final rule listing or identifying the waste or regulating the unit;

(B) the permittee submits a Class 1 modification request on or before the date on which the waste or unit becomes subject to the new requirements;

(C) the permittee is in substantial compliance with the applicable standards of Chapter 335, Subchapter E of this title [(relating to Interim Standards for Owners and Operators of Hazardous Waste Treatment, Storage, or Disposal Facilities)], Chapter 335, Subchapter H, Divisions 1 through 4 of this title (relating to Standards for the Management of Specific Wastes and Specific Types of Facilities), and 40 CFR Part 265 and Part 266;

(D) the permittee also submits a complete Class 2 or 3 modification request within 180 days after the effective date of the final rule listing or identifying the waste or subjecting the unit to Section 6921 of the Resource Conservation and Recovery Act Subtitle C (Subchapter III Hazardous Waste Management, 42 United States Code, §§6921 - 6939e)[,] ; and

(E) in the case of land disposal units, the permittee certifies that each such unit is in compliance with all applicable 40 CFR Part 265 groundwater monitoring requirements and with Chapter 37 of this title (relating to Financial Assurance) on the date 12 months after the effective date of the final rule identifying or listing the waste as hazardous, or regulating the unit as a hazardous waste management unit. If the owner or operator fails to certify compliance with these requirements, the owner or operator shall lose authority to operate under this section.

(2) New wastes or units added to a facility's permit under this subsection do not constitute expansions for the purpose of the 25% capacity expansion limit for Class 2 modifications.

(i) Combustion facility changes to meet 40 CFR Part 63, Maximum Achievable Control Technology (MACT) standards. The following procedures apply to hazardous waste combustion facility permit modifications requested under L.9. of Appendix I of subsection (k) of this section [subchapter].

(1) Facility owners or operators must have complied with the Notification of Intent to Comply (NIC) requirements of 40 CFR §63.1210(b) and (c) that were in effect prior to October 11, 2000, as amended in 40 CFR §270.42(j) through October 12, 2005 (70 Federal Register 59402) [February 14, 2002 (67 FR 6968)], before a permit modification can be requested under this section.

(2) If the executive director does not approve or deny the request within 90 days of receiving it, the request shall be deemed approved. The executive director may, at his or her discretion, extend this 90-day deadline one time for up to 30 days by notifying the facility owner or operator.

(3) Facility owners or operators may request to have specific RCRA operating and emissions limits waived by submitting a Class 1 permit modification request under L.10. in Appendix I of subsection (k) of this section. The facility owner or operator must:

(A) identify the specific RCRA permit operating and emissions limits which are requested to be waived;

(B) provide an explanation of why the changes are necessary to minimize or eliminate conflicts between the RCRA permit and MACT compliance;

(C) discuss how the revised provisions will be sufficiently protective; and

(D) the executive director shall notify the facility owner or operator whether the Class 1 permit modification has been approved or denied. If denied, the executive director shall provide justification for denial.

(4) To request the modification referenced in paragraph (3) of this subsection in conjunction with MACT performance testing where permit limits may only be waived during actual test events and pretesting, as defined under 40 CFR §63.1207(h)(2)(i) and (ii), for an aggregate time not to exceed 720 hours of operation (renewable at the discretion of the executive director); the owner or operator must:

(A) submit the modification request to the executive director at the same time the test plans are submitted to the executive director; and

(B) the executive director may elect to approve or deny the request contingent upon approval of the test plans.

(j) Military hazardous waste munitions storage, processing, and disposal. The permittee is authorized to continue to accept waste military munitions notwithstanding any permit conditions barring the permittee from accepting off-site wastes, if:

(1) the facility is in existence as a hazardous waste facility, and the facility is already permitted to handle waste military munitions, on the date when waste military munitions become subject to hazardous waste regulatory requirements;

(2) on or before the date when waste military munitions become subject to hazardous waste regulatory requirements, the permittee submits a Class 1 modification request to remove or revise the permit provision restricting the receipt of off-site waste munitions; and

(3) the permittee submits a Class 2 modification request within 180 days of the date when the waste military munitions become subject to hazardous waste regulatory requirements.

(k) Appendix I. The following appendix will be used for the purposes of this subchapter which relates to industrial and hazardous solid waste permit modification at the request of the permittee.
Figure: 30 TAC §305.69(k)
[Figure: 30 TAC §305.69(k)]

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

Filed with the Office of the Secretary of State on May 8, 2009.

TRD-200901737
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 239-6090

SUBCHAPTER G. ADDITIONAL CONDITIONS FOR HAZARDOUS AND INDUSTRIAL SOLID WASTE STORAGE, PROCESSING, OR DISPOSAL PERMITS

30 TAC §305.144, §305.150

STATUTORY AUTHORITY

The amendments are proposed under Texas Water Code (TWC), §5.103 and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the TWC or other laws of this state; and under Texas Health and Safety Code (THSC), §361.017 and §361.024, which authorize the commission to regulate industrial solid waste and hazardous waste and to adopt rules consistent with the general intent and purposes of the THSC.

The proposed amendments implement THSC, Chapter 361.

§305.144. Certification and Inspection.

For a new facility, the permittee may not commence storage, processing, or disposal of solid waste; and for a facility being modified, the permittee may not process, store, or dispose of solid waste in the modified portion of the facility, except as provided in §305.69 of this title (relating to Solid Waste Permit Modification at the Request of the Permittee) until:

(1) the permittee has submitted to the executive director by certified mail or hand delivery a letter signed by the permittee and a Texas licensed [registered] professional engineer stating that the facility has been constructed or modified in compliance with the permit; and

(2) the executive director has inspected the modified or newly constructed facility and finds it is in compliance with the conditions of the permit; or if within 15 days of submission of the letter required by paragraph (1) of this section, the permittee has not received notice from the executive director of an intent to inspect, prior inspection is waived, and the permittee may commence processing, storage, or disposal of solid waste.

§305.150. Incorporation of References.

When used in this chapter [(relating to Consolidated Permits)], the references contained in 40 Code of Federal Regulations §260.11 are incorporated by reference as amended through October 12, 2005 (70 Federal Register 59402) [May 14, 1999 (64 FR 26315)].

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 8, 2009.

TRD-200901738
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 239-6090

SUBCHAPTER I. HAZARDOUS WASTE INCINERATOR PERMITS

30 TAC §305.172, §305.175

STATUTORY AUTHORITY

The amendments are proposed under Texas Water Code (TWC), §5.103 and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the TWC or other laws of this state; and under Texas Health and Safety Code (THSC), §361.017 and §361.024, which authorize the commission to regulate industrial solid waste and hazardous waste and to adopt rules consistent with the general intent and purposes of the THSC.

The proposed amendments implement THSC, Chapter 361.

§305.172. Determining Feasibility of Compliance and Adequate Operating Conditions.

For the purposes of determining feasibility of compliance with the performance standards of 40 Code of Federal Regulations (CFR) §264.343 and of determining adequate operating conditions under 40 CFR §264.345, the commission shall establish conditions in the permit for a new hazardous waste incinerator, to be effective during the trial burn.

(1) Applicant shall propose a trial burn plan, prepared under paragraph (2) of this section, with Part B of the permit application.

(2) The trial burn plan shall include the following information:

(A) an analysis of each waste or mixture of wastes to be burned which includes:

(i) heat value of the waste in the form and composition in which it will be burned;

(ii) viscosity (if applicable), or description of physical form of the waste;

(iii) an identification of any hazardous organic constituents listed in 40 CFR Part 261, Appendix VIII, which are present in the waste to be burned, except that the applicant need not analyze for constituents listed in Part 261, Appendix VIII, which reasonably would not be expected to be found in the waste. The constituents excluded from analysis must be identified, and the basis for their exclusion established. The waste analysis must rely on appropriate analytical techniques [specified in "Test Methods for Evaluating Solid Waste, Physi-

~~cal/Chemical Methods," EPA Publication SW-846, as incorporated by reference in 40 CFR §260.11 and in §305.150 of this title (relating to Incorporation of References), or their equivalent~~]; and

(iv) an approximate quantification of the hazardous constituents identified in the waste, within the precision produced by appropriate [~~the~~] analytical methods [~~specified in "Test Methods for Evaluating Solid Waste, Physical/Chemical Methods," EPA Publication SW-846, as incorporated by reference in 40 CFR §260.11 and in §305.150 of this title (relating to Incorporation of References), or their equivalent~~];

(B) a detailed engineering description of the incinerator for which the permit is sought, including:

(i) manufacturer's name and model number of incinerator (if available);

(ii) type of incinerator;

(iii) linear dimensions of the incinerator unit, including the cross-sectional area of combustion chamber;

(iv) description of the auxiliary fuel system (type/feed);

(v) capacity of prime mover;

(vi) description of automatic waste feed cut-off system(s);

(vii) stack gas monitoring and pollution control equipment;

(viii) nozzle and burner design;

(ix) construction materials; and

(x) location and description of temperature, pressure, and flow indicating and control devices;

(C) a detailed description of sampling and monitoring procedures, including sampling and monitoring locations in the system, the equipment to be used, sampling and monitoring frequency, and planned analytical procedures for sample analysis;

(D) a detailed test schedule for each waste for which the trial burn is planned including date(s), duration, quantity of waste to be burned, and other factors relevant to the decision under paragraph (5) of this section;

(E) a detailed test protocol, including, for each waste identified, the ranges of temperature, waste feed rate, combustion gas velocity, use of auxiliary fuel, and any other relevant parameters that will be varied to affect the destruction and removal efficiency of the incinerator;

(F) a description of, and planned operating conditions for, any emission control equipment which will be used;

(G) procedures for rapidly stopping the waste feed, shutting down the incinerator, and controlling emissions in the event of an equipment malfunction; and

(H) such other information as the executive director reasonably finds necessary to determine whether to approve the trial burn plan in light of the purposes of this paragraph and the criteria in paragraph (5) of this section.

(3) The executive director, in reviewing the trial burn plan, shall evaluate the sufficiency of the information provided and may require the applicant to supplement this information, if necessary, to achieve the purposes of this section.

(4) Based on the waste analysis data in the trial burn plan, the commission shall specify as trial principal organic hazardous constituents (POHCs), those constituents for which destruction and removal efficiencies must be calculated during the trial burn. These trial POHCs will be specified by the commission based on an estimate of the difficulty of incineration of the constituents identified in the waste analysis, their concentration or mass in the waste feed, and for wastes listed in 40 CFR Part 261, Subpart D, the hazardous waste organic constituent or constituents identified in Appendix VII of that part as the basis for listing.

(5) The commission shall approve a trial burn plan if it finds that:

(A) the trial burn is likely to determine whether the incinerator performance standard required by 40 CFR §264.343 can be met;

(B) the trial burn itself will not present an imminent hazard to human health or safety or the environment;

(C) the trial burn will help the commission to determine the operating requirements to be specified (in the permit) according to 40 CFR §264.345; and

(D) the information sought in subparagraphs (A) and (C) of this paragraph cannot reasonably be developed through other means.

(6) The chief clerk shall send notice to the state senator and representative who represent the area in which the facility is or will be located, and to the persons listed in §39.13 of this title (relating to Mailed Notice) announcing the scheduled commencement and completion dates for the trial burn. The notice shall meet the requirements of 40 CFR [~~Code of Federal Regulations~~] §270.62(b)(6)(i) - (ii), as amended through December 11, 1995, at 60 FedReg 63417. The applicant may not commence the trial burn until after the chief clerk has issued such notice. This paragraph applies to initial trial burns and all other trial burns except those that are to be conducted within 180 days after permit modification covering the trial burn.

(7) During each approved trial burn (or as soon after the burn as practicable), the applicant must make the following determinations:

(A) a quantitative analysis of the trial POHCs in the waste feed to the incinerator;

(B) a quantitative analysis of the exhaust gas for the concentration and mass emissions of the trial POHCs, oxygen (O2) and hydrogen chloride (HCl);

(C) a quantitative analysis of the scrubber water (if any), ash residues, and other residues, for the purpose of estimating the fate of the trial POHCs;

(D) a computation of destruction and removal efficiency (DRE), in accordance with the DRE formula specified in 40 CFR §264.343(a);

(E) if the HCl emission rate exceeds 1.8 kilograms of HCl per hour (four pounds per hour), a computation of HCl removal efficiency in accordance with 40 CFR §264.343(b);

(F) a computation of particulate emissions, in accordance with 40 CFR §264.343(c);

(G) an identification of sources of fugitive emissions and their means of control;

(H) a measurement of average, maximum, and minimum temperatures and combustion gas velocity;

(I) a continuous measurement of carbon monoxide (CO) in the exhaust gas; and

(J) such other information as the executive director may specify as necessary to ensure that the trial burn will determine the compliance with the performance standards in 40 CFR §264.343 and to establish the operating conditions required by 40 CFR §264.345 as necessary to meet those performance standards.

(8) The applicant must submit to the executive director a certification that the trial burn has been carried out in accordance with the approved trial burn plan, and shall submit the results of all the determinations required in paragraph (7) of this section. This submission shall be made within 90 days of completion of the trial burn, or later with the prior approval of the executive director.

(9) All data collected during any trial burn shall be submitted to the executive director immediately following the completion of the trial burn.

(10) All submissions required by this section shall be certified on behalf of the applicant by the signature of a person authorized to sign a permit application or a report under §305.44 of this title (relating to Signatories to Applications) and §305.128 of this title (relating to Signatories to Reports).

(11) Based on the results of the trial burn, the commission or the executive director, as appropriate, subject to §50.33 of this title (relating to Executive Director Action on Application), shall set the operating requirements in the final permit according to 40 CFR §264.345. The permit amendment or modification shall proceed according to §305.62 of this title (relating to Amendments [~~Amendment~~]) or §305.69(c) of this title (relating to Solid Waste Permit Modification at the Request of the Permittee).

§305.175. Conditional Exemption for Demonstrating Compliance with Certain Air Standards.

When an owner or operator of a hazardous waste incineration unit becomes subject to Resource Conservation and Recovery Act permit requirements after October 12, 2005, or when an owner or operator of an existing hazardous waste incineration unit demonstrates compliance with the air emission standards and limitations in 40 Code of Federal Regulations (CFR) Part 63, Subpart EEE, the requirements of this subchapter do not apply, except those provisions the executive director determines are necessary to ensure compliance with 40 CFR §264.345(a) and 40 CFR §264.345(c), if the permittee or applicant elects to comply with 40 CFR §270.235(a)(1)(i). The executive director may apply the provisions of this subchapter, on a case-by-case basis, and require a permittee or an applicant to submit information in order to establish permit conditions under §305.50(a)(15) or (16) and §305.127(1)(B)(iii) or (4)(A) of this title (relating to Additional Requirements for an Application for a Hazardous or Industrial Solid Waste Permit and for a Post-Closure Order; and Conditions to be Determined for Individual Permits).

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 8, 2009.

TRD-200901739
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 239-6090

♦ ♦ ♦

SUBCHAPTER Q. PERMITS FOR BOILERS AND INDUSTRIAL FURNACES BURNING HAZARDOUS WASTE

30 TAC §305.571, §305.572

STATUTORY AUTHORITY

The amendments are proposed under Texas Water Code (TWC), §5.103 and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the TWC or other laws of this state; and under Texas Health and Safety Code (THSC), §361.017 and §361.024, which authorize the commission to regulate industrial solid waste and hazardous waste and to adopt rules consistent with the general intent and purposes of the THSC.

The proposed amendments implement THSC, Chapter 361.

§305.571. Applicability.

(a) Owners and operators of new boilers and industrial furnaces (those not operating under the interim status standards of 40 Code of Federal Regulations (CFR) §266.103 and §335.224 of this title (relating to Additional Interim Status Standards for Burners)) are subject to §305.572 of this title (relating to Permit and Trial Burn Requirements). Owners and operators of existing boilers and industrial furnaces operating under the interim status standards of 40 CFR §266.103 and §335.224 of this title are subject to §305.573 of this title (relating to Interim Status and Trial Burn Requirements).

(b) When an owner or operator of a cement kiln, [~~or~~] lightweight aggregate kiln, solid fuel boiler, liquid fuel boiler, or hydrochloric acid production furnace becomes subject to Resource Conservation and Recovery Act permitting requirements after October 12, 2005 or when an owner or operator of an existing cement kiln, lightweight aggregate kiln, solid fuel boiler, liquid fuel boiler or hydrochloric acid production furnace demonstrates compliance with the air emission standards and limitations in 40 CFR Part 63, Subpart EEE, the requirements of this subchapter do not apply. The requirements of this section do apply, however, if the executive director determines certain provisions [~~, except those the executive director determines~~] are necessary to comply with 40 CFR §266.102(e)(1) and [~~§266.102(e)~~](2)(iii) if the permittee or applicant elects to comply with 40 CFR §270.235(a)(1)(i) to minimize emissions of toxic compounds from startup, shutdown, and malfunction events; or if the facility is an area source and elects to comply with the 40 CFR §§266.105, 266.106, and 266.107 standards and associated requirements for particulate matter, hydrogen chloride and chlorine gas, and non-mercury metals; or the [~~. The~~] executive director may apply the provisions of this subchapter, on a case-by-case basis, and require a permittee or an applicant to submit information in order to establish permit conditions under §305.50(a)(15) or (16) and §305.127(1)(B)(iii) or (4)(A) of this title (relating to Additional Requirements for an Application for a Hazardous or Industrial Solid Waste Permit and for a Post-Closure Order; and Conditions to be Determined for Individual Permits).

§305.572. Permit and Trial Burn Requirements.

(a) The following regulations contained in 40 Code of Federal Regulations (CFR) Part 270 are adopted by reference, as amended and adopted in the CFR through August 1, 2005 (70 FedReg 44150) or as stated below [~~December 19, 2002 (67 FR 77687)~~]:

(1) §270.66(b) - Permit Operating Periods for New Boilers and Industrial Furnaces, except that any permit amendment or modifi-

cation shall proceed according to the applicable requirements of Subchapter D of this chapter (relating to Amendments, Renewals, Transfers, Corrections, Revocation, and Suspension of Permits);

(2) §270.66(c) - Requirements for Trial Burn Plans;

(3) §270.66(d) - Trial Burn Procedures, except §270.66(d)(3), and except that all required submissions must be certified on behalf of the applicant by the signature of a person authorized pursuant to §305.44 of this title (relating to Signatories to Applications);

(4) §270.66(e) - Special Procedures for DRE Trial Burns; and

(5) §270.66(f) - Determinations Based on Trial Burn.

(6) §270.235 - Options for Incinerators, Cement Kilns, Lightweight Aggregate Kilns, Solid Fuel Boilers, Liquid Fuel Boilers and Hydrochloric Acid Production Furnaces to Minimize Emissions from startup, shutdown, and malfunction events as amended through October 12, 2005 (70 FedReg 59402).

(b) With regard to trial burn notice procedures, the chief clerk shall send notice to the state senator and representative who represent the area in which the facility is or will be located, and to the persons listed in §39.13 of this title (relating to Mailed Notice) announcing the scheduled commencement and completion dates for the trial burn. The notice shall meet the requirements of 40 CFR §270.66(d)(3)(i) - (ii) as amended through December 11, 1995, at 60 FedReg 63417. The applicant may not commence the trial burn until after the chief clerk has issued such notice. This paragraph applies to initial trial burns and all other trial burns except those that are to be conducted within 180 days after permit modification covering the trial burn.

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 8, 2009.

TRD-200901740
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 239-6090

SUBCHAPTER R. RESOURCE CONSERVATION AND RECOVERY ACT STANDARD PERMITS FOR STORAGE AND TREATMENT UNITS

30 TAC §§305.650 - 305.661

STATUTORY AUTHORITY

The new sections are proposed under Texas Water Code (TWC), §5.103 and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the TWC or other laws of this state; and under Texas Health and Safety Code (THSC), §361.017 and §361.024, which authorize the commission to regulate industrial solid waste and hazardous waste and to adopt rules consistent with the general intent and purposes of the THSC.

The proposed new sections implement THSC, Chapter 361.

§305.650. General.

A Resource Conservation and Recovery Act (RCRA) standard permit is a special type of permit that authorizes the owner or operator of a facility to store and/or non-thermally treat hazardous waste. It is issued under 40 Code of Federal Regulations (CFR) Part 124, Subpart G and Subpart J, concerning Procedures for Decision Making, and this subchapter.

§305.651. Eligibility.

(a) An owner or operator may be eligible for a standard permit if:

(1) An owner or operator generates hazardous waste and then stores or non-thermally treats the hazardous waste on site in containers, tanks, or containment buildings; or

(2) An owner or operator receives hazardous waste generated off site by a generator under the same ownership as the receiving facility, and then stores or non-thermally treats the hazardous waste in containers, tanks, or containment buildings.

(b) An owner or operator will be informed of eligibility when a decision is made on a permit application.

§305.652. Applicability.

The following sections of this title apply to a standard permit:

(1) §305.42(b) of this title (relating to Application Required);

(2) §305.44 of this title (relating to Signatories to Applications);

(3) §305.45(a) of this title (relating to Contents of Application for Permit);

(4) §305.50(a)(4) of this title (relating to Additional Requirements for an Application for a Hazardous or Industrial Solid Waste Permit and for a Post-Closure Order);

(5) §305.51 of this title (relating to Revision of Applications for Hazardous Waste Permits);

(6) §305.64 of this title (relating to Transfer of Permits);

(7) §305.65 of this title (relating to Renewal);

(8) §305.66 of this title (relating to Permit Denial, Suspension, and Revocation);

(9) §305.67 of this title (relating to Revocation and Suspension Upon Request or Consent); and

(10) §305.125 of this title (relating to Standard Permit Conditions).

§305.653. Applying for a Standard Permit.

(a) An owner or operator can apply for a standard permit by following the procedures in §39.503 of this title (relating to Application for Industrial or Hazardous Waste Facility Permit) and this subchapter.

(b) The provisions of §39.503(f) of this title do not apply to a standard permit application unless a contested case hearing is requested by the executive director, applicant or Public Interest Council.

§305.654. Information Required.

The information in paragraphs (1) - (10) of this section will be the basis of a standard permit application. An owner or operator must submit the

following information to the executive director when a application under §39.503 of this title (relating to Application for Industrial or Hazardous Waste Facility Permit) requesting coverage under a Resource Conservation Recovery Act standard permit is submitted:

(1) The Part A information described in 40 Code of Federal Regulations (CFR) §270.13;

(2) Materials required by §39.503 of this title;

(3) Documentation of compliance with the location standards of 40 CFR §267.18 and §305.50(a)(10)(E) of this title (relating to Additional Requirements for an Application for a Hazardous or Industrial Solid Waste Permit and for a Post-Closure Order);

(4) Information that allows the executive director to carry out obligations under other federal laws required in 40 CFR §270.3;

(5) Solid waste management unit information required by 40 CFR §270.14(d);

(6) A certification meeting the requirements of §305.655 of this title (relating to Certification Requirements), and an audit of the facility's compliance status with Chapter 335, Subchapter U of this title (relating to Standards for Owners and Operators of Hazardous Waste Facilities Operating Under a Standard Permit) as required by §305.655 of this title;

(7) A closure plan prepared in accordance with §335.602(a)(6) of this title (relating to Standards);

(8) The most recent closure cost estimate for the facility prepared under §335.602(a)(10) of this title and a copy of the documentation required to demonstrate financial assurance under §335.602(c) of this title. For a new facility, the owner or operator may gather the required documentation 60 days before the initial receipt of hazardous wastes;

(9) If managed wastes are generated off-site, the waste analysis plan; and

(10) If managed waste is generated from off-site, documentation showing that the waste generator and the off-site facility are under the same ownership.

§305.655. Certification Requirements.

(a) A signed certification must be submitted based on an audit of the facility's compliance with Chapter 335, Subchapter U of this title (relating to Standards for Owners and Operators of Hazardous Waste Facilities Operating Under a Standard Permit).

(b) The certification must read: I certify under penalty of law that:

(1) I have personally examined and am familiar with the report containing the results of an audit conducted of my facility's compliance status with Chapter 335, Subchapter U of this title, which supports this certification. Based on my inquiry of those individuals immediately responsible for conducting the audit and preparing the report, I believe that (include subparagraph (A) or (B) of this paragraph, whichever applies):

(A) My existing facility complies with all applicable requirements of Chapter 335, Subchapter U of this title, and will continue to comply until the expiration of the permit; or

(B) My facility has been designed, and will be constructed and operated to comply with all applicable requirements Chapter 335, Subchapter U of this title, and will continue to comply until expiration of the permit;

(2) I will make all information that I am required to maintain at my facility by §§305.656 - 305.660 of this title (relating to Information Retention; Container Information; Tank Information; Equipment Information; and Air Emissions Control Information) readily available for review by the Texas Commission on Environmental Quality and the public; and

(3) I will continue to make all information required by §§305.656 - 305.660 of this title available until the permit expires. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowingly violating Chapter 335, Subchapter U of this title.

(c) The certification must be signed following the requirements of §305.44(a) of this title (relating to Signatories to Applications).

(d) The certification must be based upon an audit that is conducted of the facility's compliance status with Chapter 335, Subchapter U of this title. A written audit report, signed and certified as accurate by the auditor, must be submitted to the executive director with the 40 CFR §124.202(b), concerning Notice of Intent.

§305.656. Information Retention.

The facility must keep the following information:

(1) A general description of the facility.

(2) Chemical and physical analyses of the hazardous waste and hazardous debris handled at the facility. At a minimum, these analyses must contain all the information known to treat or store the wastes properly under the requirements of Chapter 335, Subchapter U of this title (relating to Standards for Owners and Operators of Hazardous Waste Facilities Operating Under a Standard Permit).

(3) A copy of the waste analysis plan required by 40 Code of Federal Regulations (CFR) §270.13(b).

(4) A description of the security procedures and equipment required by 40 CFR §267.14.

(5) A copy of the general inspection schedule required by 40 CFR §267.15(b). The inspection schedule must include the applicable requirements of 40 CFR §§267.174, 267.193, 267.195, 264.1033, 264.1052, 264.1053, 264.1058, and 264.1088.

(6) A justification of any modification of the preparedness and prevention requirements of §335.602(a)(2) of this title (relating to Standards).

(7) A copy of the contingency plan required by §335.602(a)(3) of this title.

(8) A description of procedures, structures, or equipment used at the facility to:

(A) prevent hazards in unloading operations (for example, use ramps, special forklifts);

(B) prevent runoff from hazardous waste handling areas to other areas of the facility or the environment, or to prevent flooding (for example, with berms, dikes, trenches);

(C) prevent contamination of water supplies;

(D) mitigate effects of equipment failure and power outages;

(E) prevent undue exposure of personnel to hazardous waste (for example, requiring protective clothing); and

(F) prevent releases to atmosphere.

(9) A description of precautions to prevent accidental ignition or reaction of ignitable, reactive, or incompatible wastes as required by 40 CFR §267.17.

(10) Traffic pattern, estimated volume (number, types of vehicles) and control (for example, show turns across traffic lanes and stacking lanes; describe access road surfacing and load bearing capacity; show traffic control signals).

(11) An outline of both the introductory and continuing training programs that will be used to prepare employees to operate or maintain the facility safely as required by 40 CFR §267.16 and a brief description of how training will be designed to meet actual job tasks under 40 CFR §267.16(a)(3) requirements.

(12) A copy of the closure plan required by 40 CFR §267.112. Include, where applicable, as part of the plans, specific requirements in 40 CFR §§267.176, 267.201, and 267.1108.

(13) The most recent closure cost estimate for the facility prepared under 40 CFR §267.142 and a copy of the documentation required to demonstrate financial assurance under 40 CFR §267.143. For a new facility, the required documentation must be gathered 60 days before the initial receipt of hazardous wastes.

(14) Where applicable, a copy of the insurance policy or other documentation that complies with the liability requirements of 40 CFR §267.147. For a new facility, documentation showing the amount of insurance meeting the specification of 40 CFR §267.147(a) that is planned to be in effect before initial receipt of hazardous waste for treatment or storage.

(15) Where appropriate, proof of coverage by a state financial mechanism, as required by 40 CFR §267.149 or §267.150.

(16) A topographic map showing a distance of 1,000 feet around the facility at a scale of 2.5 centimeters (one inch) equal to not more than 61.0 meters (200 feet). The map must show elevation contours. The contour interval must show the pattern of surface water flow in the vicinity of and from each operational unit of the facility. For example, contours with an interval of 1.5 meters (five feet), if relief is greater than 6.1 meters (20 feet), or an interval of 0.6 meters (two feet), if relief is less than 6.1 meters (20 feet). If the facility is in a mountainous area, large contour intervals should be used to adequately show topographic profiles of facilities. The map must clearly show the following:

(A) map scale and date;

(B) 100-year flood plain area;

(C) surface waters including intermittent streams;

(D) surrounding land uses (residential, commercial, agricultural, recreational);

(E) a wind rose (i.e., prevailing wind-speed and direction);

(F) orientation of the map (north arrow);

(G) legal boundaries of the facility site;

(H) access control (fences, gates);

(I) injection and withdrawal wells both on site and off site;

(J) buildings; treatment, storage, or disposal operations; or other structures (recreation areas; runoff control systems; access and internal roads; storm, sanitary, and process sewerage systems; loading and unloading areas; fire control facilities, etc.);

(K) barriers for drainage or flood control; and

(L) location of operational units within the facility, where hazardous waste is (or will be) treated or stored. (Include equipment cleanup areas.)

§305.657. Container Information.

If containers are used to store or treat hazardous waste, the following information must be kept at the facility:

(1) A description of the containment system to demonstrate compliance with the container storage area provisions of 40 Code of Federal Regulations (CFR) §267.173. This description must show the following:

(A) basic design parameters, dimensions, and materials of construction;

(B) how the design promotes drainage or how containers are kept from contact with standing liquids in the containment system;

(C) capacity of the containment system relative to the number and volume of containers to be stored;

(D) provisions for preventing or managing run-on; and

(E) how accumulated liquids can be analyzed and removed to prevent overflow.

(2) For storage areas that store containers holding wastes that do not contain free liquids, a demonstration of compliance with 40 CFR §267.173(c), including:

(A) test procedures and results or other documentation or information to show that the wastes do not contain free liquids; and

(B) a description of how the storage area is designed or operated to drain and remove liquids or how containers are kept from contact with standing liquids.

(3) Sketches, drawings, or data demonstrating compliance with 40 CFR §267.174 (location of buffer zone (15 meters or 50 feet) and containers holding ignitable or reactive wastes) and 40 CFR §267.175(c) (location of incompatible wastes in relation to each other), where applicable.

(4) Where incompatible wastes are stored or otherwise managed in containers, a description of the procedures used to ensure compliance with 40 CFR §267.175(a) and (b) and §267.17(b) and (c).

(5) Information on air emission control equipment as required by 40 CFR §270.315.

§305.658. Tank Information.

If tanks are used to store or treat hazardous waste, the following information must be kept at the facility:

(1) A written assessment that is reviewed and certified by Texas licensed professional engineer on the structural integrity and suitability for handling hazardous waste of each tank system, as required under 40 Code of Federal Regulations (CFR) §267.191 and §267.192;

(2) Dimensions and capacity of each tank;

(3) Description of feed systems, safety cutoff, bypass systems, and pressure controls (e.g., vents);

(4) A diagram of piping, instrumentation, and process flow for each tank system;

(5) A description of materials and equipment used to provide external corrosion protection, as required under 40 CFR §267.191;

(6) For new tank systems, a detailed description of how the tank system(s) will be installed in compliance with 40 CFR §267.192 and §267.194;

(7) Detailed plans and description of how the secondary containment system for each tank system is or will be designed, constructed, and operated to meet the requirements of 40 CFR §267.195 and §267.196;

(8) Description of controls and practices to prevent spills and overflows, as required under 40 CFR §267.198;

(9) For tank systems in which ignitable, reactive, or incompatible wastes are to be stored or treated, a description of how operating procedures and tank system and facility design will achieve compliance with the requirements of 40 CFR §267.202 and §267.203; and

(10) Information on air emission control equipment as required by 40 CFR §270.315.

§305.659. Equipment Information.

If the facility has equipment to which 40 Code of Federal Regulations (CFR) Part 264, Subpart BB applies, the following information must be kept at the facility:

(1) For each piece of equipment to which 40 CFR Part 264, Subpart BB applies:

(A) equipment identification number and hazardous waste management unit identification;

(B) approximate locations within the facility (e.g., identify the hazardous waste management unit on a facility plot plan);

(C) type of equipment (e.g., a pump or a pipeline valve);

(D) percent by weight of total organics in the hazardous waste stream at the equipment;

(E) hazardous waste state at the equipment (e.g., gas/vapor or liquid); and

(F) method of compliance with the standard (e.g., monthly leak detection and repair, or equipped with dual mechanical seals).

(2) For facilities that cannot install a closed-vent system and control device to comply with 40 CFR Part 264, Subpart BB on the effective date that the facility becomes subject to the Subpart BB provisions, an implementation schedule as specified in 40 CFR §264.1033(a)(2).

(3) Documentation that demonstrates compliance with the equipment standards in 40 CFR §264.1052 and §264.1059. This documentation must contain the records required under 40 CFR §264.1064.

(4) Documentation to demonstrate compliance with 40 CFR §264.1060 must include the following information:

(A) a list of all information references and sources used in preparing the documentation;

(B) records, including the dates, of each compliance test required by 40 CFR §264.1033(j);

(C) a design analysis, specifications, drawings, schematics, and piping and instrumentation diagrams based on the appropriate sections of "Course 415: Control of Gaseous Emissions" (incorporated by reference as specified in 40 CFR §260.11) or other engineering texts acceptable to the executive director that present basic control device design information. The design analysis must address the vent stream characteristics and control device operation parameters as specified in 40 CFR §264.1035(b)(4)(iii);

(D) a statement signed and dated certifying that the operating parameters used in the design analysis reasonably represent the conditions that exist when the hazardous waste management unit is operating at the highest load or capacity level reasonably expected to occur; and

(E) a statement signed and dated certifying that the control device is designed to operate at an efficiency of 95% by weight or greater.

§305.660. Air Emissions Control Information.

If an owner or operator has air emission control equipment subject to 40 Code of Federal Regulations (CFR) Part 264, Subpart CC, the following information must be kept at the facility:

(1) Documentation for each floating roof cover installed on a tank subject to 40 CFR §264.1084(d)(1) or (2) that includes information prepared or the cover manufacturer/vendor provided describing the cover design, and certification that the cover meets applicable design specifications listed in 40 CFR §264.1084(e)(1) or (f)(1).

(2) Identification of each container area subject to the requirements of 40 CFR Part 264, Subpart CC and certification that the requirements of this subpart are met.

(3) Documentation for each enclosure used to control air pollutant emissions from tanks or containers under requirements of 40 CFR §264.1084(d)(5) or §264.1086(e)(1)(ii). Records must be included for the most recent set of calculations and measurements performed to verify that the enclosure meets the criteria of a permanent total enclosure as specified in "Procedure T - Criteria for and Verification of a Permanent or Temporary Total Enclosure" under 40 CFR §52.741, Appendix B.

(4) Documentation for each closed-vent system and control device installed under requirements of 40 CFR §264.1087 that includes design and performance information as specified in 40 CFR §270.24 (c) and (d).

(5) An emission monitoring plan for both Method 21 in 40 CFR Part 60, Appendix A and control device monitoring methods. The following information must be included in the plan: monitoring point(s), monitoring methods for control devices, monitoring frequency, procedures for documenting exceedences, and procedures for mitigating noncompliances.

§305.661. Modifying a Standard Permit.

A Resource Conservation and Recovery Act standard permit can be modified by following the procedures found in 40 Code of Federal Regulations §§124.211 - 124.214 and §305.69 of this title (relating to Solid Waste Permit Modification at the Request of the Permittee).

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 8, 2009.

TRD-200901741

Robert Martinez

Director, Environmental Law Division

Texas Commission on Environmental Quality

Earliest possible date of adoption: June 21, 2009

For further information, please call: (512) 239-6090

♦ ♦ ♦

CHAPTER 335. INDUSTRIAL SOLID WASTE AND MUNICIPAL HAZARDOUS WASTE

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes amendments to §§335.1, 335.2, 335.29, 335.31, 335.47, 335.69, 335.76, 335.112, 335.116, 335.118, 335.125, 335.152, 335.163 - 335.166, 335.173, 335.175, 335.221, 335.224, 335.261, 335.431, 335.504, 335.582 - 335.584, and 335.590 - 335.593. The commission proposes new §335.601 and §335.602.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

The federal hazardous waste program is authorized under the Resource Conservation and Recovery Act of 1976 (RCRA), §3006. States may obtain authorization from the United States Environmental Protection Agency (EPA) to administer the hazardous waste program at the state level. State authorization is a rulemaking process through which EPA delegates the primary responsibility of implementing the RCRA hazardous waste program to individual states in lieu of EPA. This process ensures national consistency and minimum standards while providing flexibility to states in implementing rules. State RCRA programs must always be at least as stringent as the federal requirements.

Since the beginning of the federal hazardous waste program, the State of Texas has continuously participated in the EPA's authorization program. To maintain RCRA authorization, the commission must adopt regulations to meet the minimum standards of federal programs administered by EPA. Because the federal regulations undergo regular revision, the commission adopts new regulations periodically to meet the changing federal regulations.

Texas received authorization of its hazardous waste "base program" under the RCRA on December 26, 1984. Texas received authorization for revisions to its base hazardous waste program on February 17, 1987 (Clusters I and II). Texas submitted further revisions to its hazardous waste program and received final authorization of those revisions on March 15, 1990, July 23, 1990, October 21, 1991, December 4, 1992, June 27, 1994, November 26, 1997, October 18, 1999, September 11, 2000 and June 14, 2005 (Clusters III - X). A RCRA authorization rule package for parts of RCRA Rule Clusters XI - XV was submitted to EPA Region VI on July 25, 2007. Texas is currently waiting on authorization of these clusters. (A cluster is a grouping of federal RCRA amendments during a one year period.)

The commission proposes in this rule package to adopt parts of RCRA Rule Clusters XIV, XV, XVI, XVII and XVIII that implement revisions to the federal hazardous waste program, which were made by EPA between July 1, 2005 and June 30, 2008. Both mandatory and optional federal rule changes in these clusters are proposed to be adopted. Adoption of two of the federal rule changes is mandatory in order to maintain RCRA authorization. Although not necessary in order to maintain authorization, EPA also recommends that the optional federal rule changes be incorporated into the state rules. Establishing equivalency with federal regulations will enable the State of Texas to operate all aspects of the federal hazardous waste program in lieu of the EPA. All proposed rule changes are discussed below in the SECTION BY SECTION DISCUSSION.

The Hazardous Waste Combustion Maximum Achievable Control Technology (MACT) regulations are multi-media at the federal and state level, affecting both air quality and hazardous waste management. The TCEQ has already adopted certain parts of 40 Code of Federal Regulations (CFR) Part 63, Subpart EEE (i.e., the Hazardous Waste Combustion MACT rules) prior to this rulemaking under air quality regulations at 30 TAC Chapter 113, Standards of Performance for Hazardous Air Pollutants and for Designated Facilities and Pollutants. The purpose of this proposed rulemaking is to propose adoption of other parts of the federal combustion MACT program, which are encoded at 40 CFR Parts 264 - 266, and 270. This proposed rulemaking would incorporate those aspects of the combustion MACT rules affecting waste management as part of the changes to 30 TAC Chapters 305 and 335.

A corresponding rulemaking is published in this issue of the *Texas Register* and includes changes to 30 TAC Chapter 305, Consolidated Permits.

SECTION BY SECTION DISCUSSION

The commission proposes administrative changes throughout the proposed rulemaking to reflect the agency's current practices and to conform to Texas Register and agency guidelines. These changes include updating references to Texas State Agencies, updating cross-references, and correcting typographical, spelling, and grammatical errors.

§335.1, Definitions

The commission proposes amending §335.1 to conform to federal regulations promulgated in the July 28, 2006, issue of the *Federal Register* (71 FR 42928). Specifically, this amendment would add the definitions of "cathode ray tube or CRT," "CRT collector," "CRT glass manufacturer," and "CRT processing" to the list of definitions. Subsequent paragraphs have been renumbered accordingly. This amendment is as stringent as the current state rules. This amendment is recommended by EPA to be adopted into state rules, but is not required to maintain authorization.

The commission also proposes amending §335.1 to conform to federal regulations promulgated in the January 2, 2008, issue of the *Federal Register* (73 FR 57). Specifically, this amendment would add the definition of "gasification" to the list of definitions. This amendment is as stringent as the current state rules. This amendment is recommended by EPA to be adopted into state rules, but is not required to maintain authorization.

The commission also proposes amending §335.1(133)(A)(iv) to conform to regulations promulgated in the April 4, 2006 issue of the *Federal Register* (71 FR 16862). This amendment would reduce the paperwork burden for generators that exclude wood preserving wastewaters and spent wood preserving solutions from the definition of solid waste by no longer requiring a one-time notification stating that the plant intends to claim the exclusion. The generator will be required to maintain a copy of the notification in the on-site records for the life of the facility. This amendment is less stringent than the current state rules because it reduces the notification requirements that are currently in effect. This amendment is recommended by EPA to be adopted into state rules, but is not required to maintain authorization.

The commission also proposes amending §335.1(133)(A)(iv) to conform to federal regulations promulgated in the July 28, 2006 issue of the *Federal Register* (71 FR 42928). This amendment would exclude CRTs that meet the requirements in 40 CFR §261.4(a)(22) for reuse and recycling from classification as a solid waste. This exclusion is currently found in 40 CFR §261.4. This amendment is less stringent than the current state rules and will encourage recycling of CRTs. This amendment is recommended by EPA to be adopted into state rules, but is not required to maintain authorization.

The commission also proposes adding a definition for "standard permit" in §335.1(145) to conform to federal regulations promulgated in the September 8, 2005, issue of the *Federal Register* (70 FR 53420). Specifically, this amendment would incorporate the availability of a standard permit to RCRA treatment, storage, and disposal facilities otherwise subject to RCRA permitting that generate and then store or non-thermally treat hazardous waste on-site in tanks, containers, and containment buildings. To be eligible for a standard permit, facilities must manage hazardous waste on-site in tanks, container storage areas, or containment buildings. Standardizing this aspect of the permitting process will reduce the amount of agency technical review and processing time required by the traditional RCRA permit process. In addition, the standard permit will streamline the permitting process by allowing facilities to obtain and modify permits more easily, while still achieving the same level of environmental protection as individual permits. For a proposed facility, an applicant may submit a standard permit application in lieu of a Part B application for those units that qualify for a standard permit. If additional hazardous waste units that do not qualify for a standard permit are to be permitted at the same facility, a Part B application must be submitted. If a permittee chooses to apply for a standard permit in lieu of submitting a Part B permit renewal application for a tank, container storage area, or containment building, a standard permit application must be submitted. If the current authorization also contains other hazardous waste management units not eligible for a standard permit, a Part B permit renewal application must be submitted for those units. A contested case hearing for a standard permit may be requested by the executive director, applicant, or Office of the Public Interest Council. The term limit for a standard permit is ten years. Because facility storage units must meet the same technical standards as units permitted under a traditional permit, the proposed amendment is more flexible but equivalent to the current state rules. This amendment is recommended by EPA to be adopted into state rules, but is not required to maintain authorization.

§335.2, Permit Required

The commission proposes adding new language at §335.2(o) to conform to federal regulations promulgated in the September 8, 2005, issue of the *Federal Register* (70 FR 53420). This amendment would incorporate application requirements for a standard permit. Specifically, this amendment would incorporate the availability of a standard permit to RCRA treatment, storage, and disposal facilities otherwise subject to RCRA permitting that generate and then store or non-thermally treat hazardous waste on-site in tanks, containers, and containment buildings. Because facility storage units must meet the same technical standards as units permitted under a traditional permit, the proposed amendment is more flexible but equivalent to the current state rules. This amendment is recommended by EPA to be adopted into state rules, but is not required to maintain authorization.

The commission proposes amending §335.2(h)(8) to correct cross-referenced citations to sections in 30 TAC Chapter 330, Municipal Solid Waste, due to all sections of Chapter 330 being reorganized and amended in a previous rulemaking. The commission proposes amending §335.2(h)(8) to replace the reference of §330.136(b)(6)(B) - (E) with §330.171(c)(3)(B) - (E). This amendment is as stringent as the current state rules.

§335.29, Adoption of Appendices by Reference

The commission proposes amending §335.29(1) to conform to federal regulations promulgated in the June 14, 2005 issue of the *Federal Register* (70 FR 34538) and amended in the August 1, 2005, issue of the *Federal Register* (70 FR 44150). This amendment would adopt by reference deletion of the requirement to use "Test Methods for Evaluating Solid Waste, Physical/Chemical Methods, EPA Publication SW-846." This amendment would eliminate the requirement that facility owners and operators use SW-846 sampling methods but would not eliminate the requirement that facility owners and operators receive prior approval for specific sampling methods from the executive director through approval of a sampling and analysis plan. Facility owners and operators may propose appropriate methods in their sampling and analysis plan. This amendment is less stringent but provides greater flexibility than the current rules and is protective of human health and the environment. This amendment is recommended by EPA to be adopted into state rules, but is not required to maintain authorization.

The commission also proposes amending §335.29(3) and (4) to conform to federal regulations promulgated in the July 14, 2006, issue of the *Federal Register* (71 FR 40254). This amendment would adopt by reference corrections to errors made in the CFR. This amendment is as stringent as the current state rules. This amendment is recommended by EPA to be adopted into state rules, but is not required to maintain authorization.

§335.31, Incorporation of References

The commission proposes amending §335.31 to conform to federal regulations promulgated in the June 14, 2005, issue of the *Federal Register* (70 FR 34538) and as amended in the August 1, 2005, issue of the *Federal Register* (70 FR 44150). This amendment would incorporate by reference revisions to references found in 40 CFR §260.11. Specifically, this amendment would update a number of American Society for Testing and Materials (ASTM) and SW-846 analytical methods to reflect the most recent available analytical methods. This amendment is at least as stringent as the current state rules. This amendment is recommended by EPA to be adopted into state rules, but is not required to maintain authorization.

The commission proposes amending §335.31 to conform to federal regulations promulgated in the September 8, 2005 issue of the *Federal Register* (70 FR 53420). Specifically, this amendment would incorporate the availability of a standard permit to RCRA treatment, storage, and disposal facilities otherwise subject to RCRA permitting that generate and then store or non-thermally treat hazardous waste on-site in tanks, containers, and containment buildings. Because facility storage units must meet the same technical standards as units permitted under a traditional permit, the proposed amendment is more flexible but equivalent to the current state rules. Because portions of the rule may be affected by more than one federal rule change, only the latest *Federal Register* citation appears in the rule text. This amendment is recommended by EPA to be adopted into state rules, but is not required to maintain authorization.

§335.47, Special Requirements for Persons Eligible for a Federal Permit by Rule

The commission proposes amending §335.47(c) to update language that clarifies an existing requirement that specific documents submitted in a Part B permit application must be signed and sealed by a Texas licensed professional engineer and/or Texas licensed professional geoscientist. This revised language would replace outdated language adopted from 40 CFR Part 264 previously that states that documents must be signed and sealed by a "registered professional engineer." The new language specifically states that documents must be signed and

sealed by a "Texas licensed professional engineer and/or Texas licensed professional geoscientist." This proposed amendment is at least as stringent as the current state rules. This amendment is not required to maintain authorization.

§335.69, Accumulation Time

The commission proposes amending §335.69(a) and (m) to correct typographical errors that were made to referenced citations. Amendments to §335.69(a) and (m) were adopted in a previous rulemaking, and the corrections are required by EPA to maintain authorization.

§335.76, Additional Requirements Applicable to International Shipments

The commission proposes amending §335.76(a) and (h) to conform to federal regulations promulgated in the July 14, 2006, issue of the *Federal Register* (71 FR 40254). This amendment would incorporate by reference corrections to errors in the CFR. This amendment is as stringent as the current state rules. This amendment is recommended by EPA to be adopted into state rules, but is not required to maintain authorization.

§335.112, Standards

The commission proposes amending §335.112(a)(1), (3), (6), (8) - (13), (16), (18) - (20), and (22) to conform to federal regulations promulgated through the July 14, 2006, issue of the *Federal Register* (71 FR 40254). This amendment would incorporate by reference corrections to errors made in the CFR. As indicated below some of these sections are impacted by other federal rule changes. The latest *Federal Register* citation appears in the proposed text. This amendment is as stringent as the current state rules. This amendment is recommended by EPA to be adopted into state rules, but is not required to maintain authorization.

The commission proposes amending §335.112(a)(1), (4) - (6), (8) - (11), (13), (18), (20), and (22) to conform to federal regulations promulgated in the April 4, 2006 issue of the *Federal Register* (71 FR 16862). This amendment would adopt by reference requirements that reduce the recordkeeping and reporting burden imposed on the regulated community by ensuring that only the information needed and used to implement the hazardous waste program is collected from facilities. This amendment is less stringent than the current state rules, but the reduction in recordkeeping poses minimal risk to human health or the environment. This amendment is recommended by EPA to be adopted into state rules, but is not required to maintain authorization.

The commission proposes amending §335.112(a)(1) to clarify that emergency response training for facility personnel required by safety regulations can fulfill the requirements of this section. This amendment is as stringent as the current state rules. This amendment is recommended by EPA to be adopted into state rules, but is not required to maintain authorization.

The commission proposes amending §335.112(a)(4) to revise the default retention time for manifests and other records from 'until closure' to three years, unless otherwise specified. Records of wastes received, the location and quantity of all hazardous wastes placed in disposal cells, groundwater monitoring, and response action plans would continue to be required to be kept until closure. Closure and post-closure cost estimates, along with monitoring and analytical data would be required to be kept until closure. This amendment is less stringent than the current state rules, but the reduction in recordkeeping poses minimal risk to human health or the environment. This amendment is recommended by EPA to be adopted into state rules, but is not required to maintain authorization.

The commission proposes amending §335.112(a)(5) to no longer require the submission of groundwater quality assessment plans, but to maintain them in the facility operating file until closure of the site. This amendment is less stringent than the current state rules, but the reduction in reporting poses minimal risk to human health or the environment. This amendment is recommended by EPA to be adopted into state rules, but is not required to maintain authorization.

The commission proposes amending §335.112(a)(6) to require only annual instead of semi-annual submission of corrective action progress reports to address equipment leaks. This amendment is less stringent than the current state rules, but the reduction in reporting poses minimal risk to human health or the environment. This amendment is recommended by EPA to be adopted into state rules, but is not required to maintain authorization.

The commission proposes amending §335.112(a)(9) to incorporate federally promulgated amendments to 40 CFR §§265.191, 265.192, 265.193, and 265.196. The proposed amendments would remove outdated language that includes requirements to install secondary containment for tanks by 1989 and replace them with requirements to install secondary containment on existing hazardous waste storage tanks which have been in service more than 15 years. This amendment is as stringent as the current state rules. This amendment is recommended by EPA to be adopted into state rules, but is not required to maintain authorization.

The commission proposes amending §335.112(a)(10) to clarify that liner and leachate management requirements apply to all new surface impoundments, and to delete outdated language that specifically references 'new' units constructed after 1992. The proposed amendment would also remove the requirement to submit an excessive leakage rate response action plan; instead facilities would be allowed to keep the plan on-site until closure. This amendment is less stringent than the current state rules, but the reduction in reporting poses minimal risk to human health or the environment. This amendment is recommended by EPA to be adopted into state rules, but is not required to maintain authorization.

The commission proposes amending §335.112(a)(11) to remove the requirement to submit an excessive leakage rate response action plan; instead facilities would be allowed to keep the plan on-site until closure. This amendment is less stringent than the current state rules, but the reduction in reporting poses minimal risk to human health or the environment. This amendment is recommended by EPA to be adopted into state rules, but is not required to maintain authorization.

The commission proposes amending §335.112(a)(13) to clarify that liner and leachate management requirements apply to all new landfills, and to delete outdated language that specifically references 'new' units constructed after 1992. The proposed amendment also removes the requirement to submit an excessive leakage rate response action plan; instead facilities would be allowed to keep the plan on-site until closure. This amendment is less stringent than the current state rules, but the reduction in reporting poses minimal risk to human health or the environment. This amendment is recommended by EPA to be adopted into state rules, but is not required to maintain authorization.

The commission proposes amending §335.112(a)(20) to remove requirements to notify the executive director if a facility chooses to follow alternative management standards. This amendment is less stringent than the current state rules, but the reduction in reporting poses minimal risk to human health or the environment. This amendment is recommended by EPA to be adopted into state rules, but is not required to maintain authorization.

The commission proposes amending §335.112(a)(22) to remove outdated language that includes an option to notify the executive director prior to 1993 and recordkeeping requirements with 1993 action dates. This amendment is as stringent as the current state rules. This amendment is recommended by EPA to be adopted into state rules, but is not required to maintain authorization.

The commission proposes adding language in §335.112(b)(4)(M) to the existing requirement that clarifies that specific documents submitted must be signed and sealed by a Texas licensed professional engineer. This added language would replace outdated language. The new language specifically states that documents must be signed and sealed by a "Texas licensed professional engineer," as required by the Texas Engineering Practice Act. This proposed amendment is at least as stringent as the current state rules. This amendment is not required to maintain authorization.

§335.116, Applicability of Groundwater Monitoring Requirements

The commission proposes amending §335.116(d) to update language clarifying the existing requirement that specific documents submitted in a Part B permit application must be signed and sealed by a Texas licensed professional engineer and/or Texas licensed professional geoscientist. This revised language would replace outdated language adopted from 40 CFR previously that states that documents must be signed and sealed by a "registered professional engineer." The new language specifically states that documents must be signed and sealed by a "Texas licensed professional engineer and/or Texas licensed professional geoscientist." This proposed amendment is at least as stringent as the current state rules. This amendment is not required to maintain authorization.

The commission proposes to amend §335.116(d)(1) and (3) to conform to federal regulations promulgated in the April 4, 2006 issue of the *Federal Register* (71 FR 16862). This amendment would adopt by reference requirements that reduce the recordkeeping and reporting burden imposed on the regulated community by ensuring that only the information needed and used to implement the hazardous waste program is collected from facilities. Specifically, this amendment would no longer require submission of annual groundwater monitoring plans and reports under paragraphs (1) and (3), respectively, to the executive director for interim status hazardous waste units. Rather, the proposed amendment would require facilities to maintain these documents in the facility's operating record until closure of the facility. This proposed amendment is less stringent than the current state rules but poses minimal risk to human health and the environment. This amendment is recommended by EPA to be adopted into state rules, but is not required to maintain authorization.

§335.118, Closure Plan; Submission and Approval of Plan

The commission proposes amending §335.118 to conform to federal regulations promulgated in the July 14, 2006, issue of the *Federal Register* (71 FR 40254). This amendment would adopt corrections to errors made in the CFR. This amendment is as stringent as the current state rules. This amendment is recommended by EPA to be adopted into state rules, but is not required to maintain authorization.

§335.125, Special Requirements for Bulk and Containerized Waste

The commission proposes amending §335.125 to conform to federal regulations promulgated in the June 14, 2005, issue of the *Federal Register* (70 FR 34538) and as amended in the August 1, 2005, issue of the *Federal Register* (70 FR 44150). This amendment would incorporate changes made in 40 CFR §265.314(d) which replaces Method 9095 with Method 9095B. This amendment is at least as stringent as the current state rules. This amendment is recommended by EPA to be adopted into state rules, but is not required to maintain authorization.

The commission also proposes amending §335.125(a) - (f) to conform to federal regulations promulgated in the July 14, 2006, issue of the *Federal Register* (71 FR 40254). This amendment would update language adopted from the CFR. Specifically, the proposed amendment would remove subsection (a) which describes bulk and containerized landfill options available prior to 1985, renumber remaining subsections as (a) - (f), and update them to describe the post-1985 requirements as the only options currently available. This proposed amendment is at least as stringent as the current state rules. This amendment is recommended by EPA to be adopted into state rules, but is not required to maintain authorization.

§335.152, Standards

The commission also proposes amending §335.152(a)(1), (5), (7), (8), (10) - (12), and (14) - (20) to conform to federal regulations promulgated through the July 14, 2006, issue of the *Federal Register* (71 FR 40254). This amendment would adopt by reference corrections to errors made in the CFR. As indicated below some of these sections are impacted by other federal rule changes. The latest *Federal Register* citation appears in the proposed text. This amendment is at least as stringent as the current state rules. This amendment is recommended by EPA to be adopted into state rules, but is not required to maintain authorization.

The commission proposes amending §335.152(a)(3), (4), and (6) to conform to federal regulations promulgated in the April 4, 2006, issue of the *Federal Register* (71 FR 16862). This amendment would adopt by reference changes to the regulatory requirements of the RCRA hazardous waste program to reduce the paperwork burden these requirements impose on the states, EPA, and the regulated community. This amendment would streamline the agency's information collection requirements, ensuring that only the information that is actually needed and used to implement the RCRA program is collected and the goals of protection of human health and the environment are retained. This proposed amendment is less stringent than the current state rules but poses minimal risk to human health and the environment. This amendment is recommended by EPA to be adopted into state rules, but is not required to maintain authorization.

The commission proposes amending §335.152(a)(8), (9), and (17) - (21) to conform to federal regulations promulgated in the June 14, 2005, issue of the *Federal Register* (70 FR 34538) and as amended in the August 1, 2005, issue of the *Federal Register* (70 FR 44150). Specifically, this amendment would adopt by reference updates to a number of ASTM and SW-846 analytical methods to reflect the most recent available analytical methods. This amendment is at least as stringent as the current state rules.

This amendment is recommended by EPA to be adopted into state rules, but is not required to maintain authorization.

The commission proposes amending §335.152(a)(13) to conform to federal regulations promulgated in the April 8, 2008 issue of the *Federal Register* (73 FR 18970). This amendment would revise several compliance and monitoring provisions to simplify the monitoring requirements for sources that select mercury or semi-volatile metal feed rate limits averaged over periods greater than 12 hours, clarify compliance requirements for data to demonstrate compliance with the feed rate limits of up to a 12-hour rolling average, and correct the compliance requirements for Notice of Intent To Comply for new units. This amendment is at least as stringent as the current state rules. This amendment is recommended by EPA to be adopted into state rules, but is not required to maintain authorization.

The commission proposes adding §335.152(c)(11) to update language to the existing requirement that specific documents submitted in a Part B permit application must be signed and sealed by a Texas licensed professional engineer and/or Texas licensed professional geoscientist. This added language would replace language adopted by reference that states that documents must be signed and sealed by a "registered professional engineer." The new language specifically states that documents must be signed and sealed by a "Texas licensed professional engineer" as required by the Texas Engineering Practice Act. This proposed amendment is at least as stringent as the current state rules. This amendment is not required to maintain authorization.

§335.163, General Groundwater Monitoring Requirements

The commission also proposes amending §335.163 to conform to federal regulations promulgated in the July 14, 2006, issue of the *Federal Register* (71 FR 40254). This amendment would adopt corrections to errors made in the CFR. This amendment is as stringent as the current state rules. This amendment is recommended by EPA to be adopted into state rules, but is not required to maintain authorization.

§335.164, Detection Monitoring Program

The commission proposes amending §335.164 to conform to federal regulations promulgated in the April 4, 2006, issue of the *Federal Register* (71 FR 16862). This amendment would adopt changes to the regulatory requirements of the RCRA hazardous waste program to reduce the paperwork burden these requirements impose on the states, EPA, and the regulated community. This amendment would streamline the agency's information collection requirements, ensuring that only the information that is actually needed and used to implement the RCRA program is collected and the goals of protection of human health and the environment are retained. Specifically, this amendment would eliminate the requirement that a sequence of at least four samples from each well (background and compliance wells) must be collected at least semiannually during detection monitoring. This amendment would also eliminate the requirement to immediately sample the groundwater in all monitoring wells that exhibit statistically significant evidence of contamination and determine whether constituents in the list of Appendix IX of 40 CFR Part 264 are present. Instead, the executive director may allow sampling for a site-specific subset of constituents from the Appendix IX list. In addition, the owner or operator may resample within one month or an alternative site-specific schedule approved by the executive director and repeat the analysis for those compounds detected. This proposed amendment is more flexible than the current state rules but is protective of human health and the environment. This amendment is recommended by EPA to be adopted into state rules, but is not required to maintain authorization.

§335.165, Compliance Monitoring Program

The commission proposes amending §335.165 to conform to federal regulations promulgated in the April 4, 2006, issue of the *Federal Register* (71 FR 40254). This amendment would adopt changes to the regulatory requirements of the RCRA hazardous waste program to reduce the paperwork burden these requirements impose on the states, EPA, and the regulated community. This amendment would streamline the agency's information collection requirements, ensuring that only the information that is actually needed and used to implement the RCRA program is collected and the goals of protection of human health and the environment are retained. Specifically, this amendment would eliminate the requirement that the owner or operator must analyze samples from all monitoring wells at the compliance point for all constituents contained in 40 CFR Part 264, Appendix IX at least annually to determine whether additional hazardous constituents are present in the uppermost aquifer and if so, at what concentration. Instead, the owner or operator may consult with the executive director to determine on a case-by-case basis: which sample collection event during the year will involve enhanced sampling; the number of monitoring wells at the compliance point to undergo enhanced sampling; the number of samples to be collected from each of these monitoring wells; and the specific constituents from 40 CFR Part 264, Appendix IX for which these samples must be analyzed. This proposed amendment provides more flexibility than the current state rules by allowing determination of a sampling program based on site-specific conditions, but is still protective of human health and the environment. This amendment is recommended by EPA to be adopted into state rules, but is not required to maintain authorization.

§335.166, Corrective Action Program

The commission proposes amending §335.166 to conform to federal regulations promulgated in the April 4, 2006, issue of the *Federal Register* (71 FR 16862). This amendment would adopt changes to the regulatory requirements of the RCRA hazardous waste program to reduce the paperwork burden these requirements impose on the states, EPA, and the regulated community. This amendment would streamline the agency's information collection requirements, ensuring that only the information that is actually needed and used to implement the RCRA program is collected and the goals of protection of human health and the environment are retained. Specifically, the proposed amendment would revise the requirement that owners or operators report in writing to the executive director on the effectiveness of their corrective action program from semiannually to annually. This amendment is less stringent than the current state rules, but the reduction in reporting poses minimal risk to human health or the environment. This amendment is recommended by EPA to be adopted into state rules, but is not required to maintain authorization.

§335.173, Design and Operating Requirements (Landfills)

The commission proposes amending §335.173 to conform to federal regulations promulgated in the July 14, 2006, issue of the *Federal Register* (71 FR 16862). This amendment would adopt by reference corrections to errors made in the CFR. This amendment is as stringent as the current state rules. This amendment is recommended by EPA to be adopted into state rules, but is not required to maintain authorization.

§335.175, Special Requirements for Bulk and Containerized Waste

The commission proposes amending §335.175(a) to conform to federal regulations promulgated in the July 14, 2006, issue of the *Federal Register* (71 FR 16862). This amendment would adopt by reference corrections to errors made in the CFR. This amendment is as stringent as the current state rules. This amendment is recommended by EPA to be adopted into state rules, but is not required to maintain authorization.

The commission also proposes amending §335.175(c) to conform to federal regulations promulgated in the June 14, 2005, issue of the *Federal Register* (70 FR 34538) and as amended in the August 1, 2005, issue of the *Federal Register* (70 FR 44150). This amendment would adopt by reference revisions to analytical test methods and procedures and would replace "Test Method 9095" with "Test Method 9095B." This amendment is at least as stringent as the current state rules. This amendment is recommended by EPA to be adopted into state rules, but is not required to maintain authorization.

§335.221, Applicability and Standards

The commission proposes amending §335.221(a)(1), (6), (8), (10), (11), (14), (17), and (20) to conform to federal regulations promulgated through the July 14, 2006, issue of the *Federal Register* (71 FR 40254). This amendment would adopt by reference corrections to errors made in the CFR. As indicated below several sections are impacted by another federal rule change. The latest *Federal Register* citation appears in the proposed text. This amendment is as stringent as the current state rules. This amendment is recommended by EPA to be adopted into state rules, but is not required to maintain authorization.

The commission proposes amending §335.221(a), (a)(1), (17), and (23), to conform to federal regulations promulgated in the June 14, 2005, issue of the *Federal Register* (70 FR 34538) and as amended in the August 1, 2005, issue of the *Federal Register* (70 FR 44150). These amendments would adopt by reference updated revisions in analytical test methods, methodology, and procedures. These amendments are as stringent as the current state rules. These amendments are recommended by EPA to be adopted into state rules, but are not required to maintain authorization.

The commission also proposes amending §335.221 to conform to federal regulations promulgated in the October 12, 2005, issue of the *Federal Register* (70 FR 59402). This amendment would incorporate final National Emission Standards for Hazardous Air Pollutants (NESHAP) for hazardous waste combustors. These standards implement Section 112(d) of the Clean Air Act by requiring hazardous waste combustors to meet hazardous air pollutants emission standards reflecting the performance of the MACT. The proposed amendment is as stringent as the current state rules. This amendment is recommended by EPA to be adopted into state rules, but is not required to maintain authorization.

The commission proposes amending §335.221(a) to conform to federal regulations promulgated in the April 8, 2008, issue of the *Federal Register* (73 FR 18970). This amendment would adopt by reference relettering of subparagraphs. This amendment is as stringent as the current state rules. This amendment is recommended by EPA to be adopted into state rules, but is not required to maintain authorization.

The commission also proposes amending §335.221(a)(6) and (14) to conform to federal regulations promulgated in the April 4, 2006, issue of the *Federal Register* (71 FR 16862). This amendment would adopt changes to the regulatory requirements of the RCRA hazardous waste program to reduce the paperwork burden these requirements impose on the states, EPA, and the regulated community. This amendment would streamline the agency's information collection requirements, ensuring that only the information that is actually needed and used to implement the RCRA program is collected and the goals of protection of human health and the environment are retained. Specifically, the proposed amendment would revise the requirement that owners or operators retain records at their facility until closure to being required to retain records at their facility for five years. The proposed amendment is less stringent than the current state rules. This amendment is recommended by EPA to be adopted into state rules, but is not required to maintain authorization.

§335.224, Additional Interim Status Standards for Burners

The commission proposes amending §335.224(11) to conform to federal regulations promulgated in the April 4, 2006, issue of the *Federal Register* (71 FR 16862). This amendment would adopt changes to the regulatory requirements of the RCRA hazardous waste program to reduce the paperwork burden these requirements impose on the states, EPA, and the regulated community. This amendment would streamline the agency's information collection requirements, ensuring that only the information that is actually needed and used to implement the RCRA program is collected and the goals of protection of human health and the environment are retained. Specifically, when owners or operators conduct interim status compliance testing for burners, the proposed amendment would revise the requirement that owners and operators submit to the executive director a recertification of compliance within three years from submitting the previous certification or recertification, to submitting the recertification of compliance within five years. This amendment is less stringent than the current state rules, but the reduction in reporting poses minimal risk to human health or the environment. This amendment is recommended by EPA to be adopted into state rules, but is not required to maintain authorization.

§335.261, Universal Waste Rule

The commission proposes amending §335.261 to conform to federal regulations promulgated in the July 14, 2006, issue of the *Federal Register* (71 FR 40254). This amendment would adopt by reference corrections to errors made in the CFR. This amendment is as stringent as the current state rules. This amendment is recommended by EPA to be adopted into state rules, but is not required to maintain authorization.

§335.431, Purpose, Scope, and Applicability

The commission proposes amendments to §335.431 to conform to federal regulations promulgated through the June 14, 2005, issue of the *Federal Register* (70 FR 34538) and as amended in the August 1, 2005, issue of the *Federal Register* (70 FR 44150). This amendment would adopt by reference updated revisions in analytical test methods. This amendment is less stringent and more flexible than the current state rules but is protective of human health and the environment. This amendment is recommended by EPA to be adopted into state rules, but is not required to maintain authorization.

The commission also proposes amending §335.431 to conform to federal regulations promulgated in the April 22, 2004, issue of the *Federal Register* (69 FR 21737), and October 25, 2004,

issue of the *Federal Register* (69 FR 62217). The proposed amendment provides hazardous waste generators the option of determining if a hazardous waste must be treated while they classify the waste, and the option to send the waste to a permitted treatment facility that must determine if treatment is required. This amendment is as stringent as the current state rules. In the proposed rule text, only the latest *Federal Register* citation appears. This amendment is recommended by EPA to be adopted into state rules, but is not required to maintain authorization.

§335.504, Hazardous Waste Determination

The commission proposes amending §335.504(1) - (3). The commission proposes to amend §335.504(1) to conform to federal regulations promulgated in the February 24, 2005 (70 FR 9138), June 14, 2005 (70 FR 34538), August 1, 2005 (70 FR 44150), June 16, 2005 (70 FR 35032), October 4, 2005 (70 FR 57769), July 28, 2006 (71 FR 42928), January 2, 2008 (73 FR 57), and June 4, 2008 (73 FR 31756), issues of the *Federal Register*. The amendment would incorporate by reference revisions to both the definitions of "solid waste" and "hazardous waste." In the proposed rule text, only the latest *Federal Register* citation appears.

Specifically, the amendment to the definition of a "Solid waste" would conditionally exclude cathode ray tubes that are recycled; expand the exclusion from the definition of a solid waste for oil-bearing hazardous secondary materials generated at a petroleum refinery including adding "gasification" to the list of recognized petroleum refinery processes; and remove the requirement to use analytical methods from SW-846, Third Edition in 40 CFR §261.3(a)(2)(v). This portion of the amendment is less stringent than current state rules but encourages recycling and is protective of human health and the environment. This amendment is recommended by EPA to be adopted into state rules, but is not required to maintain authorization.

In addition, the amendment to the definition of hazardous waste would incorporate by reference: revisions to the wastewater treatment exemption for hazardous waste mixtures (i.e., the "headworks exemptions") found in 40 CFR §261.3(a)(2)(iv) that would expand the scope of the exemption and makes corrections to a previous amendment that added K-181 to the list of hazardous wastes under 40 CFR §261.32. The portion of the amendment that expands the scope of the headwater exemptions specifically adds benzene and 2-ethoxyethanol to the list of solvents whose mixtures with wastewaters are exempted from the definition of hazardous waste. To qualify for the exemption, the concentrations of benzene and 2-ethoxyethanol in wastewater must be at levels protective of human heath and the environment. The portion of the amendment that makes corrections to the K-181 listing are nontechnical administrative corrections only and are required by EPA to maintain authorization. The portion relating to expansion of waste exemptions is less stringent than the current rules, but is protective of human health and the environment. This amendment is recommended by EPA to be adopted into state rules, but is not required to maintain authorization.

In addition, the commission proposes to amend §335.504(2) to conform to federal regulations promulgated in the June 14, 2004, issue of the *Federal Register* (70 FR 34538), as amended in the August 1, 2005, issue of the *Federal Register* (70 FR 44150), and June 4, 2008, issue of the *Federal Register* (73 FR 31756). This amendment would incorporate by reference the revisions to 40 CFR §261.31 which would amend the definition of F-019 wastes to exclude from the definition of hazardous waste certain wastewater treatment sludges from the manufacturing of motor vehicles; the replacement of references to SW-836, Method 8290 with "by using an appropriate method;" and a revised definition to the term "not detected" as found in 40 CFR §261.35(b)(2)(iii)(B). The F-019 exclusion will only apply if the waste is disposed in a landfill unit subject to certain liner requirements. This amendment is less stringent than current state rules but is protective of human health and the environment. This amendment is recommended by EPA to be adopted into state rules, but is not required to maintain authorization.

The commission also proposes amending §335.504(3) to conform to federal regulations promulgated in the June 14, 2005, issue of the *Federal Register* (70 FR 34528) and as amended in the August 1, 2005, issue of the *Federal Register* (70 FR 44150). This amendment would adopt by reference updated revisions in analytical test methods. This amendment is at least as stringent as the current state rules. This amendment is recommended by EPA to be adopted into state rules, but is not required to maintain authorization.

§335.582, Prohibited Wastes

The commission proposes amending §335.582 to correct cross-referenced citations to sections in Chapter 330, due to all sections of Chapter 330 being reorganized and amended in a previous rulemaking. Specifically, the commission proposes amending §335.582(1) to reference the correct citation for the definition of "Municipal solid waste" as defined in §330.3. The commission proposes amending §335.582(4) to reference the correct citation for the definition of "Putrescible waste" as defined in §330.3. The commission also proposes amending §335.582(4) to replace the reference of §330.126 with §330.151. The commission also proposes amending §335.582(4) to replace the reference of §330.300 with §330.545. The commission proposes amending §335.582(7) to reference the correct citation for the definition of "Medical waste" as defined in §330.3. The commission proposes amending §335.582(8) to reference the correct citation for the definition of "Liquid waste" as defined in §330.3. The commission proposes amending §335.582(9) to replace the reference of §330.5(e)(1) - (5) with §330.15(e)(1) - (5). The commission proposes amending §335.582(10) to replace the reference of §330.136(b)(3) and (4) with §330.171(c)(3) and (4). This amendment is as stringent as the current state rules. This amendment is not required to maintain authorization.

§335.583, Permit Procedures

The commission proposes amending §335.583 to correct cross-referenced citations to sections in Chapter 330 because all sections of Chapter 330 have been reorganized and amended in a previous rulemaking. Specifically, the commission proposes amending §335.583(a)(1) to replace §330.50 with §330.53. The commission also proposes amending §335.583(a)(2) to replace §330.51 with §330.57. The commission also proposes amending §335.583(a)(2) to add "and Registration" after "Permit" in the paragraph. The commission additionally proposes amending §335.583(a)(2) to replace "Application" with "Applications" in the paragraph. The commission furthermore proposes amending §335.583(a)(2) to replace "Facility" with "Facilities" in the paragraph. The commission proposes amending §335.583(a)(3) to replace §330.52 with §330.59. The commission also proposes amending §335.583(a)(3) to replace "Technical Requirements" with "Contents" in the paragraph. The commission additionally proposes amending §335.583(a)(3) to replace §330.52(b)(11) with §330.63(j). The commission furthermore proposes amending §335.583(a)(3)

to replace "financial assurance" with "cost estimate for closure and post-closure care." The commission proposes amending §335.583(a)(4) to replace §330.53 with §330.61. The commission also proposes amending §335.583(a)(4) to replace "Technical Requirements" with "Contents" in the paragraph. The commission proposes amending §335.583(a)(5) to replace "§330.54" with §330.63. The commission also proposes amending §335.583(a)(5) to replace "Technical Requirements" with "Contents" in the paragraph. The commission additionally proposes amending §335.583(a)(5) to replace §330.54(3) with §330.61(b)(1)(A). The commission proposes to delete existing §335.583(a)(6). Proposed §335.583(a)(5), when adopted, will address the requirements in the current §335.583(a)(6). The commission proposes to delete §335.583(a)(7). Proposed §335.583(a)(5), when adopted, will address the requirements in the current §335.583(a)(7). The commission proposes to renumber §335.583(a)(8) as §335.583(a)(6). The commission also proposes amending current §335.583(a)(8) (proposed to be renumbered as §335.583(a)(6)) to replace §330.57 with §330.65. The commission additionally proposes amending current §335.583(a)(8) (proposed to be renumbered as §335.583(a)(6)) to replace "Technical Requirements" with "Contents" in the paragraph. The commission proposes to delete §335.583(a)(9) and replace it with §335.583(a)(7). The commission proposes amending §335.583(a)(7) to replace §330.58 with §330.219(a). The commission proposes to renumber §335.583(a)(10) as §335.583(a)(8) and also replace §330.62 with §330.67. The commission proposes to renumber §335.583(a)(11) as §335.583(a)(9) and also replace §330.64 with §330.73. The commission additionally proposes §335.583(a)(9) to add "and Registration" after "Permit" in the paragraph. These amendments are as stringent as the current state rules. These amendments are not required to maintain authorization.

§335.584, Location Restrictions

The commission proposes amending §335.584 to correct cross-referenced citations to sections in Chapter 330 due to all sections of Chapter 330 being reorganized and amended in a previous rulemaking. The commission proposes amending §335.584(a)(1) to replace §330.301 with §330.547. The commission proposes amending §335.584(a)(2) to replace §330.302 with §330.553. The commission proposes amending §335.584(a)(3) to replace §330.303 with §330.555. The commission proposes amending §335.584(a)(4) to replace §330.304 with §330.557. The commission proposes amending §335.584(a)(5) to replace §330.305 with §330.559. These amendments are as stringent as the current state rules. These amendments are not required to maintain authorization.

§335.590, Operational and Design Standards

The commission proposes amending §335.590 to correct cross-referenced citations to sections in Chapter 330 due to all sections of Chapter 330 being reorganized and amended in a previous rulemaking. The commission proposes amending §335.590(1) to replace §330.111 with §330.121. The commission proposes amending §335.590(2) to replace §330.112 with §330.123. The commission also proposes amending §335.590(2) to replace Notices with Notice. The commission proposes amending §335.590(3) to replace §330.113 with §330.125. The commission also proposes amending §335.590(3) to replace §330.113(b)(3) with §330.125(b)(3). The commission proposes amending §335.590(4) to replace §330.114 with §330.127. The commission proposes amending §335.590(5) to replace §330.115 with §330.129. The commission proposes amending §335.590(6) to replace §330.116 with §330.131. The commission proposes amending §335.590(7) to replace §330.117(a) - (c) with §330.133(a) - (c). The commission proposes amending §335.590(8) to replace §330.119 with §330.137. The commission proposes amending §335.590(9) to replace §330.120 with §330.139. The commission proposes amending §335.590(10) to replace §330.121 with §330.141. The commission proposes amending §335.590(11) to replace §330.122 with §330.143(a). The commission also proposes amending §335.590(11) to replace Benchmarks with Benchmark. The commission proposes amending §335.590(12) to replace §330.125 with §330.149. The commission also proposes amending §335.590(12) to replace "Air Criteria" with "Odor Management Plan." The commission proposes amending §335.590(13) to replace §330.127 with §330.153. The commission proposes amending §335.590(14) to replace §330.128 of this title with §330.155. The commission proposes amending §335.590(15) to replace §330.129 with §330.157. The commission proposes amending §335.590(16) to replace §330.130 with §330.159. The commission proposes amending §335.590(17) to replace §330.131 with §330.161. The commission also proposes amending §335.590(17) to replace "Abandoned Oil and Water Wells" with "Oil, Gas, and Water Wells." The commission proposes amending §335.590(18) to replace §330.132 with §330.163. The commission proposes amending §335.590(19) to replace §330.133 with §330.165. The commission proposes amending §335.590(20) to replace §330.134 with §330.167. The commission proposes amending §335.590(21) to replace §330.138 with §330.175. The commission also proposes amending §335.590(21) to add "Visual" after "relating to." The commission proposes amending §335.590(22) to replace §330.139 with §330.207. The commission also proposes amending §335.590(22) to replace "Discharge" with "Management." The commission proposes amending §335.590(24)(A)(i)(I) to add "for constituents" after "the concentration values" to clarify the intent of the requirement. The commission also proposes amending §335.590(24)(A)(i)(I) to replace "Table 1 of §330.241" with "§330.419(a)." The commission additionally proposes amending §335.590(24)(A)(i)(I) to delete "relevant" before "point of compliance." The commission proposes amending §335.590(24)(A)(iv) to delete "relevant" before "point of compliance" in all sentences in the subparagraph. The commission also proposes amending §335.590(24)(A)(iv) to reference the definition of point of compliance as defined in §330.3. The commission proposes amending §335.590(24)(C) to replace §330.54 with §330.63. The commission also proposes amending §335.590(24)(C) to replace "Technical Requirements" with "Contents." The commission proposes amending §335.590(24)(D) to replace "Subchapter I" with "Subchapter J." The commission proposes amending §335.590(24)(E) to replace §330.253 in two sentences in the paragraph with §330.457, respectively. The commission also proposes amending §335.590(24)(E) to delete "and MSW Sites." These amendments are as stringent as the current state rules. These amendments are not required to maintain authorization.

§335.591, Groundwater Protection Design and Operation

The commission proposes amending §335.591 to correct cross-referenced citations to sections in Chapter 330 due to all sections of Chapter 330 being reorganized and amended in a previous rulemaking. The commission proposes amending §335.591(1) to replace §330.201 with §330.333. The com-

mission proposes amending §335.591(2) to replace §330.202 with §330.335. The commission also proposes amending §335.591(2) to replace "Alternate" with "Alternative." The commission furthermore proposes to add "Liner" after "Alternative." The commission proposes amending §335.591(3) to replace §330.203 with §330.337. The commission also proposes to replace "Special Conditions (Liner Design Constraints)" with "Special Liner Design Constraints." The commission proposes amending §335.591(4) to replace §330.204 with §330.555. The commission also proposes to replace "Geological Faults" with "Fault Areas." The commission proposes amending §335.591(5) to replace §330.205 with §330.339. The commission also proposes amending §335.591(5) to delete "Soil and" after "relating to." The commission proposes amending §335.591(6) to replace §330.206 with §330.341. The commission also proposes to replace "Soils and Liner Evaluation Report (SLER) and Flexible Membrane Liner Evaluation Report (FMLER)" with "Soil Liner Evaluation Report and Geomembrane Liner Evaluation Report." These amendments are as stringent as the current state rules. These amendments are not required to maintain authorization.

§335.592, Groundwater Monitoring and Corrective Action

The commission proposes amending §335.592 to correct cross-referenced citations to sections in Chapter 330 due to all sections of Chapter 330 being reorganized and amended in a previous rulemaking. The commission proposes amending §335.592(1) to replace §330.230 with §330.401. The commission proposes amending §335.592(2) to replace §330.231 with §330.403. The commission proposes amending §335.592(3) to replace §330.233 with §330.405. The commission proposes amending §335.592(4) to replace §330.234 with §330.407. The commission also proposes to add "Program for Type I Landfills" after "Detection Monitoring." The commission proposes amending §335.592(5) to replace §330.235 with §330.409. The commission proposes amending §335.592(6) to replace §330.236 with §330.411. The commission proposes amending §335.592(7) to replace §330.237 with §330.413. The commission proposes amending §335.592(8) to replace §330.238 with §330.415. The commission proposes amending §335.592(9) to replace §330.241 with §330.419. The commission proposes amending §335.592(10) to replace §330.242 with §330.421. These amendments are as stringent as the current state rules. These amendments are not required to maintain authorization.

§335.593, Closure and Post-Closure Care Requirements

The commission proposes amending §335.593 to correct cross-referenced citations to sections in Chapter 330 due to all sections of Chapter 330 being reorganized and amended in a previous rulemaking. The commission proposes amending §335.593 to replace §330.253 with §330.457. The commission also proposes amending §335.593 to delete "and MSW sites." These amendments are as stringent as the current state rules. These amendments are not required to maintain authorization.

§335.601, Purpose, Scope and Applicability

The commission proposes new §335.601 to conform to federal regulations promulgated in the September 8, 2005, issue of the *Federal Register* (70 FR 53420). This amendment would incorporate requirements for a standard permit. Specifically, this new section would incorporate the availability of a standard permit to RCRA treatment, storage, and disposal facilities otherwise subject to RCRA permitting that generate and then store or non-thermally treat hazardous waste on-site in tanks, containers, and containment buildings. Because facility storage units must meet the same technical standards as units permitted under a traditional permit, the proposed amendment is more flexible but equivalent to the current state rules. This amendment is recommended by EPA to be adopted into state rules, but is not required to maintain authorization.

§335.602, Standards

The commission proposes new §335.602 to conform to federal regulations promulgated in the September 8, 2005, issue of the *Federal Register* (70 FR 53420). This new section would incorporate by reference requirements for a standard permit. Specifically, this new section would incorporate the availability of a standard permit to RCRA treatment, storage, and disposal facilities otherwise subject to RCRA permitting that generate and then store or non-thermally treat hazardous waste on-site in tanks, containers, and containment buildings. Because facility storage units must meet the same technical standards as units permitted under a traditional permit, the proposed amendment is more flexible but equivalent to the current state rules. This amendment is recommended by EPA to be adopted into state rules, but is not required to maintain authorization.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Nina Chamness, Analyst, Strategic Planning and Assessment, has determined that, for the first five-year period the proposed rules are in effect, no significant fiscal implications are anticipated for the agency as a result of administration or enforcement of the proposed rules. Local governments and businesses that are classified as large quantity generators of hazardous waste could experience cost savings under the proposed rules.

The proposed rules would update Chapter 335 to incorporate federal rule changes that are both mandatory and optional for the RCRA hazardous waste program that were adopted by the EPA from July 2005 through June 2008. A corresponding rulemaking includes proposed amendments to Chapter 305 and fiscal impacts to Chapter 305 are detailed in a separate fiscal note.

The proposed rules would incorporate several federal rule changes that remove some wastes from the definition of hazardous waste. Changing the classification of these wastes would encourage these wastes to be recycled instead of being placed into landfills where releases of the wastes can occur. Wastes to be removed from the definition of hazardous waste include: wastewater mixtures with benzene and 2-ethoxyethanol; oil-bearing hazardous secondary materials generated at a petroleum refinery when these materials are recycled by inserting them back into the petroleum refining process; cathode ray tubes when they are reused or recycled; and wastewater treatment sludges from the zinc phosphating process when used in the motor vehicle manufacturing industry.

The proposed rules would also incorporate optional federal amendments that: remove the requirement to use specific EPA methods when conducting RCRA monitoring programs; amend reporting requirements that reduce the paperwork burden of RCRA programs; correct administrative errors; defer MACT provisions to the Air Quality Title V permit; maintain risk-based requirements in the RCRA permit; clarify several NESHAP compliance and monitoring provisions; and allow for a standard permit for units that store or non-thermally treat hazardous waste.

Staff estimates that there may be as many as ten governmental entities that might choose to use the compliance options included

in the proposed rules. These governmental entities, which include large airports and military bases, could save from $20 to $100 per sample if they can use less expensive, but equally or more protective monitoring methods. If a governmental facility that stores or non-thermally treats hazardous waste chooses to apply for a standard permit, savings on permit applications could range from $500 to $20,000 per application. Fewer permit modifications may be required, which could save governmental entities from $500 to $5,000 per modification. A reduction in the amount of times waste is transported will diminish the risk of spills and reduces the amount of air emissions that result from transporting waste. If a governmental entity that has generated wastes no longer treated as hazardous waste under the proposed rules, savings could range from $50 to $200 per barrel of waste, depending on the type of waste generated. Reduction in reporting requirements could save governmental entities from $50 to $10,000 per report.

PUBLIC BENEFITS AND COSTS

Nina Chamness also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be: increased recycling of certain wastes and decreased disposal in landfills; better sampling and analytical methods in monitoring RCRA programs; burden reduction in reporting requirements; and paperwork reduction in permitting.

The RCRA hazardous waste program regulates generators of hazardous waste and facilities that have a permit to treat, store, or dispose of those wastes. Typically, these are large businesses, and staff estimates that there may be as many as 6,000 generators of hazardous waste registered in Texas and as many as 200 permitted facilities that could be affected by the proposed rules.

The proposed rules provide opportunities for cost savings. If a large business that has generated wastes no longer treated as hazardous waste under the proposed rules, savings could range from $50 to $200 per barrel of waste, depending on the type of waste generated. Reduction in reporting requirements could save from $50 to $10,000 per report. If less expensive but equally protective sampling and monitoring methods can be used, savings could range from $20 to $100 per sample. Facilities that store or non-thermally treat hazardous waste could apply for a standard permit, which could save from $500 to $20,000 in permitting costs and from $500 to $5,000 in permit modification requests.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rules. Small businesses are usually exempt from RCRA regulations because they generate very small volumes of hazardous waste. If a small business is classified as a large quantity generator of hazardous waste, it could experience the same cost savings as that of a large business if it chooses to utilize the options afforded by the proposed rules.

SMALL BUSINESS REGULATORY FLEXIBILITY ANALYSIS

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

LOCAL EMPLOYMENT IMPACT STATEMENT

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

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute.

Although the intent of the rulemaking is to protect the environment and reduce the risk to human health from environmental exposure, the rulemaking is not a major environmental rule because it will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. There is no adverse effect in a material way on the economy, a sector of the economy, productivity, competition, or jobs of the state or a sector of the state from those revisions under 42 United States Code (USC), §6926(g), which already imposes the more stringent federal requirements on the regulated community under the Hazardous and Solid Waste Amendments of 1984. Likewise, there is no adverse effect in a material way on the economy, a sector of the economy, productivity, competition, or jobs of the state or a sector of the state from those revisions outside 42 USC, §6926(g), because the regulated community benefits from the greater flexibility, reduced recordkeeping, reporting, inspection, and sampling requirements. The regulated community must comply with the more stringent federal requirements beginning on the effective date of the federal regulations.

Because the regulated community is already required to comply with the more stringent federal rules, the adopted equivalent state rules will not cause any adverse effects. There is no adverse effect in a material way on the environment, or the public health and safety of the state or a sector of the state because the rulemaking is designed to protect the environment, the public health, and the public safety of the state and all sectors of the state. Because the rulemaking does not have an adverse material impact on the economy, the rulemaking does not meet the definition of a major environmental rule. Furthermore, the rulemaking does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a).

First, the rulemaking does not exceed a standard set by federal law because the commission adopts this rulemaking to implement revisions to the federal hazardous waste program. The commission must meet the minimum standards and mandatory requirements of the federal program to maintain authorization of the state hazardous waste program.

Second, although the rulemaking contains some requirements that are more stringent than existing state rules, federal law requires the commission to promulgate rules that are as stringent as federal law for the commission to maintain authorization of the state hazardous waste program.

Third, the rulemaking does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government, where the delegation agreement or contract is to implement a state and federal program. On the contrary, the commission must undertake

the rulemaking to maintain authorization of the state hazardous waste program.

And fourth, the rulemaking does not seek to adopt a rule solely under the general powers of the agency instead of under a specific state law. The commission adopts this rulemaking under Texas Water Code (TWC), §5.103 and §5.105 and under Texas Health and Safety Code (THSC), §361.017 and §361.024.

The commission solicits public comment on the draft regulatory impact analysis determination. Written comments may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the rulemaking and performed a preliminary assessment of whether Texas Government Code, Chapter 2007 applies. The commission's preliminary assessment indicates that Texas Government Code, Chapter 2007 does not apply to the rulemaking because this action is reasonably taken to fulfill an obligation mandated by federal law; therefore, this action is exempt under Texas Government Code, §2007.003(b)(4).

The specific purpose of the rulemaking is to maintain state RCRA authorization by proposing state hazardous waste rules that are equivalent to the federal regulations. The rulemaking will substantially advance this purpose by adopting rules that incorporate and refer to the federal regulations.

Promulgation and enforcement of the rules will not be a statutory or constitutional taking of private real property. Specifically, the rulemaking does not affect a landowner's rights in private real property because this rulemaking does not constitutionally burden the owner's right to property, does not restrict or limit the owner's right to property, and does not reduce the value of property by 25% or more beyond that which would otherwise exist in the absence of the regulations.

The rulemaking seeks to meet the minimum standards of federal RCRA regulations that are already in place. 42 USC, §6926(g) imposes on the regulated community any federal requirements that are more stringent than current state rules. The regulated community must already have complied with the more stringent federal requirements as of the effective date of the federal regulations. Because the regulated community is already required to comply with the more stringent federal regulations, promulgating equivalent state rules will not burden, restrict, or limit the owner's right to property and will not reduce the value of property by 25% or more. Likewise, the regulated community is not unduly burdened by those revisions providing greater flexibility, reduced recordkeeping, reporting, inspection, and sampling requirements.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rulemaking and found that the proposal is subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act, Texas Natural Resources Code, §§33.201 *et seq.,* and therefore must be consistent with all applicable CMP goals and policies. The commission conducted a consistency determination for the proposed rules in accordance with Coastal Coordination Act Implementation Rules, 31 TAC §505.22 and found that the proposed rulemaking is consistent with the applicable CMP goals and policies. The CMP goal applicable to the rulemaking is to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (CNRAs). Applicable policies are construction and operation of solid waste treatment, storage, and disposal facilities, such that new solid waste facilities and areal expansions of existing solid waste facilities shall be sited, designed, constructed, and operated to prevent releases of pollutants that may adversely affect CNRAs and, at a minimum, comply with standards established under the Solid Waste Disposal Act, 42 USC, §§6901 *et seq.* Promulgation and enforcement of these rules are consistent with the applicable CMP goals and policies because the rule amendments will update and enhance the commission's rules concerning hazardous waste facilities. In addition, the rules do not violate any applicable provisions of the CMP's stated goals and policies.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

ANNOUNCEMENT OF HEARING

A public hearing on this proposal will be held in Austin on June 16, 2009, at 10:00 a.m. at the Texas Commission on Environmental Quality complex located at 12100 Park 35 Circle in Building B, Room 201A. The hearing will be structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. There will be no open discussion during the hearing; however, an agency staff member will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Devon Ryan, Office of Legal Services, at (512) 239-6090. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Written comments may be submitted to Devon Ryan, MC 205, Office of Legal Services, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at *http://www5.tceq.state.tx.us/rules/ecomments/.* File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2008-024-335-PR. The comment period closes June 22, 2009. Copies of the proposed rule can be obtained from the commission's Web site at *http://www.tceq.state.tx.us/nav/rules/propose_adopt.html.* For further information, please contact Cynthia Palomares, Waste Permits Division, (512) 239-6079.

SUBCHAPTER A. INDUSTRIAL SOLID WASTE AND MUNICIPAL HAZARDOUS WASTE IN GENERAL

30 TAC §§335.1, 335.2, 335.29, 335.31

STATUTORY AUTHORITY

The amendments are proposed under Texas Water Code (TWC), §5.103 (relating to Rules) and §5.105, (relating to General Policy) which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the TWC or other laws of this state; and under Texas Health and Safety Code, (THSC), §361.017 (relating to Commission's Jurisdiction: Industrial Solid Waste and Hazardous Municipal Waste) and §361.024, (relating to Rules and Standards) which authorize the commission to regulate indus-

trial solid waste and hazardous waste and to adopt rules consistent with the general intent and purposes of the THSC.

The proposed amendments implement THSC, Chapter 361.

§335.1. Definitions.

In addition to the terms defined in Chapter 3 of this title (relating to Definitions), the following words and terms, when used in this chapter, have the following meanings.

(1) Aboveground tank--A device meeting the definition of tank in this section and that is situated in such a way that the entire surface area of the tank is completely above the plane of the adjacent surrounding surface and the entire surface area of the tank (including the tank bottom) is able to be visually inspected.

(2) Act--Texas Health and Safety Code, Chapter 361.

(3) Active life--The period from the initial receipt of hazardous waste at the facility until the executive director receives certification of final closure.

(4) Active portion--That portion of a facility where processing, storage, or disposal operations are being or have been conducted after November 19, 1980, and which is not a closed portion. (See also "closed portion" and "inactive portion.")

(5) Activities associated with the exploration, development, and protection of oil or gas or geothermal resources--Activities associated with:

(A) the drilling of exploratory wells, oil wells, gas wells, or geothermal resource wells;

(B) the production of oil or gas or geothermal resources, including:

(i) activities associated with the drilling of injection water source wells that penetrate the base of usable quality water;

(ii) activities associated with the drilling of cathodic protection holes associated with the cathodic protection of wells and pipelines subject to the jurisdiction of the commission to regulate the production of oil or gas or geothermal resources;

(iii) activities associated with gasoline plants, natural gas or natural gas liquids processing plants, pressure maintenance plants, or repressurizing plants;

(iv) activities associated with any underground natural gas storage facility, provided the terms "natural gas" and "storage facility" shall have the meanings set out in the Texas Natural Resources Code, §1.173;

(v) activities associated with any underground hydrocarbon storage facility, provided the terms "hydrocarbons" and "underground hydrocarbon storage facility" shall have the meanings set out in the Texas Natural Resources Code, §91.201; and

(vi) activities associated with the storage, handling, reclamation, gathering, transportation, or distribution of oil or gas prior to the refining of such oil or prior to the use of such gas in any manufacturing process or as a residential or industrial fuel;

(C) the operation, abandonment, and proper plugging of wells subject to the jurisdiction of the commission to regulate the exploration, development, and production of oil or gas or geothermal resources; and

(D) the discharge, storage, handling, transportation, reclamation, or disposal of waste or any other substance or material associated with any activity listed in subparagraphs (A) - (C) of this paragraph, except for waste generated in connection with activities associated with gasoline plants, natural gas or natural gas liquids processing plants, pressure maintenance plants, or repressurizing plants if that waste is a hazardous waste as defined by the administrator of the United States Environmental Protection Agency in accordance with the Federal Solid Waste Disposal Act, as amended (42 United States Code, §§6901 *et seq.).*

(6) Administrator--The administrator of the United States Environmental Protection Agency or his designee.

(7) Ancillary equipment--Any device that is used to distribute, meter, or control the flow of solid waste or hazardous waste from its point of generation to a storage or processing tank(s), between solid waste or hazardous waste storage and processing tanks to a point of disposal on site, or to a point of shipment for disposal off site. Such devices include, but are not limited to, piping, fittings, flanges, valves, and pumps.

(8) Aquifer--A geologic formation, group of formations, or part of a formation capable of yielding a significant amount of groundwater to wells or springs.

(9) Area of concern--Any area of a facility under the control or ownership of an owner or operator where a release to the environment of hazardous wastes or hazardous constituents has occurred, is suspected to have occurred, or may occur, regardless of the frequency or duration.

(10) Authorized representative--The person responsible for the overall operation of a facility or an operation unit (i.e., part of a facility), e.g., the plant manager, superintendent, or person of equivalent responsibility.

(11) Battery--As defined in §335.261 of this title (relating to Universal Waste Rule).

(12) Boiler--An enclosed device using controlled flame combustion and having the following characteristics:

(A) the unit must have physical provisions for recovering and exporting thermal energy in the form of steam, heated fluids, or heated gases;

(B) the unit's combustion chamber and primary energy recovery section(s) must be of integral design. To be of integral design, the combustion chamber and the primary energy recovery section(s) (such as waterwalls and superheaters) must be physically formed into one manufactured or assembled unit. A unit in which the combustion chamber and the primary energy recovery section(s) are joined only by ducts or connections carrying flue gas is not integrally designed; however, secondary energy recovery equipment (such as economizers or air preheaters) need not be physically formed into the same unit as the combustion chamber and the primary energy recovery section. The following units are not precluded from being boilers solely because they are not of integral design:

(i) process heaters (units that transfer energy directly to a process stream); and

(ii) fluidized bed combustion units;

(C) while in operation, the unit must maintain a thermal energy recovery efficiency of at least 60%, calculated in terms of the recovered energy compared with the thermal value of the fuel; and

(D) the unit must export and utilize at least 75% of the recovered energy, calculated on an annual basis. In this calculation, no credit shall be given for recovered heat used internally in the same unit. (Examples of internal use are the preheating of fuel or combustion air, and the driving of induced or forced draft fans or feedwater pumps); or

(E) the unit is one which the executive director has determined, on a case-by-case basis, to be a boiler, after considering the standards in §335.20 of this title (relating to Variance To Be Classified as a Boiler).

(13) Captive facility--A facility that accepts wastes from only related (within the same corporation) off-site generators.

(14) Captured facility--A manufacturing or production facility that generates an industrial solid waste or hazardous waste that is routinely stored, processed, or disposed of on a shared basis in an integrated waste management unit owned, operated by, and located within a contiguous manufacturing complex.

(15) Captured receiver--A receiver that is located within the property boundaries of the generators from which it receives waste.

(16) Carbon regeneration unit--Any enclosed thermal treatment device used to regenerate spent activated carbon.

(17) Cathode ray tube or CRT--A vacuum tube, composed primarily of glass, which is the visual or video display component of an electronic device. A used, intact CRT means a CRT whose vacuum has not been released. A used, broken CRT means its glass has been removed from its housing, or casing whose vacuum has been released.

(18) [~~(17)~~] Certification--A statement of professional opinion based upon knowledge and belief.

(19) [~~(18)~~] Class 1 wastes--Any industrial solid waste or mixture of industrial solid wastes which because of its concentration, or physical or chemical characteristics, is toxic, corrosive, flammable, a strong sensitizer or irritant, a generator of sudden pressure by decomposition, heat, or other means, or may pose a substantial present or potential danger to human health or the environment when improperly processed, stored, transported, or disposed of or otherwise managed, as further defined in §335.505 of this title (relating to Class 1 Waste Determination).

(20) [~~(19)~~] Class 2 wastes--Any individual solid waste or combination of industrial solid waste which cannot be described as hazardous, Class 1, or Class 3 as defined in §335.506 of this title (relating to Class 2 Waste Determination).

(21) [~~(20)~~] Class 3 wastes--Inert and essentially insoluble industrial solid waste, usually including, but not limited to, materials such as rock, brick, glass, dirt, and certain plastics and rubber, etc., that are not readily decomposable, as further defined in §335.507 of this title (relating to Class 3 Waste Determination).

(22) [~~(21)~~] Closed portion--That portion of a facility which an owner or operator has closed in accordance with the approved facility closure plan and all applicable closure requirements. (See also "active portion" and "inactive portion.")

(23) [~~(22)~~] Closure--The act of permanently taking a waste management unit or facility out of service.

(24) [~~(23)~~] Commercial hazardous waste management facility--Any hazardous waste management facility that accepts hazardous waste or polychlorinated biphenyl compounds for a charge, except a captured facility or a facility that accepts waste only from other facilities owned or effectively controlled by the same person.

(25) [~~(24)~~] Component--Either the tank or ancillary equipment of a tank system.

(26) [~~(25)~~] Confined aquifer--An aquifer bounded above and below by impermeable beds or by beds of distinctly lower permeability than that of the aquifer itself; an aquifer containing confined groundwater.

(27) [~~(26)~~] Consignee--The ultimate treatment, storage, or disposal facility in a receiving country to which the hazardous waste will be sent.

(28) [~~(27)~~] Container--Any portable device in which a material is stored, transported, processed, or disposed of, or otherwise handled.

(29) [~~(28)~~] Containment building--A hazardous waste management unit that is used to store or treat hazardous waste under the provisions of §335.152(a)(19) or §335.112(a)(21) of this title (relating to Standards).

(30) [~~(29)~~] Contaminant--Includes, but is not limited to, "solid waste," "hazardous waste," and "hazardous waste constituent" as defined in this subchapter; "pollutant" as defined in Texas Water Code (TWC), §26.001, and Texas Health and Safety Code (THSC), §361.401; "hazardous substance" as defined in THSC, §361.003; and other substances that are subject to the Texas Hazardous Substances Spill Prevention and Control Act, TWC, §§26.261 - 26.267.

(31) [~~(30)~~] Contaminated medium/media--A portion or portions of the physical environment to include soil, sediment, surface water, groundwater or air, that contain contaminants at levels that pose a substantial present or future threat to human health and the environment.

(32) [~~(31)~~] Contingency plan--A document setting out an organized, planned, and coordinated course of action to be followed in case of a fire, explosion, or release of hazardous waste or hazardous waste constituents which could threaten human health or the environment.

(33) [~~(32)~~] Control--To apply engineering measures such as capping or reversible treatment methods and/or institutional measures such as deed restrictions to facilities or areas with wastes or contaminated media which result in remedies that are protective of human health and the environment when combined with appropriate maintenance, monitoring, and any necessary further corrective action.

(34) [~~(33)~~] Corrosion expert--A person who, by reason of his knowledge of the physical sciences and the principles of engineering and mathematics, acquired by a professional education and related practical experience, is qualified to engage in the practice of corrosion control on buried or submerged metal piping systems and metal tanks. Such a person must be certified as being qualified by the National Association of Corrosion Engineers or be a registered professional engineer who has certification or licensing that includes education and experience in corrosion control on buried or submerged metal piping systems and metal tanks.

(35) Cathode Ray Tube collector--A person who receives used, intact Cathode Ray Tubes for recycling, repair, resale, or donation.

(36) Cathode Ray Tube glass manufacturer--An operation or part of an operation that uses a furnace to manufacture Cathode Ray Tube glass.

(37) Cathode Ray Tube processing--Conducting all of the following activities:

(A) Receiving broken or intact Cathode Ray Tubes (CRTs);

(B) Intentionally breaking intact CRTs or further breaking or separating broken CRTs; and

(C) Sorting or otherwise managing glass removed from CRT monitors.

(38) [~~(34)~~] Decontaminate--To apply a treatment process(es) to wastes or contaminated media whereby the substantial present or future threat to human health and the environment is eliminated.

(39) [~~(35)~~] Designated facility--A Class 1 or hazardous waste treatment, storage, or disposal facility which has received a United States Environmental Protection Agency permit (or a facility with interim status) in accordance with the requirements of 40 Code of Federal Regulations (CFR) Parts 270 and 124; a permit from a state authorized in accordance with 40 CFR Part 271 (in the case of hazardous waste); a permit issued in accordance with §335.2 of this title (relating to Permit Required) (in the case of nonhazardous waste); or that is regulated under §335.24(f), (g), or (h) of this title (relating to Requirements for Recyclable Materials and Nonhazardous Recyclable Materials) or §335.241 of this title (relating to Applicability and Requirements) and that has been designated on the manifest by the generator in accordance with §335.10 of this title (relating to Shipping and Reporting Procedures Applicable to Generators of Hazardous Waste or Class 1 Waste and Primary Exporters of Hazardous Waste). If a waste is destined to a facility in an authorized state which has not yet obtained authorization to regulate that particular waste as hazardous, then the designated facility must be a facility allowed by the receiving state to accept such waste. Designated facility also means a generator site designated on the manifest to receive its waste as a return shipment from a facility that has rejected the waste in accordance with §335.12(e) of this title (relating to Shipping Requirements Applicable to Owners or Operators of Treatment, Storage, or Disposal Facilities).

(40) [~~(36)~~] Destination facility--Has the definition adopted under §335.261 of this title (relating to Universal Waste Rule).

(41) [~~(37)~~] Dike--An embankment or ridge of either natural or man-made materials used to prevent the movement of liquids, sludges, solids, or other materials.

(42) [~~(38)~~] Dioxins and furans (D/F)--Tetra, penta, hexa, hepta, and octa-chlorinated dibenzo dioxins and furans.

(43) [~~(39)~~] Discharge or hazardous waste discharge--The accidental or intentional spilling, leaking, pumping, pouring, emitting, emptying, or dumping of waste into or on any land or water.

(44) [~~(40)~~] Disposal--The discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste (whether containerized or uncontainerized) into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including groundwaters.

(45) [~~(41)~~] Disposal facility--A facility or part of a facility at which solid waste is intentionally placed into or on any land or water, and at which waste will remain after closure. The term "disposal facility" does not include a corrective action management unit into which remediation wastes are placed.

(46) [~~(42)~~] Drip pad--An engineered structure consisting of a curbed, free-draining base, constructed of non-earthen materials and designed to convey preservative kick-back or drippage from treated wood, precipitation, and surface water run-on to an associated collection system at wood preserving plants.

(47) [~~(43)~~] Elementary neutralization unit--A device which:

(A) is used for neutralizing wastes which are hazardous only because they exhibit the corrosivity characteristic defined in 40 Code of Federal Regulations (CFR) §261.22, or are listed in 40 CFR Part 261, Subpart D, only for this reason; or is used for neutralizing the pH of non-hazardous industrial solid waste; and

(B) meets the definition of tank, tank system, container, transport vehicle, or vessel as defined in this section.

(48) [~~(44)~~] United States Environmental Protection Agency (EPA) acknowledgment of consent--The cable sent to EPA from the United States Embassy in a receiving country that acknowledges the written consent of the receiving country to accept the hazardous waste and describes the terms and conditions of the receiving country's consent to the shipment.

(49) [~~(45)~~] United States Environmental Protection Agency (EPA) hazardous waste number--The number assigned by the EPA to each hazardous waste listed in 40 Code of Federal Regulations (CFR) Part 26l, Subpart D and to each characteristic identified in 40 CFR Part 26l, Subpart C.

(50) [~~(46)~~] United States Environmental Protection Agency (EPA) identification number--The number assigned by the EPA or the commission to each generator, transporter, and processing, storage, or disposal facility.

(51) [~~(47)~~] Essentially insoluble--Any material, which if representatively sampled and placed in static or dynamic contact with deionized water at ambient temperature for seven days, will not leach any quantity of any constituent of the material into the water in excess of current United States Public Health Service or United States Environmental Protection Agency limits for drinking water as published in the *Federal Register*.

(52) [~~(48)~~] Equivalent method--Any testing or analytical method approved by the administrator under 40 Code of Federal Regulations §260.20 and §260.21.

(53) [~~(49)~~] Existing portion--That land surface area of an existing waste management unit, included in the original Part A permit application, on which wastes have been placed prior to the issuance of a permit.

(54) [~~(50)~~] Existing tank system or existing component--A tank system or component that is used for the storage or processing of hazardous waste and that is in operation, or for which installation has commenced on or prior to July 14, 1986. Installation will be considered to have commenced if the owner or operator has obtained all federal, state, and local approvals or permits necessary to begin physical construction of the site or installation of the tank system and if either:

(A) a continuous on-site physical construction or installation program has begun; or

(B) the owner or operator has entered into contractual obligations--which cannot be canceled or modified without substantial loss--for physical construction of the site or installation of the tank system to be completed within a reasonable time.

(55) [~~(51)~~] Explosives or munitions emergency--A situation involving the suspected or detected presence of unexploded ordnance, damaged or deteriorated explosives or munitions, an improvised explosive device, other potentially explosive material or device, or other potentially harmful military chemical munitions or device, that creates an actual or potential imminent threat to human health, including safety, or the environment, including property, as determined by an explosives or munitions emergency response specialist. These situations may require immediate and expeditious action by an explosives or munitions emergency response specialist to control, mitigate, or eliminate the threat.

(56) [~~(52)~~] Explosives or munitions emergency response--All immediate response activities by an explosives and munitions emergency response specialist to control, mitigate, or eliminate the actual or potential threat encountered during an explosives or munitions emergency, subject to the following:

(A) an explosives or munitions emergency response includes in-place render-safe procedures, treatment or destruction of the explosives or munitions and/or transporting those items to another location to be rendered safe, treated, or destroyed;

(B) any reasonable delay in the completion of an explosives or munitions emergency response caused by a necessary, unforeseen, or uncontrollable circumstance will not terminate the explosives or munitions emergency; and

(C) explosives and munitions emergency responses can occur on either public or private lands and are not limited to responses at hazardous waste facilities.

(57) [~~(53)~~] Explosives or munitions emergency response specialist--An individual trained in chemical or conventional munitions or explosives handling, transportation, render-safe procedures, or destruction techniques, including United States Department of Defense (DOD) emergency explosive ordnance disposal, technical escort unit, and DOD-certified civilian or contractor personnel; and, other federal, state, or local government, or civilian personnel similarly trained in explosives or munitions emergency responses.

(58) [~~(54)~~] Extrusion--A process using pressure to force ground poultry carcasses through a decreasing-diameter barrel or nozzle, causing the generation of heat sufficient to kill pathogens, and resulting in an extruded product acceptable as a feed ingredient.

(59) [~~(55)~~] Facility--Includes:

(A) all contiguous land, and structures, other appurtenances, and improvements on the land, used for storing, processing, or disposing of municipal hazardous waste or industrial solid waste. A facility may consist of several treatment, storage, or disposal operational units (e.g., one or more landfills, surface impoundments, or combinations of them);

(B) for the purpose of implementing corrective action under §335.167 of this title (relating to Corrective Action for Solid Waste Management Units), all contiguous property under the control of the owner or operator seeking a permit for the treatment, storage, and/or disposal of hazardous waste. This definition also applies to facilities implementing corrective action under Texas Water Code, §7.031 (Corrective Action Relating to Hazardous Waste).

(60) [~~(56)~~] Final closure--The closure of all hazardous waste management units at the facility in accordance with all applicable closure requirements so that hazardous waste management activities under Subchapter E of this chapter (relating to Interim Standards for Owners and Operators of Hazardous Waste Treatment, Storage, or Disposal Facilities) and Subchapter F of this chapter (relating to Permitting Standards for Owners and Operators of Hazardous Waste Treatment, Storage, or Disposal Facilities) are no longer conducted at the facility unless subject to the provisions in §335.69 of this title (relating to Accumulation Time).

(61) [~~(57)~~] Food-chain crops--Tobacco, crops grown for human consumption, and crops grown for feed for animals whose products are consumed by humans.

(62) [~~(58)~~] Freeboard--The vertical distance between the top of a tank or surface impoundment dike, and the surface of the waste contained therein.

(63) [~~(59)~~] Free liquids--Liquids which readily separate from the solid portion of a waste under ambient temperature and pressure.

(64) Gasification--For the purpose of complying with 40 Code of Federal Regulations §261.4(a)(12)(i), gasification is a process, conducted in an enclosed device or system, designed and operated to process petroleum feedstock, including oil-bearing hazardous secondary materials through a series of highly controlled steps utilizing thermal decomposition, limited oxidation, and gas cleaning to yield a synthesis gas composed primarily of hydrogen and carbon monoxide gas.

(65) [~~(60)~~] Generator--Any person, by site, who produces municipal hazardous waste or industrial solid waste; any person who possesses municipal hazardous waste or industrial solid waste to be shipped to any other person; or any person whose act first causes the solid waste to become subject to regulation under this chapter. For the purposes of this regulation, a person who generates or possesses Class 3 wastes only shall not be considered a generator.

(66) [~~(61)~~] Groundwater--Water below the land surface in a zone of saturation.

(67) [~~(62)~~] Hazardous industrial waste--Any industrial solid waste or combination of industrial solid wastes identified or listed as a hazardous waste by the administrator of the United States Environmental Protection Agency in accordance with the Resource Conservation and Recovery Act of 1976, §3001 (42 United States Code, §6921). The administrator has identified the characteristics of hazardous wastes and listed certain wastes as hazardous in 40 Code of Federal Regulations Part 26l. The executive director will maintain in the offices of the commission a current list of hazardous wastes, a current set of characteristics of hazardous waste, and applicable appendices, as promulgated by the administrator.

(68) [~~(63)~~] Hazardous substance--Any substance designated as a hazardous substance under 40 Code of Federal Regulations Part 302.

(69) [~~(64)~~] Hazardous waste--Any solid waste identified or listed as a hazardous waste by the administrator of the United States Environmental Protection Agency in accordance with the federal Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act, 42 United States Code, §§6901 *et seq.*

(70) [~~(65)~~] Hazardous waste constituent--A constituent that caused the administrator to list the hazardous waste in 40 Code of Federal Regulations (CFR) Part 261, Subpart D or a constituent listed in Table 1 of 40 CFR §261.24.

(71) [~~(66)~~] Hazardous waste management facility--All contiguous land, including structures, appurtenances, and other improvements on the land, used for processing, storing, or disposing of hazardous waste. The term includes a publicly- or privately-owned hazardous waste management facility consisting of processing, storage, or disposal operational hazardous waste management units such as one or more landfills, surface impoundments, waste piles, incinerators, boilers, and industrial furnaces, including cement kilns, injection wells, salt dome waste containment caverns, land treatment facilities, or a combination of units.

(72) [~~(67)~~] Hazardous waste management unit--A landfill, surface impoundment, waste pile, industrial furnace, incinerator, cement kiln, injection well, container, drum, salt dome waste containment cavern, or land treatment unit, or any other structure, vessel, appurtenance, or other improvement on land used to manage hazardous waste.

(73) [(68)] In operation--Refers to a facility which is processing, storing, or disposing of solid waste or hazardous waste.

(74) [(69)] Inactive portion--That portion of a facility which is not operated after November 19, 1980. (See also "active portion" and "closed portion.")

(75) [(70)] Incinerator--Any enclosed device that:

(A) uses controlled flame combustion and neither meets the criteria for classification as a boiler, sludge dryer, or carbon regeneration unit, nor is listed as an industrial furnace; or

(B) meets the definition of infrared incinerator or plasma arc incinerator.

(76) [(71)] Incompatible waste--A hazardous waste which is unsuitable for:

(A) placement in a particular device or facility because it may cause corrosion or decay of containment materials (e.g., container inner liners or tank walls); or

(B) commingling with another waste or material under uncontrolled conditions because the commingling might produce heat or pressure, fire or explosion, violent reaction, toxic dusts, mists, fumes, or gases, or flammable fumes or gases.

(77) [(72)] Individual generation site--The contiguous site at or on which one or more solid waste or hazardous wastes are generated. An individual generation site, such as a large manufacturing plant, may have one or more sources of solid waste or hazardous waste, but is considered a single or individual generation site if the site or property is contiguous.

(78) [(73)] Industrial furnace--Includes any of the following enclosed devices that use thermal treatment to accomplish recovery of materials or energy:

(A) cement kilns;

(B) lime kilns;

(C) aggregate kilns;

(D) phosphate kilns;

(E) coke ovens;

(F) blast furnaces;

(G) smelting, melting, and refining furnaces (including pyrometallurgical devices such as cupolas, reverberator furnaces, sintering machines, roasters, and foundry furnaces);

(H) titanium dioxide chloride process oxidation reactors;

(I) methane reforming furnaces;

(J) pulping liquor recovery furnaces;

(K) combustion devices used in the recovery of sulfur values from spent sulfuric acid;

(L) halogen acid furnaces for the production of acid from halogenated hazardous waste generated by chemical production facilities where the furnace is located on the site of a chemical production facility, the acid product has a halogen acid content of at least 3.0%, the acid product is used in a manufacturing process, and, except for hazardous waste burned as fuel, hazardous waste fed to the furnace has a minimum halogen content of 20% as generated; and

(M) other devices the commission may list, after the opportunity for notice and comment is afforded to the public.

(79) [(74)] Industrial solid waste--Solid waste resulting from or incidental to any process of industry or manufacturing, or mining or agricultural operation, which may include hazardous waste as defined in this section.

(80) [(75)] Infrared incinerator--Any enclosed device that uses electric powered resistance heaters as a source of radiant heat followed by an afterburner using controlled flame combustion and which is not listed as an industrial furnace.

(81) [(76)] Inground tank--A device meeting the definition of tank in this section whereby a portion of the tank wall is situated to any degree within the ground, thereby preventing visual inspection of that external surface area of the tank that is in the ground.

(82) [(77)] Injection well--A well into which fluids are injected. (See also "underground injection.")

(83) [(78)] Inner liner--A continuous layer of material placed inside a tank or container which protects the construction materials of the tank or container from the contained waste or reagents used to treat the waste.

(84) [(79)] Installation inspector--A person who, by reason of his knowledge of the physical sciences and the principles of engineering, acquired by a professional education and related practical experience, is qualified to supervise the installation of tank systems.

(85) [(80)] International shipment--The transportation of hazardous waste into or out of the jurisdiction of the United States.

(86) [(81)] Lamp--Has the definition adopted under §335.261 of this title (relating to Universal Waste Rule).

(87) [(82)] Land treatment facility--A facility or part of a facility at which solid waste or hazardous waste is applied onto or incorporated into the soil surface and that is not a corrective action management unit; such facilities are disposal facilities if the waste will remain after closure.

(88) [(83)] Landfill--A disposal facility or part of a facility where solid waste or hazardous waste is placed in or on land and which is not a pile, a land treatment facility, a surface impoundment, an injection well, a salt dome formation, a salt bed formation, an underground mine, a cave, or a corrective action management unit.

(89) [(84)] Landfill cell--A discrete volume of a solid waste or hazardous waste landfill which uses a liner to provide isolation of wastes from adjacent cells or wastes. Examples of landfill cells are trenches and pits.

(90) [(85)] Leachate--Any liquid, including any suspended components in the liquid, that has percolated through or drained from solid waste or hazardous waste.

(91) [(86)] Leak-detection system--A system capable of detecting the failure of either the primary or secondary containment structure or the presence of a release of solid waste or hazardous waste or accumulated liquid in the secondary containment structure. Such a system must employ operational controls (e.g., daily visual inspections for releases into the secondary containment system of aboveground tanks) or consist of an interstitial monitoring device designed to detect continuously and automatically the failure of the primary or secondary containment structure or the presence of a release of solid waste or hazardous waste into the secondary containment structure.

(92) [(87)] Licensed professional geoscientist--A geoscientist who maintains a current license through the Texas Board of Professional Geoscientists in accordance with its requirements for professional practice.

(93) [~~(88)~~] Liner--A continuous layer of natural or man-made materials, beneath or on the sides of a surface impoundment, landfill, or landfill cell, which restricts the downward or lateral escape of solid waste or hazardous waste, hazardous waste constituents, or leachate.

(94) [~~(89)~~] Management or hazardous waste management--The systematic control of the collection, source separation, storage, transportation, processing, treatment, recovery, and disposal of solid waste or hazardous waste.

(95) [~~(90)~~] Manifest--The waste shipping document, United States Environmental Protection Agency (EPA) Form 8700-22, originated and signed by the generator or offeror, that will accompany and be used for tracking the transportation, disposal, treatment, storage, or recycling of shipments of hazardous wastes or Class 1 industrial solid wastes. The form used for this purpose is the EPA Form 8700-22, obtainable from any printer registered with the EPA.

(96) [~~(91)~~] Manifest tracking number--The alphanumeric identification number (i.e., a unique three-letter suffix preceded by nine numerical digits), which is pre-printed on the manifest by a registered source.

(97) [~~(92)~~] Military munitions--All ammunition products and components produced or used by or for the Department of Defense (DOD) or the United States Armed Services for national defense and security, including military munitions under the control of the DOD, the United States Coast Guard, the United States Department of Energy (DOE), and National Guard personnel. The term "military munitions":

(A) includes confined gaseous, liquid, and solid propellants, explosives, pyrotechnics, chemical and riot control agents, smokes, and incendiaries used by DOD components, including bulk explosives and chemical warfare agents, chemical munitions, rockets, guided and ballistic missiles, bombs, warheads, mortar rounds, artillery ammunition, small arms ammunition, grenades, mines, torpedoes, depth charges, cluster munitions and dispensers, demolition charges, and devices and components thereof; and

(B) includes non-nuclear components of nuclear devices, managed under DOE's nuclear weapons program after all required sanitization operations under the Atomic Energy Act of 1954, as amended, have been completed; but

(C) does not include wholly inert items, improvised explosive devices, and nuclear weapons, nuclear devices, and nuclear components thereof.

(98) [~~(93)~~] Miscellaneous unit--A hazardous waste management unit where hazardous waste is stored, processed, or disposed of and that is not a container, tank, surface impoundment, pile, land treatment unit, landfill, incinerator, boiler, industrial furnace, underground injection well with appropriate technical standards under Chapter 331 of this title (relating to Underground Injection Control), corrective action management unit, containment building, staging pile, or unit eligible for a research, development, and demonstration permit or under Chapter 305, Subchapter K of this title (relating to Research, Development, and Demonstration Permits).

(99) [~~(94)~~] Movement--That solid waste or hazardous waste transported to a facility in an individual vehicle.

(100) [~~(95)~~] Municipal hazardous waste--A municipal solid waste or mixture of municipal solid wastes which has been identified or listed as a hazardous waste by the administrator of the United States Environmental Protection Agency.

(101) [~~(96)~~] Municipal solid waste--Solid waste resulting from or incidental to municipal, community, commercial, institutional, and recreational activities; including garbage, rubbish, ashes, street cleanings, dead animals, abandoned automobiles, and all other solid waste other than industrial waste.

(102) [~~(97)~~] New tank system or new tank component--A tank system or component that will be used for the storage or processing of hazardous waste and for which installation has commenced after July 14, 1986; except, however, for purposes of 40 Code of Federal Regulations (CFR) §264.193(g)(2) (incorporated by reference at §335.152(a)(8) of this title (relating to Standards)) and 40 CFR §265.193(g)(2) (incorporated by reference at §335.112(a)(9) of this title (relating to Standards)), a new tank system is one for which construction commences after July 14, 1986. (See also "existing tank system.")

(103) [~~(98)~~] Off-site--Property which cannot be characterized as on-site.

(104) [~~(99)~~] Onground tank--A device meeting the definition of tank in this section and that is situated in such a way that the bottom of the tank is on the same level as the adjacent surrounding surface so that the external tank bottom cannot be visually inspected.

(105) [~~(100)~~] On-Site--The same or geographically contiguous property which may be divided by public or private rights-of-way, provided the entrance and exit between the properties is at a cross-roads intersection, and access is by crossing, as opposed to going along, the right-of-way. Noncontiguous properties owned by the same person but connected by a right-of-way which he controls and to which the public does not have access, is also considered on-site property.

(106) [~~(101)~~] Open burning--The combustion of any material without the following characteristics:

(A) control of combustion air to maintain adequate temperature for efficient combustion;

(B) containment of the combustion-reaction in an enclosed device to provide sufficient residence time and mixing for complete combustion; and

(C) control of emission of the gaseous combustion products. (See also "incineration" and "thermal treatment.")

(107) [~~(102)~~] Operator--The person responsible for the overall operation of a facility.

(108) [~~(103)~~] Owner--The person who owns a facility or part of a facility.

(109) [~~(104)~~] Partial closure--The closure of a hazardous waste management unit in accordance with the applicable closure requirements of Subchapters E and F of this chapter (relating to Interim Standards for Owners and Operators of Hazardous Waste Treatment, Storage, or Disposal Facilities; and Permitting Standards for Owners and Operators of Hazardous Waste Treatment, Storage, or Disposal Facilities) at a facility that contains other active hazardous waste management units. For example, partial closure may include the closure of a tank (including its associated piping and underlying containment systems), landfill cell, surface impoundment, waste pile, or other hazardous waste management unit, while other units of the same facility continue to operate.

(110) [~~(105)~~] PCBs or polychlorinated biphenyl compounds--Compounds subject to 40 Code of Federal Regulations Part 761.

(111) [~~(106)~~] Permit--A written permit issued by the commission which, by its conditions, may authorize the permittee to construct, install, modify, or operate a specified municipal hazardous waste

or industrial solid waste treatment, storage, or disposal facility in accordance with specified limitations.

(112) [~~(107)~~] Personnel or facility personnel--All persons who work at, or oversee the operations of, a solid waste or hazardous waste facility, and whose actions or failure to act may result in noncompliance with the requirements of this chapter.

(113) [~~(108)~~] Pesticide--Has the definition adopted under §335.261 of this title (relating to Universal Waste Rule).

(114) [~~(109)~~] Petroleum substance--A crude oil or any refined or unrefined fraction or derivative of crude oil which is a liquid at standard conditions of temperature and pressure.

(A) Except as provided in subparagraph (C) of this paragraph for the purposes of this chapter, a "petroleum substance" shall be limited to a substance in or a combination or mixture of substances within the following list (except for any listed substance regulated as a hazardous waste under the federal Solid Waste Disposal Act, Subtitle C (42 United States Code (USC), §§6921, *et seq.))* and which is liquid at standard conditions of temperature (20 degrees Centigrade) and pressure (1 atmosphere):

(i) basic petroleum substances--i.e., crude oils, crude oil fractions, petroleum feedstocks, and petroleum fractions;

(ii) motor fuels--a petroleum substance which is typically used for the operation of internal combustion engines and/or motors (which includes, but is not limited to, stationary engines and engines used in transportation vehicles and marine vessels);

(iii) aviation gasolines--i.e., Grade 80, Grade 100, and Grade 100-LL;

(iv) aviation jet fuels--i.e., Jet A, Jet A-1, Jet B, JP-4, JP-5, and JP-8;

(v) distillate fuel oils--i.e., Number 1-D, Number 1, Number 2-D, and Number 2;

(vi) residual fuel oils--i.e., Number 4-D, Number 4-light, Number 4, Number 5-light, Number 5-heavy, and Number 6;

(vii) gas-turbine fuel oils--i.e., Grade O-GT, Grade 1-GT, Grade 2-GT, Grade 3-GT, and Grade 4-GT;

(viii) illuminating oils--i.e., kerosene, mineral seal oil, long-time burning oils, 300 oil, and mineral colza oil;

(ix) lubricants--i.e., automotive and industrial lubricants;

(x) building materials--i.e., liquid asphalt and dust-laying oils;

(xi) insulating and waterproofing materials--i.e., transformer oils and cable oils; and

(xii) used oils--See definition for "used oil" in this section.

(B) For the purposes of this chapter, a "petroleum substance" shall include solvents or a combination or mixture of solvents (except for any listed substance regulated as a hazardous waste under the federal Solid Waste Disposal Act, Subtitle C (42 USC, §§6921, *et seq.))* and which is liquid at standard conditions of temperature (20 degrees Centigrade) and pressure (1 atmosphere) i.e., Stoddard solvent, petroleum spirits, mineral spirits, petroleum ether, varnish makers' and painters' naphthas, petroleum extender oils, and commercial hexane.

(C) The following materials are not considered petroleum substances:

(i) polymerized materials, i.e., plastics, synthetic rubber, polystyrene, high and low density polyethylene;

(ii) animal, microbial, and vegetable fats;

(iii) food grade oils;

(iv) hardened asphalt and solid asphaltic materials--i.e., roofing shingles, roofing felt, hot mix (and cold mix); and

(v) cosmetics.

(115) [~~(110)~~] Pile--Any noncontainerized accumulation of solid, nonflowing solid waste or hazardous waste that is used for processing or storage, and that is not a corrective action management unit or a containment building.

(116) [~~(111)~~] Plasma arc incinerator--Any enclosed device using a high intensity electrical discharge or arc as a source of heat followed by an afterburner using controlled flame combustion and which is not listed as an industrial furnace.

(117) [~~(112)~~] Post-closure order--An order issued by the commission for post-closure care of interim status units, a corrective action management unit unless authorized by permit, or alternative corrective action requirements for contamination commingled from Resource Conservation and Recovery Act and solid waste management units.

(118) [~~(113)~~] Poultry--Chickens or ducks being raised or kept on any premises in the state for profit.

(119) [~~(114)~~] Poultry carcass--The carcass, or part of a carcass, of poultry that died as a result of a cause other than intentional slaughter for use for human consumption.

(120) [~~(115)~~] Poultry facility--A facility that:

(A) is used to raise, grow, feed, or otherwise produce poultry for commercial purposes; or

(B) is a commercial poultry hatchery that is used to produce chicks or ducklings.

(121) [~~(116)~~] Primary exporter--Any person who is required to originate the manifest for a shipment of hazardous waste in accordance with the regulations contained in 40 Code of Federal Regulations Part 262, Subpart B, which are in effect as of November 8, 1986, or equivalent state provision, which specifies a treatment, storage, or disposal facility in a receiving country as the facility to which the hazardous waste will be sent and any intermediary arranging for the export.

(122) [~~(117)~~] Processing--The extraction of materials, transfer, volume reduction, conversion to energy, or other separation and preparation of solid waste for reuse or disposal, including the treatment or neutralization of solid waste or hazardous waste, designed to change the physical, chemical, or biological character or composition of any solid waste or hazardous waste so as to neutralize such waste, or so as to recover energy or material from the waste or so as to render such waste nonhazardous, or less hazardous; safer to transport, store or dispose of; or amenable for recovery, amenable for storage, or reduced in volume. The transfer of solid waste for reuse or disposal as used in this definition does not include the actions of a transporter in conveying or transporting solid waste by truck, ship, pipeline, or other means. Unless the executive director determines that regulation of such activity is necessary to protect human health or the environment, the definition of processing does not include activities relating to those materials exempted by the administrator of the United States Environmental Protection Agency in accordance with the federal Solid

Waste Disposal Act, as amended by the Resource Conservation and Recovery Act, 42 United States Code, §§6901 *et seq.,* as amended.

(123) [~~(118)~~] Publicly-owned treatment works (POTW)--Any device or system used in the treatment (including recycling and reclamation) of municipal sewage or industrial wastes of a liquid nature which is owned by a state or municipality (as defined by the Clean Water Act, §502(4)). The definition includes sewers, pipes, or other conveyances only if they convey wastewater to a POTW providing treatment.

(124) [~~(119)~~] Qualified groundwater scientist--A scientist or engineer who has received a baccalaureate or post-graduate degree in the natural sciences or engineering, and has sufficient training and experience in groundwater hydrology and related fields as may be demonstrated by state registration, professional certifications, or completion of accredited university courses that enable that individual to make sound professional judgments regarding groundwater monitoring and contaminant fate and transport.

(125) [~~(120)~~] Receiving country--A foreign country to which a hazardous waste is sent for the purpose of treatment, storage, or disposal (except short-term storage incidental to transportation).

(126) [~~(121)~~] Regional administrator--The regional administrator for the United States Environmental Protection Agency region in which the facility is located, or his designee.

(127) [~~(122)~~] Remediation--The act of eliminating or reducing the concentration of contaminants in contaminated media.

(128) [~~(123)~~] Remediation waste--All solid and hazardous wastes, and all media (including groundwater, surface water, soils, and sediments) and debris, which contain listed hazardous wastes or which themselves exhibit a hazardous waste characteristic, that are managed for the purpose of implementing corrective action requirements under §335.167 of this title (relating to Corrective Action for Solid Waste Management Units) and Texas Water Code, §7.031 (Corrective Action Relating to Hazardous Waste). For a given facility, remediation wastes may originate only from within the facility boundary, but may include waste managed in implementing corrective action for releases beyond the facility boundary under §335.166(5) of this title (relating to Corrective Action Program) or §335.167(c) of this title.

(129) [~~(124)~~] Remove--To take waste, contaminated design or operating system components, or contaminated media away from a waste management unit, facility, or area to another location for treatment, storage, or disposal.

(130) [~~(125)~~] Replacement unit--A landfill, surface impoundment, or waste pile unit:

(A) from which all or substantially all the waste is removed; and

(B) that is subsequently reused to treat, store, or dispose of hazardous waste. "Replacement unit" does not apply to a unit from which waste is removed during closure, if the subsequent reuse solely involves the disposal of waste from that unit and other closing units or corrective action areas at the facility, in accordance with an approved closure plan or United States Environmental Protection Agency or state approved corrective action.

(131) [~~(126)~~] Representative sample--A sample of a universe or whole (e.g., waste pile, lagoon, groundwater) which can be expected to exhibit the average properties of the universe or whole.

(132) [~~(127)~~] Run-off--Any rainwater, leachate, or other liquid that drains over land from any part of a facility.

(133) [~~(128)~~] Run-on--Any rainwater, leachate, or other liquid that drains over land onto any part of a facility.

(134) [~~(129)~~] Saturated zone or zone of saturation--That part of the earth's crust in which all voids are filled with water.

(135) [~~(130)~~] Shipment--Any action involving the conveyance of municipal hazardous waste or industrial solid waste by any means off-site.

(136) [~~(131)~~] Sludge dryer--Any enclosed thermal treatment device that is used to dehydrate sludge and that has a maximum total thermal input, excluding the heating valve of the sludge itself, of 2,500 British thermal units per pound of sludge treated on a wet-weight basis.

(137) [~~(132)~~] Small quantity generator--A generator who generates less than 1,000 kilograms of hazardous waste in a calendar month.

(138) [~~(133)~~] Solid waste--

(A) Any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant or air pollution control facility, and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, municipal, commercial, mining, and agricultural operations, and from community and institutional activities, but does not include:

(i) solid or dissolved material in domestic sewage, or solid or dissolved material in irrigation return flows, or industrial discharges subject to regulation by permit issued in accordance with Texas Water Code, Chapter 26 (an exclusion applicable only to the actual point source discharge that does not exclude industrial wastewaters while they are being collected, stored, or processed before discharge, nor does it exclude sludges that are generated by industrial wastewater treatment);

(ii) uncontaminated soil, dirt, rock, sand, and other natural or man-made inert solid materials used to fill land if the object of the fill is to make the land suitable for the construction of surface improvements. The material serving as fill may also serve as a surface improvement such as a structure foundation, a road, soil erosion control, and flood protection. Man-made materials exempted under this provision shall only be deposited at sites where the construction is in progress or imminent such that rights to the land are secured and engineering, architectural, or other necessary planning have been initiated. Waste disposal shall be considered to have occurred on any land which has been filled with man-made inert materials under this provision if the land is sold, leased, or otherwise conveyed prior to the completion of construction of the surface improvement. Under such conditions, deed recordation shall be required. The deed recordation shall include the information required under §335.5(a) of this title (relating to Deed Recordation of Waste Disposal), prior to sale or other conveyance of the property;

(iii) waste materials which result from activities associated with the exploration, development, or production of oil or gas or geothermal resources, as those activities are defined in this section, and any other substance or material regulated by the Railroad Commission of Texas in accordance with the Natural Resources Code, §91.101, unless such waste, substance, or material results from activities associated with gasoline plants, natural gas, or natural gas liquids processing plants, pressure maintenance plants, or repressurizing plants and is a hazardous waste as defined by the administrator of the United States Environmental Protection Agency in accordance with the federal Solid Waste Disposal Act, 42 United States Code, §§6901 *et seq.,* as amended; or

(iv) a material excluded by 40 Code of Federal Regulations (CFR) §261.4(a)(1) - (22) [~~(21)~~], as amended through July 28, 2006 (71 FR 42928) [~~July 24, 2002 (67 FR 48393)~~], subject to the changes in this clause, or by variance granted under §335.18 of this title (relating to Variances from Classification as a Solid Waste) and §335.19 of this title (relating to Standards and Criteria for Variances from Classification as a Solid Waste). For the purposes of the exclusion under 40 CFR §261.4(a)(16), 40 CFR §261.38 is adopted by reference as amended through July 10, 2000 (65 FR 42292), and is revised as follows, with "subparagraph (A)(iv) under the definition of 'solid Waste' in 30 TAC §335.1" meaning "subparagraph (A)(iv) under the definition of 'solid Waste' in §335.1 of this title (relating to Definitions)":

(I) in the certification statement under 40 CFR §261.38(c)(1)(i)(C)(4), the reference to "40 CFR §261.38" is changed to "40 CFR §261.38, as revised under subparagraph (A)(iv) under the definition of 'Solid Waste' in 30 TAC §335.1," and the reference to "40 CFR §261.28(c)(10)" is changed to "40 CFR §261.38(c)(10)";

(II) in 40 CFR §261.38(c)(2), the references to "§260.10 of this chapter" are changed to "§335.1 of this title (relating to Definitions)," and the reference to "parts 264 or 265 of this chapter" is changed to "Chapter 335, Subchapter E of this title (relating to Interim Standards for Owners and Operators of Hazardous Waste Treatment, Storage, or Disposal Facilities) or Chapter 335, Subchapter F of this title (relating to Permitting Standards for Owners and Operators of Hazardous Waste Treatment, Storage, or Disposal Facilities)";

(III) in 40 CFR §261.38(c)(3) - (5), the references to "parts 264 and 265, or §262.34 of this chapter" are changed to "Chapter 335, Subchapter E of this title (relating to Interim Standards for Owners and Operators of Hazardous Waste Treatment, Storage, or Disposal Facilities) and Chapter 335, Subchapter F of this title (relating to Permitting Standards for Owners and Operators of Hazardous Waste Treatment, Storage, or Disposal Facilities), or §335.69 of this title (relating to Accumulation Time)";

(IV) in 40 CFR §261.38(c)(5), the reference to "§261.6(c) of this chapter" is changed to "§335.24(e) and (f) of this title (relating to Requirements for Recyclable Materials and Nonhazardous Recyclable Materials)";

(V) in 40 CFR §261.38(c)(7), the references to "appropriate regulatory authority" and "regulatory authority" are changed to "executive director";

(VI) in 40 CFR §261.38(c)(8), the reference to "§262.11 of this chapter" is changed to "§335.62 of this title (relating to Hazardous Waste Determination and Waste Classification)";

(VII) in 40 CFR §261.38(c)(9), the reference to "§261.2(c)(4) of this chapter" is changed to §335.1(138)[~~(133)~~](D)(iv) " of this title (relating to Definitions)"; and

(VIII) in 40 CFR §261.38(c)(10), the reference to "implementing authority" is changed to "executive director."

(B) A discarded material is any material which is:

(i) abandoned, as explained in subparagraph (C) of this paragraph;

(ii) recycled, as explained in subparagraph (D) of this paragraph;

(iii) considered inherently waste-like, as explained in subparagraph (E) of this paragraph; or

(iv) a military munition identified as a solid waste in 40 CFR §266.202.

(C) Materials are solid wastes if they are abandoned by being:

(i) disposed of;

(ii) burned or incinerated; or

(iii) accumulated, stored, or processed (but not recycled) before or in lieu of being abandoned by being disposed of, burned, or incinerated.

(D) Except for materials described in subparagraph (H) of this paragraph, materials are solid wastes if they are "recycled" or accumulated, stored, or processed before recycling as specified in this subparagraph. The chart referred to as Table 1 indicates only which materials are considered to be solid wastes when they are recycled and is not intended to supersede the definition of solid waste provided in subparagraph (A) of this paragraph.

(i) Used in a manner constituting disposal. Materials noted with an asterisk in Column 1 of Table 1 are solid wastes when they are:

(I) applied to or placed on the land in a manner that constitutes disposal; or

(II) used to produce products that are applied to or placed on the land or are otherwise contained in products that are applied to or placed on the land (in which cases the product itself remains a solid waste). However, commercial chemical products listed in 40 CFR §261.33 are not solid wastes if they are applied to the land and that is their ordinary manner of use.

(ii) Burning for energy recovery. Materials noted with an asterisk in Column 2 of Table 1 are solid wastes when they are:

(I) burned to recover energy; or

(II) used to produce a fuel or are otherwise contained in fuels (in which cases the fuel itself remains a solid waste). However, commercial chemical products, which are listed in 40 CFR §261.33, not listed in §261.33, but that exhibit one or more of the hazardous waste characteristics, or will be considered nonhazardous waste if disposed, are not solid wastes if they are fuels themselves and burned for energy recovery.

(iii) Reclaimed. Materials noted with an asterisk in Column 3 of Table 1 are solid wastes when reclaimed (except as provided under 40 CFR §261.4(a)(17)). Materials without an asterisk in Column 3 of Table 1 are not solid wastes when reclaimed.

(iv) Accumulated speculatively. Materials noted with an asterisk in Column 4 of Table 1 are solid wastes when accumulated speculatively.
Figure: 30 TAC §335.1(138)(D)(iv)
[~~Figure: 30 TAC §335.1(133)(D)(iv)~~]

(E) Materials that are identified by the administrator of the EPA as inherently waste-like materials under 40 CFR §261.2(d) are solid wastes when they are recycled in any manner.

(F) Materials are not solid wastes when they can be shown to be recycled by being:

(i) used or reused as ingredients in an industrial process to make a product, provided the materials are not being reclaimed;

(ii) used or reused as effective substitutes for commercial products;

(iii) returned to the original process from which they were generated, without first being reclaimed or land disposed. The material must be returned as a substitute for feedstock materials. In cases where the original process to which the material is returned is a secondary process, the materials must be managed such that there is no placement on the land. In cases where the materials are generated and reclaimed within the primary mineral processing industry, the conditions of the exclusion found at 40 CFR §261.4(a)(17) apply rather than this provision; or

(iv) secondary materials that are reclaimed and returned to the original process or processes in which they were generated where they are reused in the production process provided:

(I) only tank storage is involved, and the entire process through completion of reclamation is closed by being entirely connected with pipes or other comparable enclosed means of conveyance;

(II) reclamation does not involve controlled flame combustion (such as occurs in boilers, industrial furnaces, or incinerators);

(III) the secondary materials are never accumulated in such tanks for over 12 months without being reclaimed; and

(IV) the reclaimed material is not used to produce a fuel, or used to produce products that are used in a manner constituting disposal.

(G) Except for materials described in subparagraph (H) of this paragraph, the following materials are solid wastes, even if the recycling involves use, reuse, or return to the original process, as described in subparagraph (F) of this paragraph:

(i) materials used in a manner constituting disposal, or used to produce products that are applied to the land;

(ii) materials burned for energy recovery, used to produce a fuel, or contained in fuels;

(iii) materials accumulated speculatively; or

(iv) materials deemed to be inherently waste-like by the administrator of the EPA, as described in 40 CFR §261.2(d)(1) and (2).

(H) With the exception of contaminated soils which are being relocated for use under §350.36 of this title (relating to Relocation of Soils Containing Chemicals of Concern for Reuse Purposes) and other contaminated media, materials that will otherwise be identified as nonhazardous solid wastes if disposed of are not considered solid wastes when recycled by being applied to the land or used as ingredients in products that are applied to the land, provided these materials can be shown to meet all of the following criteria:

(i) a legitimate market exists for the recycling material as well as its products;

(ii) the recycling material is managed and protected from loss as will be raw materials or ingredients or products;

(iii) the quality of the product is not degraded by substitution of raw material/product with the recycling material;

(iv) the use of the recycling material is an ordinary use and it meets or exceeds the specifications of the product it is replacing without treatment or reclamation, or if the recycling material is not replacing a product, the recycling material is a legitimate ingredient in a production process and meets or exceeds raw material specifications without treatment or reclamation;

(v) the recycling material is not burned for energy recovery, used to produce a fuel, or contained in a fuel;

(vi) the recycling material can be used as a product itself or to produce products as it is generated without treatment or reclamation;

(vii) the recycling material must not present an increased risk to human health, the environment, or waters in the state when applied to the land or used in products which are applied to the land and the material, as generated:

(I) is a Class 3 waste under Subchapter R of this chapter (relating to Waste Classification), except for arsenic, cadmium, chromium, lead, mercury, nickel, selenium, and total dissolved solids; and

(II) for the metals listed in subclause (I) of this clause:

(-a-) is a Class 2 or Class 3 waste under Subchapter R of this chapter; and

(-b-) does not exceed a concentration limit under §312.43(b)(3), Table 3 of this title (relating to Metal Limits); and

(viii) with the exception of the requirements under §335.17(a)(8) of this title (relating to Special Definitions for Recyclable Materials and Nonhazardous Recyclable Materials):

(I) at least 75% (by weight or volume) of the annual production of the recycling material must be recycled or transferred to a different site and recycled on an annual basis; and

(II) if the recycling material is placed in protective storage, such as a silo or other protective enclosure, at least 75% (by weight or volume) of the annual production of the recycling material must be recycled or transferred to a different site and recycled on a biennial basis.

(I) Respondents in actions to enforce the industrial solid waste regulations who raise a claim that a certain material is not a solid waste, or is conditionally exempt from regulation, must demonstrate that there is a known market or disposition for the material, and that they meet the terms of the exclusion or exemption. In doing so, they must provide appropriate documentation (such as contracts showing that a second person uses the material as an ingredient in a production process) to demonstrate that the material is not a waste, or is exempt from regulation. In addition, owners or operators of facilities claiming that they actually are recycling materials must show that they have the necessary equipment to do so and that the recycling activity is legitimate and beneficial.

(J) Materials that are reclaimed from solid wastes and that are used beneficially are not solid wastes and hence are not hazardous wastes under 40 CFR §261.3(c) unless the reclaimed material is burned for energy recovery or used in a manner constituting disposal.

(K) Other portions of this chapter that relate to solid wastes that are recycled include §335.6 of this title (relating to Notification Requirements), §§335.17 - 335.19 of this title, §335.24 of this title (relating to Requirements for Recyclable Materials and Nonhazardous Recyclable Materials), and Subchapter H of this chapter (relating to Standards for the Management of Specific Wastes and Specific Types of Facilities).

(139) [~~(134)~~] Sorbent--A material that is used to soak up free liquids by either adsorption or absorption, or both. Sorb means to either adsorb or absorb, or both.

(140) [~~(135)~~] Spill--The accidental spilling, leaking, pumping, emitting, emptying, or dumping of solid waste or hazardous wastes or materials which, when spilled, become solid waste or hazardous wastes into or on any land or water.

(141) [~~(136)~~] Staging pile--An accumulation of solid, non-flowing remediation waste, as defined in this section, that is not a containment building and that is used only during remedial operations for temporary storage at a facility. Staging piles must be designated by the executive director according to the requirements of 40 Code of Federal Regulations §264.554, as adopted by reference under §335.152(a) of this title (relating to Standards).

(142) Standard Permit--A written permit issued by the commission which, by its conditions, may authorize the permittee to construct, install, modify, or operate a specified municipal hazardous waste non-thermal treatment and/or storage facility in accordance with specified limitations.

(143) [~~(137)~~] Storage--The holding of solid waste for a temporary period, at the end of which the waste is processed, disposed of, recycled, or stored elsewhere.

(144) [~~(138)~~] Sump--Any pit or reservoir that meets the definition of tank in this section and those troughs/trenches connected to it that serve to collect solid waste or hazardous waste for transport to solid waste or hazardous waste treatment, storage, or disposal facilities; except that as used in the landfill, surface impoundment, and waste pile rules, "sump" means any lined pit or reservoir that serves to collect liquids drained from a leachate collection and removal system or leak detection system for subsequent removal from the system.

(145) [~~(139)~~] Surface impoundment or impoundment--A facility or part of a facility which is a natural topographic depression, man-made excavation, or diked area formed primarily of earthen materials (although it may be lined with man-made materials), which is designed to hold an accumulation of liquid wastes or wastes containing free liquids, and which is not an injection well or a corrective action management unit. Examples of surface impoundments are holding, storage, settling, and aeration pits, ponds, and lagoons.

(146) [~~(140)~~] Tank--A stationary device, designed to contain an accumulation of solid waste which is constructed primarily of non-earthen materials (e.g., wood, concrete, steel, plastic) which provide structural support.

(147) [~~(141)~~] Tank system--A solid waste or hazardous waste storage or processing tank and its associated ancillary equipment and containment system.

(148) [~~(142)~~] TEQ--Toxicity equivalence, the international method of relating the toxicity of various dioxin/furan congeners to the toxicity of 2,3,7,8-tetrachlorodibenzo-p-dioxin.

(149) [~~(143)~~] Thermal processing--The processing of solid waste or hazardous waste in a device which uses elevated temperatures as the primary means to change the chemical, physical, or biological character or composition of the solid waste or hazardous waste. Examples of thermal processing are incineration, molten salt, pyrolysis, calcination, wet air oxidation, and microwave discharge. (See also "incinerator" and "open burning.")

(150) [~~(144)~~] Thermostat--Has the definition adopted under §335.261 of this title (relating to Universal Waste Rule).

(151) [~~(145)~~] Totally enclosed treatment facility--A facility for the processing of hazardous waste which is directly connected to an industrial production process and which is constructed and operated in a manner which prevents the release of any hazardous waste or any constituent thereof into the environment during processing. An example is a pipe in which acid waste is neutralized.

(152) [~~(146)~~] Transfer facility--Any transportation-related facility including loading docks, parking areas, storage areas, and other similar areas where shipments of hazardous or industrial solid waste are held during the normal course of transportation.

(153) [~~(147)~~] Transit country--Any foreign country, other than a receiving country, through which a hazardous waste is transported.

(154) [~~(148)~~] Transport vehicle--A motor vehicle or rail car used for the transportation of cargo by any mode. Each cargo-carrying body (trailer, railroad freight car, etc.) is a separate transport vehicle. Vessel includes every description of watercraft, used or capable of being used as a means of transportation on the water.

(155) [~~(149)~~] Transporter--Any person who conveys or transports municipal hazardous waste or industrial solid waste by truck, ship, pipeline, or other means.

(156) [~~(150)~~] Treatability study--A study in which a hazardous or industrial solid waste is subjected to a treatment process to determine:

(A) whether the waste is amenable to the treatment process;

(B) what pretreatment (if any) is required;

(C) the optimal process conditions needed to achieve the desired treatment;

(D) the efficiency of a treatment process for a specific waste or wastes; or

(E) the characteristics and volumes of residuals from a particular treatment process. Also included in this definition for the purpose of 40 Code of Federal Regulations §261.4(e) and (f) (§§335.2, 335.69, and 335.78 of this title (relating to Permit Required; Accumulation Time; and Special Requirements for Hazardous Waste Generated by Conditionally Exempt Small Quantity Generators)) exemptions are liner compatibility, corrosion, and other material compatibility studies and toxicological and health effects studies. A treatability study is not a means to commercially treat or dispose of hazardous or industrial solid waste.

(157) [~~(151)~~] Treatment--To apply a physical, biological, or chemical process(es) to wastes and contaminated media which significantly reduces the toxicity, volume, or mobility of contaminants and which, depending on the process(es) used, achieves varying degrees of long-term effectiveness.

(158) [~~(152)~~] Treatment zone--A soil area of the unsaturated zone of a land treatment unit within which hazardous constituents are degraded, transferred, or immobilized.

(159) [~~(153)~~] Underground injection--The subsurface emplacement of fluids through a bored, drilled, or driven well; or through a dug well, where the depth of the dug well is greater than the largest surface dimension. (See also "injection well.")

(160) [~~(154)~~] Underground tank--A device meeting the definition of tank in this section whose entire surface area is totally below the surface of and covered by the ground.

(161) [~~(155)~~] Unfit-for-use tank system--A tank system that has been determined through an integrity assessment or other inspection to be no longer capable of storing or processing solid waste or hazardous waste without posing a threat of release of solid waste or hazardous waste to the environment.

(162) [~~(156)~~] Universal waste--Any of the hazardous wastes defined as universal waste under §335.261(b)(13)(F) of this title (relating to Universal Waste Rule) that are managed under the universal waste requirements of Subchapter H, Division 5 of this chapter (relating to Universal Waste Rule).

(163) [~~(157)~~] Universal waste handler--Has the definition adopted under §335.261 of this title (relating to Universal Waste Rule).

(164) [~~(158)~~] Universal waste transporter--Has the definition adopted under §335.261 of this title (relating to Universal Waste Rule).

(165) [~~(159)~~] Unsaturated zone or zone of aeration--The zone between the land surface and the water table.

(166) [~~(160)~~] Uppermost aquifer--The geologic formation nearest the natural ground surface that is an aquifer, as well as lower aquifers that are hydraulically interconnected within the facility's property boundary.

(167) [~~(161)~~] Used oil--Any oil that has been refined from crude oil, or any synthetic oil, that has been used, and, as a result of such use, is contaminated by physical or chemical impurities. Used oil fuel includes any fuel produced from used oil by processing, blending, or other treatment. Rules applicable to nonhazardous used oil, oil characteristically hazardous from use versus mixing, conditionally exempt small quantity generator hazardous used oil, and household used oil after collection that will be recycled are found in Chapter 324 of this title (relating to Used Oil Standards) and 40 Code of Federal Regulations Part 279 (Standards for Management of Used Oil).

(168) [~~(162)~~] Wastewater treatment unit--A device which:

(A) is part of a wastewater treatment facility subject to regulation under either the Federal Water Pollution Control Act (Clean Water Act), 33 United States Code, §§466 *et seq.,* §402 or §307(b), as amended;

(B) receives and processes or stores an influent wastewater which is a hazardous or industrial solid waste, or generates and accumulates a wastewater treatment sludge which is a hazardous or industrial solid waste, or processes or stores a wastewater treatment sludge which is a hazardous or industrial solid waste; and

(C) meets the definition of tank or tank system as defined in this section.

(169) [~~(163)~~] Water (bulk shipment)--The bulk transportation of municipal hazardous waste or Class 1 industrial solid waste which is loaded or carried on board a vessel without containers or labels.

(170) [~~(164)~~] Well--Any shaft or pit dug or bored into the earth, generally of a cylindrical form, and often walled with bricks or tubing to prevent the earth from caving in.

(171) [~~(165)~~] Zone of engineering control--An area under the control of the owner/operator that, upon detection of a solid waste or hazardous waste release, can be readily cleaned up prior to the release of solid waste or hazardous waste or hazardous constituents to groundwater or surface water.

§335.2. Permit Required.

(a) Except with regard to storage, processing, or disposal to which subsections (c) - (h) of this section apply, and as provided in §335.45(b) of this title (relating to Effect on Existing Facilities), and in accordance with the requirements of §335.24 of this title (relating to Requirements for Recyclable Materials and Nonhazardous Recyclable Materials) and §335.25 of this title (relating to Handling, Storing, Processing, Transporting, and Disposing of Poultry Carcasses), and as provided in §332.4 of this title (relating to General Requirements), no person may cause, suffer, allow, or permit any activity of storage, processing, or disposal of any industrial solid waste or municipal hazardous waste unless such activity is authorized by a permit, amended permit, or other authorization from the Texas Commission on Environmental Quality (commission) or its predecessor agencies, the Department of State Health Services (DSHS), or other valid authorization from a Texas state agency. No person may commence physical construction of a new hazardous waste management facility without first having submitted Part A and Part B of the permit application and received a finally effective permit.

(b) In accordance with the requirements of subsection (a) of this section, no generator, transporter, owner or operator of a facility, or any other person may cause, suffer, allow, or permit its wastes to be stored, processed, or disposed of at an unauthorized facility or in violation of a permit. In the event this requirement is violated, the executive director will seek recourse against not only the person who stored, processed, or disposed of the waste, but also against the generator, transporter, owner or operator, or other person who caused, suffered, allowed, or permitted its waste to be stored, processed, or disposed.

(c) Any owner or operator of a solid waste management facility that is in existence on the effective date of a statutory or regulatory change that subjects the owner or operator to a requirement to obtain a hazardous waste permit who has filed a hazardous waste permit application with the commission in accordance with the rules and regulations of the commission, may continue the storage, processing, or disposal of hazardous waste until such time as the commission approves or denies the application, or, if the owner or operator becomes subject to a requirement to obtain a hazardous waste permit after November 8, 1984, except as provided by the United States Environmental Protection Agency (EPA) or commission rules relative to termination of interim status. If a solid waste facility which has become a commercial hazardous waste management facility as a result of the federal toxicity characteristic rule effective September 25, 1990, and is required to obtain a hazardous waste permit, such facility that qualifies for interim status is limited to those activities that qualify it for interim status until the facility obtains the hazardous waste permit. Owners or operators of municipal hazardous waste facilities that satisfied this requirement by filing an application on or before November 19, 1980, with the EPA are not required to submit a separate application with the DSHS. Applications filed under this section shall meet the requirements of §335.44 of this title (relating to Application for Existing On-Site Facilities). Owners and operators of solid waste management facilities that are in existence on the effective date of statutory or regulatory amendments under the Texas Solid Waste Disposal Act (Vernon's Supplement 1991), Texas Civil Statutes, Article 4477-7, or the Resource Conservation and Recovery Act (RCRA), 42 United States Code, §§6901 *et seq.,* that render the facilities subject to the requirement to obtain a hazardous waste permit, may continue to operate if Part A of their permit application is submitted no later than six months after the date of publication of regulations by the EPA under RCRA, which first require them to comply with the standards in Subchapter E of this chapter (relating to Interim Standards for Owners and Operators of Hazardous Waste Treatment, Storage, [~~Processing,~~] or Disposal Facilities), or Subchapter H of this chapter (relating to Standards for the Management of Specific Wastes and Specific Types of Facilities); or 30 days after the date they first become subject to the standards in these subchapters, whichever first occur; or for generators who generate greater than 100 kilograms but less than 1,000 kilograms of hazardous waste in a calendar month and who process, store, or dispose of these wastes on-site, a Part A permit application shall be submitted to the EPA by March 24, 1987, as required by 40 Code of Federal Regulations (CFR) §270.10(e)(1)(iii). This subsection shall not apply to a facility if it has been previously de-

nied a hazardous waste permit or if authority to operate the facility has been previously terminated. Applications filed under this section shall meet the requirements of §335.44 of this title. For purposes of this subsection, a solid waste management facility is in existence if the owner or operator has obtained all necessary federal, state, and local preconstruction approvals or permits, as required by applicable federal, state, and local hazardous waste control statutes, regulations, or ordinances; and either:

(1) a continuous physical, on-site construction program has begun; or

(2) the owner or operator has entered into contractual obligations, which cannot be cancelled or modified without substantial loss, for construction of the facility to be completed within a reasonable time.

(d) No permit shall be required for:

(1) the processing or disposal of nonhazardous industrial solid waste, if the waste is processed or disposed on property owned or otherwise effectively controlled by the owner or operator of the industrial plant, manufacturing plant, mining operation, or agricultural operation from which the waste results or is produced; the property is within 50 miles of the plant or operation; and the waste is not commingled with waste from any other source or sources (An industrial plant, manufacturing plant, mining operation, or agricultural operation owned by one person shall not be considered an "other source" with respect to other plants and operations owned by the same person.);

(2) the storage of nonhazardous industrial solid waste, if the waste is stored on property owned or otherwise effectively controlled by the owner or operator of the industrial plant, manufacturing plant, mining operation, or agricultural operation from which the waste results or is produced, and the waste is not commingled with waste from any other source or sources (An industrial plant, manufacturing plant, mining operation, or agricultural operation owned by one person shall not be considered an "other source" with respect to other plants and operations owned by the same person.);

(3) the storage or processing of nonhazardous industrial solid waste, if the waste is processed in an elementary neutralization unit;

(4) the collection, storage, or processing of nonhazardous industrial solid waste, if the waste is collected, stored, or processed as part of a treatability study;

(5) the storage of nonhazardous industrial solid waste, if the waste is stored in a transfer facility in containers for a period of ten days or less, unless the executive director determines that a permit should be required in order to protect human health and the environment;

(6) the storage or processing of nonhazardous industrial solid waste, if the waste is processed in a publicly owned treatment works with discharges subject to regulation under the Clean Waste Act, §402, as amended through October 4, 1996, if the owner or operator has a National Pollutant Discharge Elimination System permit and complies with the conditions of the permit;

(7) the storage or processing of nonhazardous industrial solid waste, if the waste is stored or processed in a wastewater unit and is discharged in accordance with a Texas Pollutant Discharge Elimination System authorization issued under Texas Water Code, Chapter 26;

(8) the storage or processing of nonhazardous industrial solid waste, if the waste is stored or processed in a wastewater treatment unit that discharges to a publicly owned treatment works and the units are located at a noncommercial solid waste management facility; or

(9) the storage or processing of nonhazardous industrial solid waste, if the waste is processed in a wastewater treatment unit that discharges to a publicly owned treatment works liquid wastes that are incidental to the handling, processing, storage, or disposal of solid wastes at municipal solid waste facilities or commercial industrial solid waste landfill facilities.

(e) No permit shall be required for the on-site storage of hazardous waste by a person who is a conditionally exempt small quantity generator as described in §335.78 of this title (relating to Special Requirements for Hazardous Waste Generated by Conditionally Exempt Small Quantity Generators).

(f) No permit under this chapter shall be required for the storage, processing, or disposal of hazardous waste by a person described in §335.41(b) - (d) of this title (relating to Purpose, Scope, and Applicability) or for the storage of hazardous waste under the provisions of 40 CFR §261.4(c) and (d).

(g) No permit under this chapter shall be required for the storage, processing, or disposal of hazardous industrial waste or municipal hazardous waste that is generated or collected for the purpose of conducting treatability studies. Such samples are subject to the requirements in 40 CFR §261.4(e) and (f), as amended and adopted in the CFR through February 18, 1994, as published in the *Federal Register* (59 FR 8362), which are adopted by reference.

(h) A person may obtain authorization from the executive director for the storage, processing, or disposal of nonhazardous industrial solid waste in an interim status landfill that has qualified for interim status in accordance with 40 CFR Part 270, Subpart G, and that has complied with the standards in Subchapter E of this chapter, by complying with the notification and information requirements in §335.6 of this title (relating to Notification Requirements). The executive director may approve or deny the request for authorization or grant the request for authorization subject to conditions, which may include, without limitation, public notice and technical requirements. A request for authorization for the disposal of nonhazardous industrial solid waste under this subsection shall not be approved unless the executive director determines that the subject facility is suitable for disposal of such waste at the facility as requested. At a minimum, a determination of suitability by the executive director must include approval by the executive director of construction of a hazardous waste landfill meeting the design requirements of 40 CFR §265.301(a). In accordance with §335.6 of this title, such person shall not engage in the requested activities if denied by the executive director or unless 90 days' notice has been provided and the executive director approves the request except where express executive director approval has been obtained prior to the expiration of the 90 days. Authorization may not be obtained under this subsection for:

(1) nonhazardous industrial solid waste, the storage, processing, or disposal of which is expressly prohibited under an existing permit or site development plan applicable to the facility or a portion of the facility;

(2) polychlorinated biphenyl compounds wastes subject to regulation by 40 CFR Part 761;

(3) explosives and shock-sensitive materials;

(4) pyrophorics;

(5) infectious materials;

(6) liquid organic peroxides;

(7) radioactive or nuclear waste materials, receipt of which will require a license from the TDH or the commission or any other successor agency; and

(8) friable asbestos waste unless authorization is obtained in compliance with the procedures established under §330.171(c)(3)(B) - (E) [~~§330.136(b)(6)(B) - (E)~~] of this title (relating to Disposal of Special Wastes). Authorizations obtained under this subsection shall be effective during the pendency of the interim status and shall cease upon the termination of interim status, final administrative disposition of the subject permit application, failure of the facility to operate the facility in compliance with the standards set forth in Subchapter E of this chapter, or as otherwise provided by law.

(i) Owners or operators of hazardous waste management units must have permits during the active life (including the closure period) of the unit. Owners or operators of surface impoundments, landfills, land treatment units, and waste pile units that received wastes after July 26, 1982, or that certified closure (according to 40 CFR §265.115) after January 26, 1983, must have post-closure permits, unless they demonstrate closure by removal or decontamination as provided under 40 CFR §270.1(c)(5) and (6), or obtain an order in lieu of a post-closure permit, as provided in subsection (m) of this section. If a post-closure permit is required, the permit must address applicable provisions of 40 CFR Part 264, and Subchapter F of this chapter (relating to Permitting Standards for Owners and Operators of Hazardous Waste Treatment, Storage, [~~Processing,~~] or Disposal Facilities) provisions concerning groundwater monitoring, unsaturated zone monitoring, corrective action, and post-closure care requirements. The denial of a permit for the active life of a hazardous waste management facility or unit does not affect the requirement to obtain a post-closure permit under this section.

(j) Upon receipt of the federal Hazardous and Solid Waste Act (HSWA) authorization for the commission's Hazardous Waste Program, the commission shall be authorized to enforce the provisions that the EPA imposed in hazardous waste permits that were issued before the HSWA authorization was granted.

(k) Any person who intends to conduct an activity under subsection (d) of this section shall comply with the notification requirements of §335.6 of this title.

(l) No permit shall be required for the management of universal wastes by universal waste handlers or universal waste transporters, in accordance with the definitions and requirements of Subchapter H, Division 5 of this chapter (relating to Universal Waste Rule).

(m) At the discretion of the commission, an owner or operator may obtain a post-closure order in lieu of a post-closure permit for interim status units, a corrective action management unit unless authorized by a permit, or alternative corrective action requirements for contamination commingled from RCRA and solid waste management units. The post-closure order must address the facility-wide corrective action requirements of §335.167 of this title (relating to Corrective Action for Solid Waste Management Units) and groundwater monitoring requirements of §335.156 of this title (relating to Applicability of Groundwater Monitoring and Response).

(n) Except as provided in subsection (d)(9) of this section, owners or operators of commercial industrial solid waste facilities that receive industrial solid waste for discharge to a publicly owned treatment works are required to obtain a permit under this subchapter. By June 1, 2006, owners or operators of existing commercial industrial solid waste facilities that receive industrial solid waste for discharge to a publicly owned treatment works must have a permit issued under this subchapter or obtain a general permit issued under Chapter 205 of this title (relating to General Permits for Waste Discharges) to continue operating. A general permit issued under Chapter 205 of this title will authorize operations until a final decision is made on the application for an individual permit or 15 months, whichever is earlier. The general permit shall authorize operations for a maximum period of 15 months except that authorization may be extended on an individual basis in one-year increments at the discretion of the executive director. Should an application for a general permit issued under Chapter 205 of this title be submitted, the applicant shall also submit to the commission, by June 1, 2006, the appropriate information to demonstrate compliance with financial assurance requirements for closure of industrial solid waste facilities in accordance with Chapter 37, Subchapter P of this title (relating to Financial Assurance for Hazardous and Nonhazardous Industrial Solid Waste Facilities). Owners or operators of commercial industrial solid waste facilities that receive industrial solid waste for discharge to a publicly owned treatment works operating under a general permit issued under Chapter 205 of this title shall submit an application for a permit issued under this subchapter prior to September 1, 2006.

(o) Treatment, storage, and disposal facilities that are otherwise subject to permitting under RCRA and that meet the criteria in paragraphs (1) or (2) of this subsection, may be eligible for a standard permit under Subchapter U of this chapter (relating to Standards for Owners and Operators of Hazardous Waste Facilities Operating Under a Standard Permit) if they satisfy one of the two following criteria:

(1) facility generates hazardous waste and then non-thermally treats and/or stores hazardous waste on-site; or

(2) facility receives hazardous waste generated off-site by a generator under the same ownership as the receiving facility.

§335.29. Adoption of Appendices by Reference.

The following appendices contained in 40 Code of Federal Regulations Part 261 are adopted by reference as amended and adopted through April 1, 1987, and as further amended as indicated in each paragraph:

(1) Appendix I--Representative Sampling Methods (as amended through August, 1 2005 (70 *Federal Register* (FR) 44150));

(2) Appendix VII--Basis for Listing Hazardous Waste (as amended through February 24, 2005 (70 FR 9138));

(3) Appendix VIII--Hazardous Constituents (as amended through July 14, 2006 (71 FR 40254)) [~~February 24, 2005 (70 FR 9138))~~]; and

(4) Appendix IX--Wastes Excluded Under §260.20 and §260.22 (as amended through July 14, 2006 (71 FR 40254)) [~~October 19, 1999 (64 FR 56256))~~].

§335.31. Incorporation of References.

When used in Chapter 335 of this title (relating to Industrial Solid Waste and Municipal Hazardous Waste), the references contained in 40 Code of Federal Regulations (CFR) §260.11 are incorporated by reference as amended and adopted in the CFR through September 8, 2005 (70 FR 53420) [~~June 28, 2001 (66 FR 34374)~~].

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 8, 2009.

TRD-200901742
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 239-6090

SUBCHAPTER B. HAZARDOUS WASTE MANAGEMENT GENERAL PROVISIONS

30 TAC §335.47

STATUTORY AUTHORITY

The amendment is proposed under Texas Water Code (TWC), §5.103 (relating to Rules) and §5.105, (relating to General Policy) which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the TWC or other laws of this state; and under Texas Health and Safety Code, (THSC), §361.017 (relating to Commission's Jurisdiction: Industrial Solid Waste and Hazardous Municipal Waste) and §361.024, (relating to Rules and Standards) which authorize the commission to regulate industrial solid waste and hazardous waste and to adopt rules consistent with the general intent and purposes of the THSC.

The proposed amendment implements THSC, Chapter 361.

§335.47. Special Requirements for Persons Eligible for a Federal Permit by Rule.

(a) The following persons are eligible for a permit by rule under 40 Code of Federal Regulations (CFR) §270.60:

(1) the owner or operator of a barge or other vessel which accepts hazardous waste for ocean disposal;

(2) the owner or operator of a publicly owned treatment works (POTW) which accepts hazardous waste for treatment; and

(3) the owner or operator of an injection well used to dispose of hazardous waste.

(b) To be eligible for a permit by rule, such person shall comply with the requirements of 40 CFR §270.60 and the following rules:

(1) 40 CFR §264.11 (EPA identification number);

(2) 40 CFR §264.73(a) and (b)(1) (operating record);

(3) 40 CFR §264.75 (biennial report);

(4) §335.12 of this title (relating to Shipping Requirements Applicable to Owners or Operators of Storage, Processing, or Disposal Facilities); and

(5) §335.15 of this title (relating to Recordkeeping and Reporting Requirements Applicable to Owners or Operators of Storage, Processing, or Disposal Facilities).

(c) In addition to the requirements stated in subsection (b) of this section, the owner or operator of an injection well used to dispose of hazardous waste shall:

(1) comply with the applicable personnel training requirements of 40 CFR §264.16;

(2) when abandonment is completed, submit to the executive director certification by the owner or operator and certification by a Texas licensed professional engineer [~~an independent registered professional engineer~~] that the facility has been closed in accordance with the specifications in §331.46 of this title (relating to Closure Standards [~~Plugging and Abandonment Standards~~]); and

(3) for underground injection control permits issued after November 8, 1984, comply with §335.167 of this title (relating to Corrective Action for Solid Waste Management Units). Where the underground injection well is the only unit at a facility which requires a permit, comply with 40 CFR §270.14(d) (concerning information requirements for solid waste management units). Persons who dispose of hazardous waste by means of underground injection must obtain a permit under the Texas Water Code, Chapter 27.

(d) In addition to the requirements stated in subsection (b) of this section, the owner or operator of a POTW which accepts hazardous waste for treatment shall:

(1) meet all federal, state, and local pretreatment requirements which would be applicable to the waste if it were being discharged into the POTW through a sewer, pipe, or similar conveyance; and

(2) for National Pollutant Discharge Elimination System permits issued after November 8, 1984, comply with §335.167 of this title.

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

Filed with the Office of the Secretary of State on May 8, 2009.

TRD-200901743
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 239-6090

SUBCHAPTER C. STANDARDS APPLICABLE TO GENERATORS OF HAZARDOUS WASTE

30 TAC §335.69, §335.76

STATUTORY AUTHORITY

The amendments are proposed under Texas Water Code (TWC), §5.103 (relating to Rules) and §5.105 (relating to General Policy), which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the TWC or other laws of this state; and under Texas Health and Safety Code, (THSC), §361.017 (relating to Commission's Jurisdiction: Industrial Solid Waste and Hazardous Municipal Waste) and §361.024 (relating to Rules and Standards), which authorize the commission to regulate industrial solid waste and hazardous waste and to adopt rules consistent with the general intent and purposes of the THSC.

The proposed amendments implement THSC, Chapter 361.

§335.69. Accumulation Time.

(a) Generators that comply with the requirements of paragraph (1) of this subsection are exempt from all requirements adopted by reference in §335.112(a)(6) and (7) of this title (relating to Standards), except 40 Code of Federal Regulations (CFR) §265.111 and §265.114. Except as provided in subsections (f) - (h) and (n) [~~(f) - (k)~~] of this section, a generator may accumulate hazardous waste on-site for 90 days without a permit or interim status provided that:

(1) the waste is placed:

(A) in containers and the generator complies with the applicable requirements of 40 CFR Part 265, Subparts I, AA, and BB, and CC, as adopted by reference under §335.112(a) of this title; and/or

(B) in tanks and the generator complies with the applicable requirements of 40 CFR Part 265, Subparts J, AA, BB, and CC,

except 40 CFR §265.197(c) and §265.200, as adopted by reference under §335.112(a) of this title; and/or

(C) on drip pads and the generator complies with §335.112(a)(18) of this title and maintains the following records at the facility: a description of procedures that will be followed to ensure that all wastes are removed from the drip pad and associated collection system at least once every 90 days; and documentation of each waste removal, including the quantity of waste removed from the drip pad and the sump or collection system and the date and time of removal; and/or

(D) [~~the waste is placed~~] in containment buildings and the generator complies with 40 CFR Part 265, Subpart DD, as adopted by reference under §335.112(a) of this title and has placed its professional engineer certification that the building complies with the design standards specified in 40 CFR §265.1101 in the facility's operating record prior to operation of the unit. The owner or operator shall maintain the following records at the facility:

(i) a written description of procedures to ensure that each waste volume remains in the unit for no more than 90 days, a written description of the waste generation and management practices for the facility showing that they are consistent with respecting the 90-day limit, and documentation that the procedures are complied with; or

(ii) documentation that the unit is emptied at least once every 90 days;

(2) the date upon which each period of accumulation begins is clearly marked and visible for inspection on each container; and

(3) while being accumulated on-site, each container and tank is labeled or marked clearly with the words, "Hazardous Waste"; and

(4) the generator complies with the following:

(A) the requirements for owners or operators in 40 CFR Part 265, Subparts C and D and with 40 CFR §265.16, as adopted by reference in §335.112(a) of this title;

(B) 40 CFR §268.7(a)(5), as adopted by reference under §335.431(c) of this title (relating to Purpose, Scope, and Applicability); and

(C) §335.113 of this title (relating to Reporting of Emergency Situations by Emergency Coordinator).

(b) A generator who accumulates hazardous waste for more than 90 days is an operator of a hazardous waste storage facility and is subject to the requirements of this chapter and Chapter 305 of this title (relating to Consolidated Permits) applicable to such owners and operators, unless he has been granted an extension to the 90-day period. Such extension may be granted by the executive director if hazardous wastes must remain on-site for longer than 90 days due to unforeseen, temporary, and uncontrollable circumstances. An extension of up to 30 days may be granted at the discretion of the executive director on a case-by-case basis.

(c) Persons exempted under this provision, who generate hazardous waste, are still subject to the requirements in Subchapter A of this chapter (relating to Industrial Solid Waste and Municipal Hazardous Waste in General) applicable to generators of Class 1 waste.

(d) A generator, other than a conditionally exempt small quantity generator regulated under §335.78 of this title (relating to Special Requirements for Hazardous Waste Generated by Conditionally Exempt Small Quantity Generators), may accumulate as much as 55 gallons of hazardous waste or one quart of acutely hazardous waste listed in 40 CFR §261.33(e) in containers at or near any point of generation where wastes initially accumulate, which is under the control of the operator of the process generating the waste, without a permit or interim status and without complying with subsection (a) of this section provided he:

(1) complies with 40 CFR §§265.171, 265.172, and 265.173(a), as adopted by reference under §335.112(a) of this title [~~(relating to Standards)~~]; and

(2) marks his containers either with the words "Hazardous Waste" or with other words that identify the contents of the containers.

(e) A generator who accumulates either hazardous waste or acutely hazardous waste listed in 40 CFR §261.33(e) in excess of the amounts listed in subsection (d) of this section at or near any point of generation must, with respect to that amount of excess waste, comply within three days with subsection (a) of this section or other applicable provisions of this chapter. During the three-day period, the generator must continue to comply with subsection (d) of this section. The generator must mark the container holding the excess accumulation of hazardous waste with the date the excess amount began accumulating.

(f) A generator who generates greater than 100 kilograms but less than 1,000 kilograms of hazardous waste in a calendar month may accumulate hazardous waste on-site for 180 days or less without a permit or without having interim status provided that:

(1) the quantity of waste accumulated on-site never exceeds 6,000 kilograms;

(2) the generator complies with the requirements of 40 CFR Part 265, Subpart I, as adopted by reference under §335.112(a) of this title, except 40 CFR §265.176 and §265.178;

(3) the generator complies with the requirements of 40 CFR §265.201, as adopted by reference under §335.112(a) of this title;

(4) the generator complies with the requirements of:

(A) subsection (a)(2) and (3) of this section;

(B) 40 CFR Part 265, Subpart C, as adopted by reference under §335.112(a) of this title; and

(C) 40 CFR §268.7(a)(5), as adopted by reference under §335.431(c) of this title; and

(5) the generator complies with the following requirements.

(A) At all times there must be at least one employee either on the premises or on call (i.e., available to respond to an emergency by reaching the facility within a short period of time) with the responsibility for coordinating all emergency response measures specified in subparagraph (D) of this paragraph. This employee is the emergency coordinator.

(B) The generator must post the following information next to telephones that may be used to summon emergency assistance:

(i) the name and telephone number of the emergency coordinator;

(ii) location of fire extinguishers and spill control material, and, if present, fire alarm; and

(iii) the telephone number of the fire department, unless the facility has a direct alarm.

(C) The generator must ensure that all employees are thoroughly familiar with proper waste handling and emergency procedures, relevant to their responsibilities during normal facility operations and emergencies;

(D) The emergency coordinator or his designee must respond to any emergencies that arise. The applicable responses are as follows.

(i) In the event of a fire, call the fire department or attempt to extinguish it using a fire extinguisher.

(ii) In the event of a spill, contain the flow of hazardous waste to the extent possible, and as soon as is practicable, clean up the hazardous waste and any contaminated materials or soil.

(iii) In the event of a fire, explosion, or other release which could threaten human health outside the facility or when the generator has knowledge that a spill has reached surface water, the generator must immediately notify the National Response Center (using its 24-hour toll free number (800) 424-8802) and the commission according to the procedures set out in the State of Texas oil and hazardous substances spill contingency plan. The reports must include the following information:

(I) the name, address, and United States Environmental Protection Agency (EPA) identification number of the generator;

(II) date, time, and type of incident (e.g., spill or fire);

(III) quantity and type of hazardous waste involved in the incident;

(IV) extent of injuries, if any; and

(V) estimated quantity and disposition of recovered materials, if any.

(g) A generator who generates greater than 100 kilograms but less than 1,000 kilograms of hazardous waste in a calendar month and who must transport his waste, or offer his waste for transportation, over a distance of 200 miles or more for off-site processing, storage, or disposal may accumulate hazardous waste on-site for 270 days or less without a permit or without having interim status, provided that he complies with the requirements of subsection (f) of this section.

(h) A generator who generates greater than 100 kilograms but less than 1,000 kilograms of hazardous waste in a calendar month and who accumulates hazardous waste in quantities exceeding 6,000 kilograms or accumulates hazardous waste for more than 180 days (or for more than 270 days if he must transport his waste, or offer his waste for transportation, over a distance of 200 miles or more) is an operator of a storage facility and is subject to the requirements of this chapter (relating to Industrial Solid Waste and Municipal Hazardous Waste), and Subchapters E and F of this chapter (relating to Interim Standards for Owners and Operators of Hazardous Waste Treatment, Storage, or Disposal Facilities; and Permitting Standards for Owners and Operators of Hazardous Waste Treatment, Storage, or Disposal Facilities) and the permit requirements of Chapter 305 of this title (relating to Consolidated Permits), unless he has been granted an extension to the 180-day (or 270-day, if applicable) period. Such extension may be granted by the executive director if hazardous wastes must remain on-site for longer than 180 days (or 270 days, if applicable) due to unforeseen, temporary, and uncontrollable circumstances. An extension of up to 30 days may be granted at the discretion of the executive director on a case-by-case basis.

(i) A generator who generates or collects hazardous waste for the purpose of treatability studies is not subject to this section.

(j) A generator of 1,000 kilograms or greater of hazardous waste per calendar month who also generates wastewater treatment sludges from electroplating operations that meet the listing description for EPA hazardous waste number F006, may accumulate F006 waste on-site for more than 90 days, but not more than 180 days without a permit or without having interim status provided that:

(1) the generator has implemented pollution prevention practices that reduce the amount of any hazardous substances, pollutants, or contaminants entering the F006 waste or otherwise released to the environment prior to its recycling;

(2) the F006 waste is legitimately recycled through metals recovery;

(3) no more than 20,000 kilograms of F006 waste is accumulated on-site at any one time; and

(4) the F006 waste is managed in accordance with the following:

(A) the F006 waste is placed:

(i) in containers and the generator complies with the applicable requirements of 40 CFR Part 265, Subparts I, AA, and BB, as adopted by reference under §335.112(a) of this title, and 40 CFR Part 265, Subpart CC; and/or

(ii) in tanks and the generator complies with the applicable requirements of 40 CFR Part 265, Subparts J, AA, BB, as adopted by reference under §335.112(a) of this title, and 40 CFR Part 265, Subpart CC, except 40 CFR §265.197(c) and §265.200; and/or

(iii) in containment buildings and the generator complies with 40 CFR Part 265, Subpart DD, as adopted by reference under §335.112(a) of this title, and has placed its professional engineer certification that the building complies with the design standards specified in 40 CFR §265.1101 in the facility's operating record prior to operation of the unit. The owner or operator shall maintain the following records at the facility:

(I) a written description of procedures to ensure that the F006 waste remains in the unit for no more than 180 days, a written description of the waste generation and management practices for the facility showing that they are consistent with the 180-day limit, and documentation that the generator is complying with the procedures; or

(II) documentation that the unit is emptied at least once every 180 days;

(B) the generator complies with 40 CFR §265.111 and §265.114, as adopted by reference under §335.112(a)(6) of this title;

(C) the date upon which each period of accumulation begins is clearly marked and visible for inspection on each container;

(D) while being accumulated on-site, each container and tank is labeled or marked clearly with the words "Hazardous Waste"; and

(E) the generator complies with the following:

(i) the requirements for owners or operators in 40 CFR Part 265, Subparts C and D, and 40 CFR §265.16, as adopted by reference under §335.112(a) of this title;

(ii) 40 CFR §268.7(a)(5), as adopted by reference under §335.431(c) of this title; and

(iii) §335.113 of this title.

(k) A generator of 1,000 kilograms or greater of hazardous waste per calendar month who also generates wastewater treatment sludges from electroplating operations that meet the listing description for EPA hazardous waste number F006, and who must transport

this waste, or offer this waste for transportation, over a distance of 200 miles or more for off-site metals recovery, may accumulate F006 waste on-site for more than 90 days, but not more than 270 days without a permit or without having interim status if the generator complies with the requirements of subsection (j)(1) - (4) of this section.

(l) A generator accumulating F006 waste in accordance with subsection (j) or (k) of this section who accumulates F006 waste on-site for more than 180 days (or for more than 270 days if the generator must transport this waste, or offer this waste for transportation, over a distance of 200 miles or more), or who accumulates more than 20,000 kilograms of F006 waste on-site is an operator of a hazardous waste storage facility and is subject to the requirements of this chapter and Chapter 305 of this title applicable to such owners and operators, unless the generator has been granted an extension to the 180-day (or 270-day if applicable) period or an exception to the 20,000 kilogram accumulation limit. Such extensions and exceptions may be granted by the executive director if F006 waste must remain on-site for longer than 180 days (or 270 days if applicable) or if more than 20,000 kilograms of F006 waste must remain on-site due to unforeseen, temporary, and uncontrollable circumstances. An extension of up to 30 days or an exception to the accumulation limit may be granted at the discretion of the executive director on a case-by-case basis.

(m) A generator who sends a shipment of hazardous waste to a designated facility with the understanding that the designated facility can accept and manage the waste and later receives that shipment back as a rejected load or residue in accordance with the manifest discrepancy provisions of §335.10 of this title (relating to Shipping and Reporting Procedures Applicable to Generators of Hazardous Waste or Class 1 Waste and Primary Exporters of Hazardous Waste) may accumulate the returned waste on-site in accordance with subsections (a) and (b) or (f) - (h) [~~(d), (e), and (f)~~] of this section depending on the amount of hazardous waste on-site in that calendar month.

§335.76. Additional Requirements Applicable to International Shipments.

(a) Any person who exports hazardous waste to a foreign country or imports hazardous waste from a foreign country into the state must comply with the requirements of this title and with the special requirements of this section. Except to the extent the regulations contained in 40 Code of Federal Regulations (CFR) §262.58 as amended through July 14, 2006 (71 FR 40254), a primary exporter of hazardous waste must comply with the special requirements of this section as they apply to primary exporters, and a transporter transporting hazardous waste for export must comply with applicable requirements of §335.11 of this title (relating to Shipping Requirements for Transporters of Hazardous Waste or Class 1 Waste) and §335.14 of this title (relating to Recordkeeping Requirements Applicable to Transporters of Hazardous Waste or Class 1 Waste) and Subchapter D of this chapter (relating to Standards Applicable to Transporters of Hazardous Waste). 40 CFR §262.58 sets forth the requirements of international agreements between the United States and receiving countries which establish different notice, export, and enforcement procedures for the transportation, processing, storage, and disposal of hazardous waste for shipments between the United States and those countries.

(b) Exports of hazardous waste are prohibited except in compliance with the applicable requirements of this subchapter, the special requirements of this section, and §335.11 of this title and §335.14 of this title [~~(relating to Recordkeeping Requirements Applicable to Transporters of Hazardous Waste or Class 1 Waste)~~] and Subchapter D of this chapter [~~(relating to Standards Applicable to Transporters of Hazardous Waste)~~]. Exports of hazardous waste are prohibited unless:

(1) notification in accordance with the regulations contained in 40 CFR §262.53, as amended and adopted through April 12, 1996 (61 FR 16290) has been provided;

(2) the receiving country has consented to accept the hazardous waste;

(3) a copy of the United States Environmental Protection Agency (EPA) acknowledgment of consent to the shipment accompanies the hazardous waste shipment and, unless exported by rail, is attached to the manifest (or shipping paper for exports by water (bulk shipment));

(4) the hazardous waste shipment conforms to the terms of the receiving country's written consent as reflected in the EPA acknowledgment of consent; and

(5) the primary exporter complies with the manifest requirements of §335.10 of this title (relating to Shipping and Reporting Procedures Applicable to Generators of Hazardous Waste or Class 1 Waste and Primary Exporters of Hazardous Waste) except that:

(A) the primary exporter must attach a copy of the EPA acknowledgment of consent to the shipment to the manifest which must accompany the hazardous waste shipment. For exports by rail or water (bulk shipment), the primary exporter must provide the transporter with an EPA acknowledgment of consent which must accompany the hazardous waste but which need not be attached to the manifest except that for exports by water (bulk shipment) the primary exporter must attach the copy of the EPA acknowledgment of consent to the shipping paper; and

(B) the primary exporter may obtain the manifest from any source that is registered with the EPA as a supplier of manifests.

(c) A primary exporter must submit an exception report to the executive director if:

(1) he has not received a copy of the manifest signed by the transporter stating the date and place of departure from the United States within 45 days from the date it was accepted by the initial transporter;

(2) within 90 days from the date the waste was accepted by the initial transporter, the primary exportor has not received written confirmation from the foreign consignee that the hazardous waste was received; or

(3) the waste was returned to the United States.

(d) When importing hazardous waste into the state from a foreign country, a person must prepare a manifest in accordance with the requirements of §335.10 of this title for the manifest except:

(1) in place of the generator's name, address, and EPA identification number, the name and address of the foreign generator and the importer's name, address, and EPA identification number must be used;

(2) in place of the generator's signature on the certification statement, the United States importer or his agent must sign and date the certification and obtain the signature of the initial transporter; and

(3) a person who imports hazardous waste may obtain the Uniform Hazardous Waste Manifest from any source that is registered with the EPA as a supplier of the manifests.

(e) Any person exporting hazardous waste shall file an annual report with the executive director as required in §335.9 of this title (relating to Recordkeeping and Annual Reporting Procedures Applicable

to Generators) summarizing the types, quantities, frequency, and ultimate destination of all such hazardous waste exported during the previous calendar year.

(f) Any person who exports hazardous waste to a foreign country or imports hazardous waste from a foreign country into the state must comply with the requirements of the regulations contained in 40 CFR §262.58 (International Agreements), as amended and adopted through April 12, 1996 (61 FR 16290).

(g) Except to the extent that they are clearly inconsistent with Texas Health and Safety Code, Chapter 361, or the rules of the commission, primary exporters must comply with the regulations contained in 40 CFR §262.57, which are in effect as of November 8, 1986.

(h) Transfrontier shipments of hazardous waste for recovery within the Organization for Economic Cooperation and Development are subject to 40 CFR Part 262, Subpart H, which is adopted by reference as amended and adopted in the CFR through July 14, 2006 (71 FR 40254) [~~April 12, 1996 (61 FR 16290)~~].

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 8, 2009.

TRD-200901744
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 239-6090

SUBCHAPTER E. INTERIM STANDARDS FOR OWNERS AND OPERATORS OF HAZARDOUS WASTE TREATMENT, STORAGE, OR DISPOSAL FACILITIES

30 TAC §§335.112, 335.116, 335.118, 335.125

STATUTORY AUTHORITY

The amendments are proposed under Texas Water Code (TWC), §5.103 (relating to Rules) and §5.105 (relating to General Policy), which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the TWC or other laws of this state; and under Texas Health and Safety Code, (THSC), §361.017 (relating to Commission's Jurisdiction: Industrial Solid Waste and Hazardous Municipal Waste) and §361.024 (relating to Rules and Standards), which authorize the commission to regulate industrial solid waste and hazardous waste and to adopt rules consistent with the general intent and purposes of the THSC.

The proposed amendments implement THSC, Chapter 361.

§335.112. Standards.

(a) The following regulations contained in 40 Code of Federal Regulations (CFR) Part 265 (including all appendices to Part 265) (except as otherwise specified herein) are adopted by reference as amended and adopted in the CFR through June 1, 1990 (55 FR 22685) and as further amended as indicated in each paragraph of this subsection:

(1) Subpart B - General Facility Standards (as amended through July 14, 2006 (71 FR 40254)) [~~December 8, 1997 (62 FR 64636)~~)];

(2) Subpart C - Preparedness and Prevention;

(3) Subpart D - Contingency Plan and Emergency Procedures (as amended through July 14, 2006 (71 FR 40254)), except 40 CFR §265.56(d);

(4) Subpart E - Manifest System, Recordkeeping and Reporting (as amended through April 4, 2006 (71 FR 16862)); [~~June 16, 2005 (70 CFR 35037)).~~]

(5) Subpart F - Groundwater Monitoring (as amended through April 4, 2006 (71 FR 16862)) [~~October 22, 1998 (63 FR 56709)~~)], except 40 CFR §265.90 and §265.94;

(6) Subpart G - Closure and Post-Closure (as amended through July 14, 2006 (71 FR 40254)) [~~October 22, 1998 (63 FR 56709)~~)]; except 40 CFR §265.112(d)(3) and (4) and §265.118(e) and (f);

(7) Subpart H - Financial Requirements (as amended through September 16, 1992 (57 FR 42832)); except 40 CFR §§265.140, 265.141, 265.142(a)(2), 265.142(b) and (c), 265.143(a) - (g), 265.144(b) and (c), 265.145(a) - (g), 264.146, 265.147(a) - (d), 265.147(f) - (k), and 265.148 - 265.150;

(8) Subpart I - Use and Management of Containers (as amended through July 14, 2006 (71 FR 40254)) [~~November 25, 1996 (61 FR 59932)~~)];

(9) Subpart J - Tank Systems (as amended through July 14, 2006 (71 FR 40254)), [~~November 25, 1996 (61 FR 59932)~~)];

(10) Subpart K - Surface Impoundments (as amended through July 14, 2006 (71 FR 40254)) [~~November 25, 1996 (61 FR 59932)~~)];

(11) Subpart L - Waste Piles (as amended through July 14, 2006 (71 FR 40254)) [~~January 29, 1992 (57 FR 3493)~~)], except 40 CFR §265.253;

(12) Subpart M - Land Treatment (as amended through July 14, 2006 (71 FR 40254)), except 40 CFR §§265.272, 265.279, and 265.280;

(13) Subpart N - Landfills (as amended through July 14, 2006 (71 FR 40254)) [~~July 10, 1992 (57 FR 30658)~~)], except 40 CFR §§265.301(f) - (i), 265.314, and 265.315;

(14) Subpart O - Incinerators (as amended through September 30, 1999 (64 FR 52828));

(15) Subpart P - Thermal Treatment (as amended through July 17, 1991 (56 FR 32692));

(16) Subpart Q - Chemical, Physical, and Biological Treatment (as amended through July 14, 2006 (71 FR 40254));

(17) Subpart R - Underground Injection;

(18) Subpart W - Drip Pads (as amended through July 14, 2006 (71 FR 40254)) [~~December 24, 1992 (57 FR 61492)~~)];

(19) Subpart AA - Air Emission Standards for Process Vents (as amended through July 14, 2006 (71 FR 40254)) [~~December 8, 1997 (62 FR 64636)~~)];

(20) Subpart BB - Air Emission Standards for Equipment Leaks (as amended through April 4, 2006 (71 FR 16862)) [~~April 26, 2005 (69 FR 22601)~~)];

(21) Subpart CC - Air Emission Standards for Tanks, Surface Impoundments, and Containers (as amended through July 14, 2006 (71 FR 40254)) [~~January 21, 1999 (64 FR 33820))~~];

(22) Subpart DD - Containment Buildings (as amended through July 14, 2006 (71 FR 40254)) [~~August 18, 1992 (57 FR 37194))~~];

(23) Subpart EE - Hazardous Waste Munitions and Explosives Storage (as amended through February 12, 1997 (62 FR 6622)); and

(24) the following appendices contained in 40 CFR Part 265:

(A) Appendix I - Recordkeeping Instructions (as amended through March 24, 1994 (59 FR 13891));

(B) Appendix III - EPA Interim Primary Drinking Water Standards;

(C) Appendix IV - Tests for Significance;

(D) Appendix V - Examples of Potentially Incompatible Waste; and

(E) Appendix VI - Compounds With Henry's Law Constant Less Than 0.1 Y/X.

(b) The regulations of the United States Environmental Protection Agency (EPA) that are adopted by reference in this section are adopted subject to the following changes.

(1) The term "regional administrator" is changed to the "executive director" of the Texas Commission on Environmental Quality or to the commission, consistent with the organization of the commission as set out in Texas Water Code, Chapter 5, Subchapter B.

(2) The term "treatment" is changed to "processing."

(3) Reference to Resource Conservation and Recovery Act, §3008(h) is changed to Texas Water Code, §7.031(c) - (e) (Corrective Action Relating to Hazardous Waste).

(4) Reference to:

(A) 40 CFR §260.10 is changed to §335.1 of this title (relating to Definitions);

(B) 40 CFR §264.90 is changed to §335.156 of this title (relating to Applicability of Groundwater Monitoring and Response);

(C) 40 CFR §264.101 is changed to §335.167 of this title (relating to Corrective Action for Solid Waste Management Units);

(D) 40 CFR §264.310 is changed to §335.174 of this title (relating to Closure and Post-Closure Care (Landfills));

(E) 40 CFR §265.1 is changed to §335.111 of this title (relating to Purpose, Scope, and Applicability);

(F) 40 CFR §265.90 is changed to §335.116 of this title (relating to Applicability of Groundwater Monitoring Requirements);

(G) 40 CFR §265.94 is changed to §335.117 of this title (relating to Recordkeeping and Reporting);

(H) 40 CFR §265.314 is changed to §335.125 of this title (relating to Special Requirements for Bulk and Containerized Waste);

(I) 40 CFR §270.1 is changed to §335.2 of this title (relating to Permit Required);

(J) 40 CFR §270.28 is changed to §305.50 of this title (relating to Additional Requirements for an Application for a Hazardous or Industrial Solid Waste Permit and for a Post-Closure Order);

(K) 40 CFR §270.41 is changed to §305.62 of this title (relating to Amendment); [~~and~~]

(L) 40 CFR §270.42 is changed to §305.69 of this title (relating to Solid Waste Permit Modification at the Request of the Permittee); and [~~.~~]

(M) Qualified professional engineer is changed to Texas licensed professional engineer.

(5) 40 CFR Parts 260 - 270 means the commission's rules including, but not limited to, Chapters 50, 305, and 335 of this title (relating to Action on Applications and Other Authorizations; Consolidated Permits; and Industrial Solid Waste and Municipal Hazardous Waste), as applicable.

(6) Reference to 40 CFR Part 265, Subpart D (Contingency Plan and Emergency Procedures) is changed to §335.112(a)(3) of this title (relating to Standards) and §335.113 of this title (relating to Reporting of Emergency Situations by Emergency Coordinator).

(7) Reference to 40 CFR §§265.71, 265.72, 265.76, and 265.77 is changed to §335.12 of this title (relating to Shipping Requirements Applicable to Owners or Operators of Treatment, Storage, or Disposal Facilities), §335.12(c)(1) and (2) of this title, §335.15(3) of this title (relating to Recordkeeping and Reporting Requirements Applicable to Owners or Operators of Treatment, Storage, or Disposal Facilities), and §335.115 of this title (relating to Additional Reports), respectively.

(8) Reference to 40 CFR Part 264, Subpart F is changed to §335.156 of this title, §335.157 of this title (relating to Required Programs), §335.158 of this title (relating to Groundwater Protection Standard), §335.159 of this title (relating to Hazardous Constituents), §335.160 of this title (relating to Concentration Limits), §335.161 of this title (relating to Point of Compliance), §335.162 of this title (relating to Compliance Period), §335.163 of this title (relating to General Groundwater Monitoring Requirements), §335.164 of this title (relating to Detection Monitoring Program), §335.165 of this title (relating to Compliance Monitoring Program), §335.166 of this title (relating to Corrective Action Program), and §335.167 of this title.

(9) Reference to 40 CFR Part 265, Subpart F is changed to include §335.116 and §335.117 of this title, in addition to the reference to 40 CFR Part 265, Subpart F, except §265.90 and §265.94.

(10) Reference to the EPA is changed to the Texas Commission on Environmental Quality.

(c) A copy of 40 CFR Part 265 is available for inspection at the library of the Texas Commission on Environmental Quality, located on the first floor of Building A at 12100 Park 35 Circle, Austin, Texas.

§335.116. Applicability of Groundwater Monitoring Requirements.

(a) On November 19, 1981, the owner or operator of a surface impoundment, landfill, or land treatment facility which is used to manage hazardous waste must implement a groundwater monitoring program capable of determining the facility's impact on the quality of groundwater in the uppermost aquifer underlying the facility, except as provided in subsection (c) of this section.

(b) Except as provided in subsections (c), (d), and (g) of this section, the owner or operator must install, operate, and maintain a groundwater monitoring system which meets the requirements of 40 Code of Federal Regulations (CFR) §265.91, and must comply with 40 CFR §265.92 and §265.93, and §335.117 of this title (relating to

Recordkeeping and Reporting). This groundwater monitoring program must be carried out during the active life of the facility, and for disposal facilities during the post-closure care period as well.

(c) All or part of the groundwater monitoring requirements of this subchapter may be waived if the owner or operator can demonstrate that there is a low potential for migration of hazardous waste or hazardous waste constituents from the facility via the uppermost aquifer to water supply wells (domestic, industrial, or agricultural) or to surface water. This demonstration must be in writing and must be kept at the facility. This demonstration shall be certified by a licensed professional geoscientist or geotechnical engineer and must establish the following:

(1) the potential for migration of hazardous waste constituents from the facility to the uppermost aquifer, by an evaluation of:

(A) a water balance of precipitation, evapotranspiration, runoff, and infiltration; and

(B) unsaturated zone characteristics (i.e., geologic materials, physical properties, and depth to groundwater); and

(2) the potential for hazardous waste or hazardous waste constituents which enter the uppermost aquifer to migrate to a water supply well or surface water, by an evaluation of:

(A) saturated zone characteristics (i.e., geologic materials, physical properties, and rate of groundwater flow); and

(B) the proximity of the facility to water supply wells or surface water.

(d) If an owner or operator assumes (or knows) that groundwater monitoring of indicator parameters in accordance with 40 CFR §265.91 and §265.92 would show statistically significant increases (or decreases in the case of pH) when evaluated under 40 CFR §265.93(b), he may install, operate, and maintain an alternate groundwater monitoring system (other than the one described in 40 CFR §265.91 and §265.92). If the owner or operator does decide to use an alternate groundwater monitoring system he must:

(1) prior to November 19, 1981, develop [~~submit to the executive director~~] a specific plan certified by a Texas licensed professional geoscientist [~~qualified geologist~~] or geotechnical engineer which satisfies the requirements of 40 CFR §265.93(d)(3), for an alternate groundwater monitoring system. This plan is to be placed in the facility's operating record and maintained until closure of the facility;

(2) prior to November 19, 1981, initiate the determinations specified in 40 CFR §265.93(d)(4);

(3) prepare [~~and submit~~] a written report in accordance with 40 CFR §265.93(d)(5) and place it in the facility's operating record and maintain until closure of the facility;

(4) continue to make the determinations specified in 40 CFR §265.93(d)(4) on a quarterly basis until final closure of the facility; and

(5) comply with the recordkeeping and reporting requirements in §335.117 of this title.

(e) The groundwater monitoring requirements of this subchapter may be waived with respect to any surface impoundment that:

(1) is used to neutralize wastes which are hazardous solely because they exhibit the corrosivity characteristic under 40 CFR §261.22 or are listed as hazardous wastes in 40 CFR Part 261, Subpart D, only for this reason; and

(2) contains no other hazardous wastes, if the owner or operator can demonstrate that there is no potential for migration of hazardous wastes from the impoundment. The demonstrations must establish, based upon consideration of the characteristics of the wastes and the impoundment, that the corrosive wastes will be neutralized to the extent that they no longer meet the corrosivity characteristic before they can migrate out of the impoundment. The demonstration must be in writing and must be certified by a qualified professional.

(f) For owners and operators who have not established background concentrations or values in accordance with 40 CFR §265.92(c) by November 19, 1982, the executive director may require the implementation of a groundwater assessment plan under 40 CFR §265.93, whenever he determines that existing data indicates that there is a substantial likelihood that hazardous waste or hazardous constituents from the facility have entered the uppermost aquifer.

(g) The commission may replace all or part of the requirements of this subchapter applying to a regulated unit with alternative requirements developed for groundwater monitoring set out in a permit or a post-closure order where the commission determines that:

(1) a regulated unit is situated among solid waste management units or area of concern, a release has occurred, and both the regulated unit and one or more solid waste management unit(s) or area of concern are likely to have contributed to the release; and

(2) it is not necessary to apply the requirement of this subchapter because the alternative requirements will be protective of human health and the environment. The alternative standards for the regulated unit must meet the requirements of §335.8 and §335.167 of this title (relating [~~related~~] to Closure and Remediation and Corrective Action for Solid Waste Management Units).

§335.118. Closure Plan; Submission and Approval of Plan.

(a) Except as provided in this section, the owner or operator must submit his closure plan to the executive director in accordance with the procedures outlined in 40 Code of Federal Regulations (CFR) §265.112. The owner or operator must submit his closure plan to the executive director no later than 15 days after:

(1) termination of interim status (except when a permit is issued to the facility simultaneously with termination of interim status); or

(2) issuance of a judicial decree or compliance order under the Resource Conservation and Recovery Act [~~RCRA~~] or Texas Health and Safety Code, Chapter 361, to cease receiving wastes or close.

(b) Except as provided in subsection (c) of this section, the executive director will provide the owner or operator and the public, through newspaper notice, the opportunity to submit written comments on the plan and request modifications of the plan within 30 days of the date of the notice. The owner or operator is responsible for the cost of publication. The executive director may, in response to a request or at his own discretion, hold a public hearing whenever such a hearing might clarify one or more issues concerning a closure plan. The executive director will give public notice of the hearing at least 30 days before it occurs. (Public notice of the hearing may be given at the same time as notice of the opportunity for the public to submit written comments, and the two notices may be combined.) The executive director will approve, modify, or disapprove the plan within 90 days of receipt. If the executive director does not approve the plan, he shall provide the owner or operator with a detailed written statement of reasons for the refusal and the owner or operator must modify the plan or submit a new plan within 30 days after receiving such written statement. The executive director will approve or modify this plan in writing within 60 days. If the executive director modifies the plan, this modified plan becomes the

approved closure plan. The executive director's decision must assure that the approved closure plan is consistent with 40 CFR §§265.111 - 265.115, and the applicable closure requirements contained in this chapter for specific waste management methods, and contained in 40 CFR §265.1102 [~~§264.1102~~]. A copy of this modified plan with a detailed statement of reasons for the modifications must be mailed to the owner or operator.

(c) Closure plans submitted in an application for a post-closure order in accordance with §305.50(b) of this title (relating to Additional Requirements for an Application for a Hazardous or Industrial Solid Waste Permit and for a Post-Closure Order) must comply with the public notice and comment requirements specified in Chapter 39, Subchapter N of this title (relating to [~~regarding~~] Public Notice of Post Closure Orders).

§335.125. Special Requirements for Bulk and Containerized Waste.

[~~(a) Bulk or non-containerized liquid waste or waste containing free liquids may be placed in a landfill prior to May 8, 1985, only if prior to disposal, the liquid waste or waste containing free liquids is processed or stabilized, chemically or physically (e.g., by mixing with a sorbent solid), so that free liquids are no longer present.~~]

(a) [~~(b)~~] Effective May 8, 1985, the placement of bulk or non-containerized liquid hazardous waste or hazardous waste containing free liquids (whether or not sorbents have been added) in any landfill is prohibited.

(b) [~~(c)~~] A container holding liquid waste or waste containing free liquids must not be placed in a landfill unless:

(1) the container is designed to hold liquids or free liquids for use other than storage, such as a capacitor or battery;

(2) the container is very small, such as an ampule; or

(3) the container is disposed of in accordance with 40 Code of Federal Regulations (CFR) §265.316.

(c) [~~(d)~~] To demonstrate the absence or presence of free liquids in either a containerized or a bulk waste, the following test must be used: Method 9095B [~~9095~~] (Paint Filter Liquids Test) as described in "Test Methods for Evaluating Solid Waste, Physical/Chemical Methods," EPA Publication SW-846, as incorporated by reference in 40 CFR §260.11 and in §335.31 of this title (relating to Incorporation of References).

(d) [~~(e)~~] The date for compliance with subsection (a) of this section is November 19, 1981. The date for compliance with subsection (b) [~~(c)~~] of this section is March 22, 1982.

(e) [~~(f)~~] The [~~Effective November 8, 1985, the~~] placement of any liquid which is not a hazardous waste in a landfill is prohibited unless the owner or operator of such landfill demonstrates to the executive director, or the executive director determines that:

(1) the only reasonably available alternative to the placement in such landfill is placement in a landfill or unlined surface impoundment, whether or not permitted or operating under interim status, which contains, or may reasonably be anticipated to contain, hazardous waste; and

(2) placement in such owner or operator's landfill will not present a risk of contamination of any underground source of drinking water (as that term is defined in §331.2 of this title (relating to Definitions)).

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

Filed with the Office of the Secretary of State on May 8, 2009.

TRD-200901745
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 239-6090

♦ ♦ ♦

SUBCHAPTER F. PERMITTING STANDARDS FOR OWNERS AND OPERATORS OF HAZARDOUS WASTE TREATMENT, STORAGE, OR DISPOSAL FACILITIES

30 TAC §§335.152, 335.163 - 335.166, 335.173, 335.175

STATUTORY AUTHORITY

The amendments are proposed under Texas Water Code (TWC), §5.103 (relating to Rules) and §5.105 (relating to General Policy), which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the TWC or other laws of this state; and under Texas Health and Safety Code, (THSC), §361.017 (relating to Commission's Jurisdiction: Industrial Solid Waste and Hazardous Municipal Waste) and §361.024 (relating to Rules and Standards), which authorize the commission to regulate industrial solid waste and hazardous waste and to adopt rules consistent with the general intent and purposes of the THSC.

The proposed amendments implement THSC, Chapter 361.

§335.152. Standards.

(a) The following regulations contained in 40 Code of Federal Regulations (CFR) Part 264 (including all appendices to Part 264) are adopted by reference as amended and adopted in the CFR through June 1, 1990 (55 FR 22685) and as further amended and adopted as indicated in each paragraph of this subsection:

(1) Subpart B--General Facility Standards (as amended through July 14, 2006 (71 FR 40254)) [~~December 8, 1997 (62 FR 64636))~~]; in addition, the facilities which are subject to 40 CFR Part 264, Subpart X, are subject to regulation under 40 CFR §264.15(b)(4) and §264.18(b)(1)(ii);

(2) Subpart C--Preparedness and Prevention;

(3) Subpart D--Contingency Plan and Emergency Procedures (as amended through April 4, 2006 (71 FR 16862)), except 40 CFR §264.56(d);

(4) Subpart E--Manifest System, Recordkeeping and Reporting (as amended through April 4, 2006 (71 FR 16862)) [~~June 16, 2005 (70 FR 35037))~~]; facilities which are subject to 40 CFR Part 264, Subpart X, are subject to 40 CFR §264.73(b)(6);

(5) Subpart G--Closure and Post-Closure (as amended through July 14, 2006 (71 FR 40254)) [~~October 22, 1998 (63 FR 56709))~~]; facilities which are subject to 40 CFR Part 264, Subpart X, are subject to 40 CFR §§264.90(d), 264.111(c), 264.112(a)(2), 264.114, 264.117(a)(1)(i) and (ii), and 264.118(b)(1) and (2)(i) and (ii);

(6) Subpart H--Financial Requirements (as amended through April 4, 2006 (71 FR 16862)) [~~June 10, 1994 (59 FR 29958))~~]; except 40 CFR §§264.140, 264.141, 264.142(a)(2), 264.142(b) and (c), 264.143(a) - (h), 264.144(b) and (c), 264.145(a) - (h), 264.146,

264.147(a) - (d), 264.147(f) - (k), and 264.148 - 264.151; and subject to the following limitations: facilities which are subject to 40 CFR Part 264, Subpart X, are subject to 40 CFR §§264.142(a), 264.144(a), and 37.6031(c) of this title (relating to Financial Assurance Requirements for Liability);

(7) Subpart I--Use and Management of Containers (as amended through July 14, 2006 (71 FR 40254)) [~~November 25, 1996 (61 FR 59932))~~];

(8) Subpart J--Tank Systems (as amended through July 14, 2006 (71 FR 40254)) [~~November 25, 1996 (61 FR 59932))~~];

(9) Subpart K--Surface Impoundments (as amended through August 1, 2005 (70 FR 44150)) [~~November 25, 1996 (61 FR 59932))~~], except 40 CFR §264.221 and §264.228:

(A) reference to 40 CFR §264.221 is changed to §335.168 of this title (relating to Design and Operating Requirements (Surface Impoundments));

(B) reference to 40 CFR §264.228 is changed to §335.169 of this title (relating to Closure and Post-Closure Care (Surface Impoundments));

(10) Subpart L--Waste Piles (as amended and adopted through July 14, 2006 (71 FR 40254)) [~~January 29, 1992 (57 FR 3462))~~], except 40 CFR §264.251;

(11) Subpart M--Land Treatment (as amended and adopted through July 14, 2006 (71 FR 40254)), except 40 CFR §264.273 and §264.280;

(12) Subpart N--Landfills (as amended through July 14, 2006 (71 FR 40254)) [~~November 18, 1992 (57 FR 54452))~~], except 40 CFR §§264.301, 264.310, 264.314, and 264.315;

(13) Subpart O--Incinerators (as amended through April 8, 2008 (73 FR 18970)) [~~July 3, 2001 (66 FR 35087))~~];

(14) Subpart S--Special Provisions for Cleanup (as amended through July 14, 2006 (71 FR 40254)) [~~January 22, 2002 (67 FR 2962))~~];

(15) Subpart W--Drip Pads (as amended through July 14, 2006 (71 FR 40254)) [~~December 24, 1992 (57 FR 61492))~~];

(16) Subpart X--Miscellaneous Units (as amended through July 14, 2006 (71 FR 40254)) [~~September 30, 1999 (64 FR 52828))~~];

(17) Subpart AA--Air Emission Standards for Process Vents (as amended through July 14, 2006 (71 FR 40254))) [~~January 21, 1999 (64 FR 3382))~~];

(18) Subpart BB--Air Emission Standards for Equipment Leaks (as amended through July 14, 2006 (71 FR 40254)) [~~December 8, 1997 (62 FR 64636))~~];

(19) Subpart CC--Air Emission Standards for Tanks, Surface Impoundments, and Containers (as amended through July 14, 2006 (71 FR 40254)) [~~January 21, 1999 (64 FR 3382))~~];

(20) Subpart DD--Containment Buildings (as amended through July 14, 2006 (71 FR 40254)) [~~August 18, 1992 (57 FR 37194))~~];

(21) Subpart EE--Hazardous Waste Munitions and Explosives Storage (as amended through August 1, 2005 (70 FR 44150)) [~~February 12, 1997 (62 FR 6622))~~]; and

(22) the following appendices contained in 40 CFR Part 264:

(A) Appendix I--Recordkeeping Instructions (as amended through March 24, 1994 (59 FR 13891));

(B) Appendix IV--Cochron's Approximation to the Behrens-Fisher Students' T-Test;

(C) Appendix V--Examples of Potentially Incompatible Waste;

(D) Appendix VI--Political Jurisdictions in Which Compliance With §264.18(a) Must Be Demonstrated; and

(E) Appendix IX--Ground-Water Monitoring List (as amended through June 13, 1997 (62 FR 32451)).

(b) The provisions of 40 CFR §264.18(b) are applicable to owners and operators of hazardous waste management facilities, for which a permit is being sought, which are not subject to the requirements of §§335.201 - 335.206 of this title (relating to Purpose, Scope, and Applicability; Definitions; Site Selection to Protect Groundwater or Surface Water; Unsuitable Site Characteristics; Prohibition of Permit Issuance; and Petitions for Rulemaking [~~Location Standards for Hazardous Waste Storage, Processing, or Disposal~~]). A copy of 40 CFR §264.18(b) is available for inspection at the library of the Texas Commission on Environmental Quality, located on the first floor of Building A at 12100 Park 35 Circle, Austin, Texas.

(c) The regulations of the United States Environmental Protection Agency (EPA) that are adopted by reference in this section are adopted subject to the following changes.

(1) The term "regional administrator" is changed to the "executive director" of the Texas Commission on Environmental Quality or to the commission, consistent with the organization of the commission as set out in Texas Water Code, Chapter 5, Subchapter B.

(2) The term "treatment" is changed to "processing."

(3) Reference to Resource Conservation and Recovery Act, §3008(h) is changed to Texas Water Code, §7.031(c) - (e) (relating to Corrective Action Relating to Hazardous Waste).

(4) Reference to:

(A) 40 CFR §260.10 is changed to §335.1 of this title (relating to Definitions);

(B) 40 CFR §264.1 is changed to §335.151 of this title (relating to Purpose, Scope, and Applicability);

(C) 40 CFR §264.280 is changed to §335.172 of this title (relating to Closure and Post-Closure Care (Land Treatment Units));

(D) 40 CFR §264.90 is changed to §335.156 of this title (relating to Applicability of Groundwater Monitoring and Response);

(E) 40 CFR §264.101 is changed to §335.167 of this title (relating to Corrective Action for Solid Waste Management Units);

(F) 40 CFR §264.310 is changed to §335.174 of this title (relating to Closure and Post-Closure Care (Landfills));

(G) 40 CFR §270.41 is changed to §305.62 of this title (relating to Amendments [~~Amendment~~]); and

(H) 40 CFR §270.42 is changed to §305.69 of this title (relating to Solid Waste Permit Modification at the Request of the Permittee).

(5) 40 CFR Parts 260 - 270 means the commission's rules including, but not limited to, Chapters 50, 305, and 335 of this title (relating to Action on Applications and Other Authorizations; Consolidated Permits; and Industrial Solid Waste and Municipal Hazardous Waste), as applicable.

(6) Reference to 40 CFR Part 264, Subpart D is changed to §335.152(a)(3) of this title (relating to Standards) and §335.153 of this title (relating to Reporting of Emergency Situations by Emergency Coordinator).

(7) Reference to 40 CFR §§264.71, 264.72, 264.76, and 264.77 is changed to §335.12 of this title (relating to Shipping Requirements Applicable to Owners or Operators of Treatment, Storage, or Disposal Facilities), §335.12(c)(1) and (2) of this title, §335.15(3) of this title (relating to Recordkeeping and Reporting Requirements Applicable to Owners or Operators of Treatment, Storage, or Disposal Facilities), and §335.155 of this title (relating to Additional Reports), respectively.

(8) Reference to 40 CFR Part 264, Subpart F is changed to §335.156 of this title, §335.157 of this title (relating to Required Programs), §335.158 of this title (relating to Groundwater Protection Standard), §335.159 of this title (relating to Hazardous Constituents), §335.160 of this title (relating to Concentration Limits), §335.161 of this title (relating to Point of Compliance), §335.162 of this title (relating to Compliance Period), §335.163 of this title (relating to General Groundwater Monitoring Requirements), §335.164 of this title (relating to Detection Monitoring Program), §335.165 of this title (relating to Compliance Monitoring Program), §335.166 of this title (relating to Corrective Action Program), and §335.167 of this title.

(9) Reference to 40 CFR Part 265, Subpart F is changed to include §335.116 of this title (relating to Applicability of Groundwater Monitoring Requirements) and §335.117 of this title (relating to Recordkeeping and Reporting), in addition to the reference to 40 CFR Part 265, Subpart F, except §265.90 and §265.94.

(10) Reference to the EPA is changed to the Texas Commission on Environmental Quality.

(11) Reference to qualified professional engineer is changed to Texas licensed professional engineer.

(d) A copy of 40 CFR Part 264 is available for inspection at the library of the Texas Commission on Environmental Quality, located on the first floor of Building A at 12100 Park 35 Circle, Austin, Texas.

§335.163. General Groundwater Monitoring Requirements.

If a facility contains more than one waste management area, separate groundwater monitoring systems must be installed. The owner or operator must comply with the following requirements for any groundwater monitoring program developed to satisfy §§335.164 - 335.166 of this title (relating to Detection Monitoring Program; Compliance Monitoring Program; and Corrective Action Program).

(1) The groundwater monitoring system must consist of a sufficient number of wells, installed at appropriate locations and depths to yield groundwater samples from the uppermost aquifer that:

(A) represent the quality of background groundwater [~~water~~] that has not been affected by leakage from a regulated unit:

(i) a determination of background groundwater quality may include sampling of wells that are not hydraulically upgradient of the waste management area where hydrogeologic conditions do not allow the owner or operator to determine what wells are hydraulically upgradient; and

(ii) sampling at other wells will provide an indication of background groundwater quality that is representative or more representative than that provided by the upgradient wells;

(B) represent the quality of groundwater passing the point of compliance; and

(C) allow for detection of contamination when hazardous waste or hazardous constituents have migrated from the waste management area to the uppermost aquifer.

(2) If a waste management area contains more than one regulated unit, separate groundwater monitoring systems are not required for each regulated unit, provided that provisions for sampling the groundwater in the uppermost aquifer will enable detection and measurement at the compliance point of hazardous constituents from the regulated units that have entered the groundwater in the uppermost aquifer.

(3) All monitoring wells must be cased in a manner that maintains the integrity of the monitoring-well bore hole. This casing must be screened or perforated and packed with gravel or sand, where necessary, to enable collection of groundwater samples. The annular space (i.e., the space between the bore hole and well casing) above the sampling depth must be sealed to prevent contamination of samples and the groundwater.

(4) The groundwater monitoring program must include consistent sampling and analysis procedures that are designed to ensure monitoring results that provide a reliable indication of groundwater quality below the waste management area. At a minimum, the program must include procedures and techniques for:

(A) sample collection;

(B) sample preservation and shipment;

(C) analytical procedures; and

(D) chain of custody control.

(5) The groundwater monitoring program must include sampling and analytical methods that are appropriate for groundwater sampling and that accurately measure hazardous constituents in groundwater samples.

(6) The groundwater monitoring program must include a determination of the groundwater surface elevation each time groundwater is sampled.

(7) In detection monitoring or where appropriate in compliance monitoring, data on each hazardous constituent specified in the permit will be collected from background wells and wells at the compliance point(s). The number and kinds of samples collected to establish background shall be appropriate for the form of statistical test employed and shall follow generally accepted statistical principles. The sample size shall be as large as necessary to ensure with reasonable confidence that a contaminant released to groundwater from a facility will be detected. The owner or operator will determine an appropriate sampling procedure and interval for each hazardous constituent listed in the facility permit. This sampling procedure shall be:

(A) a sequence of at least four samples, taken at an interval that assures, to the greatest extent technically feasible, that an independent sample is obtained, by reference to the uppermost aquifer's effective porosity, hydraulic conductivity, and hydraulic gradient, and the fate and transport characteristics of the potential contaminants; or

(B) an alternate sampling procedure proposed by the owner or operator of the facility and approved by the commission.

(8) The owner or operator will specify one of the following statistical methods to be used in evaluating groundwater monitoring data for each hazardous constituent which, upon approval by the commission, will be specified in the facility's permit on a unit by unit basis. The statistical test chosen shall be conducted separately for each hazardous constituent in each well. Where practical quantification limits (PQLs) are used in any of the following statistical procedures to comply

with paragraph (9)(E) of this section, the PQL must be proposed by the owner or operator and approved by the executive director. Use of any of the following statistical methods must be protective of human health and the environment and must comply with the performance standards outlined in paragraph (9) of this section:

(A) a parametric analysis of variance (ANOVA) followed by multiple comparisons procedures to identify statistically significant evidence of contamination. The method must include estimation and testing of the contrasts between each compliance well's mean and the background mean levels for each constituent;

(B) an [~~analysis of variance (~~]ANOVA[~~)~~] based on ranks followed by multiple comparisons procedures to identify statistically significant evidence of contamination. The method must include estimation and testing of the contrasts between each compliance well's median and the background median levels for each constituent;

(C) a tolerance or prediction interval procedure in which an interval for each constituent is established from the distribution of the background data, and the level of each constituent in each compliance well is compared to the upper tolerance or prediction limit;

(D) a control chart approach that gives control limits for each constituent;

(E) another statistical test method submitted by the owner or operator and approved by the executive director.

(9) Any statistical method chosen under paragraph (8) of this section for specification in the unit permit shall comply with the following performance standards, as appropriate.

(A) The statistical method used to evaluate groundwater monitoring data shall be appropriate for the distribution of chemical parameters or hazardous constituents. If the distribution of the chemical parameters or hazardous constituents is shown by the owner or operator to be inappropriate for a normal theory test, then the data should be transformed or a distribution-free theory test should be used. If the distributions for the constituents differ, more than one statistical method may be needed.

(B) If an individual well comparison procedure is used to compare an individual compliance well constituent concentration with background constituent concentrations or a groundwater protection standard, the test shall be done at a Type I error level no less than 0.01 for each testing period. If a multiple comparisons procedure is used, the Type I experiment wise error rate for each testing period shall be no less than 0.05; however, the Type I error of no less than 0.01 for individual well comparisons must be maintained. This performance standard does not apply to tolerance intervals, prediction intervals, or control charts.

(C) If a control chart approach is used to evaluate groundwater monitoring data, the specific type of control chart and its associated parameter values shall be proposed by the owner or operator and approved by the commission if it finds it to be protective of human health and the environment.

(D) If a tolerance interval or a prediction interval is used to evaluate groundwater monitoring data, the levels of confidence and, for tolerance intervals, the percentage of the population that the interval must contain, shall be proposed by the owner or operator and approved by the commission if it finds these parameters to be protective of human health and the environment. These parameters will be determined after considering the number of samples in the background data base, the data distribution, and the range of the concentration values for each constituent of concern.

(E) The statistical method shall account for data below the limit of detection with one or more statistical procedures that are protective of human health and the environment. Any PQL approved by the executive director under paragraph (8) of this section that is used in the statistical method shall be the lowest concentration level that can be reliably achieved within specified limits of precision and accuracy during routine laboratory operating conditions that are available to the facility.

(F) If necessary, the statistical method shall include procedures to control or correct for seasonal and spatial variability as well as temporal correlation in the data.

(10) Groundwater monitoring data collected in accordance with paragraph (7) of this section including actual levels of constituents must be maintained in the facility operating record. The commission will specify in the permit when the data must be submitted for review.

§335.164. Detection Monitoring Program.

An owner or operator required to establish a detection monitoring program must, at a minimum, discharge the following responsibilities:

(1) The owner or operator must monitor for indicator parameters (e.g., specific conductance, total organic carbon, or total organic halogen), waste constituents, or reaction products that provide a reliable indication of the presence of hazardous constituents in groundwater. The commission will specify the parameters or constituents to be monitored in the facility permit, after considering the following factors:

(A) the types, quantities, and concentrations of constituents in wastes managed at the regulated unit;

(B) the mobility, stability, and persistence of waste constituents or their reaction products in the unsaturated zone beneath the waste management area;

(C) the detectability of indicator parameters, waste constituents, and reaction products in groundwater; and

(D) the concentrations or values and coefficients of variation of proposed monitoring parameters or constituents in the groundwater background.

(2) The owner or operator must install a groundwater monitoring system at the compliance point as specified under §335.161 of this title (relating to Point of Compliance). The groundwater monitoring system must comply with §335.163(1)(B), (2), and (3) of this title (relating to General Groundwater Monitoring Requirements).

(3) The owner or operator must conduct a groundwater monitoring program for each chemical parameter and hazardous constituent specified in its permit pursuant to paragraph (1) of this section in accordance with §335.163(7) of this title. The owner or operator must maintain a record of groundwater analytical data as measured and in a form necessary for the determination of statistical significance under §335.163(8) of this title.

(A) The owner or operator must comply with §335.163(7) of this title in developing the data base used to determine background values.

(B) The owner or operator must express background values in a form necessary for the determination of statistically significant increases under §335.163(8) of this title.

(C) In taking samples used in the determination of background values, the owner or operator must use a groundwater monitoring system that complies with §335.163(1)(A), (2), and (3) of this title.

(4) The commission will specify the frequencies for collecting samples and conducting statistical tests to determine whether there is statistically significant evidence of contamination for any parameter or hazardous constituent specified in the permit under paragraph (1) of this section in accordance with §335.163(7) of this title. [~~A sequence of at least four samples from each well (background and compliance wells) must be collected at least semiannually during detection monitoring.~~]

(5) The owner or operator must determine the groundwater flow rate and direction in the uppermost aquifer at least annually.

(6) The owner or operator must determine whether there is statistically significant evidence of contamination for any chemical parameter or hazardous constituent specified in the permit pursuant to paragraph (1) of this section at a frequency specified under paragraph (4) of this section.

(A) In determining whether statistically significant evidence of contamination exists, the owner or operator must use the method(s) specified in the permit under §335.163(8) of this title. These method(s) must compare data collected at the compliance point(s) to the background groundwater quality data.

(B) The owner or operator must determine whether there is statistically significant evidence of contamination at each monitoring well at the compliance point within a reasonable period of time after completion of sampling. The commission will specify in the facility permit what period of time is reasonable, after considering the complexity of the statistical test and the availability of laboratory facilities to perform the analysis of groundwater samples.

(7) If the owner or operator determines pursuant to paragraph (6) of this section that there is statistically significant evidence of contamination for chemical parameters or hazardous constituents specified pursuant to paragraph (1) of this section at any monitoring well at the compliance point, he must:

(A) notify the executive director of this finding in writing within seven days. The notification must indicate what chemical parameters or hazardous constituents have shown statistically significant evidence of contamination;

(B) immediately sample the groundwater in all monitoring wells that exhibit statistically significant evidence of contamination and determine whether constituents in the list of Appendix IX of 40 Code of Federal Regulations Part 264 are present, and if so, in what concentration. However, the executive director, on a discretionary basis, may allow sampling for a site-specific subset of constituents from the Appendix IX list and other representative/related waste constituents;

(C) For any Appendix IX compounds found in the analysis pursuant to subparagraph (B) of this paragraph, the owner or operator may resample within one month or an alternative site-specific schedule approved by the executive director and repeat the analysis for those compounds detected. If the results of the second analysis confirm the initial results, then these constituents will form the basis for compliance monitoring. If the owner or operator does not resample for the compounds found in [~~pursuant to~~] subparagraph (B) of this paragraph, the hazardous constituents found during this initial Appendix IX analysis will form the basis for compliance monitoring.

(D) within 90 days, submit to the executive director an application for a permit amendment or modification to establish a compliance monitoring program meeting the requirements of §335.165 of this title (relating to Compliance Monitoring Program). The application must include the following information:

(i) an identification of the concentration of any Appendix IX constituent detected in the groundwater at each monitoring well that exhibits statistically significant evidence of contamination at the compliance point;

(ii) any proposed changes to the groundwater monitoring system at the facility necessary to meet the requirements of §335.165 of this title;

(iii) any proposed additions or changes to the monitoring frequency, sampling and analysis procedures or methods, or statistical methods used at the facility necessary to meet the requirements of §335.165 of this title; and

(iv) for each hazardous constituent detected at the compliance point, a proposed concentration limit under §335.160(a)(1) or (2) of this title (relating to Concentration Limits), or a notice of intent to seek an alternate concentration limit under §335.160(b) of this title;

(E) within 180 days, submit to the executive director:

(i) all data necessary to justify an alternate concentration limit sought under §335.160(b) of this title [~~(relating to Concentration Limits)~~];

(ii) an engineering feasibility plan for a corrective action program necessary to meet the requirements of §335.166 of this title (relating to Corrective Action Program), unless:

(I) all hazardous constituents identified under subparagraph (B) [~~(b)~~] of this paragraph are listed in Table 1 of §335.160 of this title [~~(relating to Concentration Limits)~~] and their concentrations do not exceed the respective values given in that table; or

(II) the owner or operator has sought an alternate concentration limit under §335.160(b) of this title [~~(relating to Concentration Limits)~~] for every hazardous constituent identified under subparagraph (B) of this paragraph.

(F) if the owner or operator determines, pursuant to paragraph (6) of this section, that there is a statistically significant difference for chemical parameters or hazardous constituents specified pursuant to paragraph (1) of this section at any monitoring well at the compliance point, he or she may demonstrate that a source other than a regulated unit caused the contamination or that the detection is an artifact caused by an error in sampling, analysis, or statistical evaluation or natural variation in the groundwater. The owner operator may make a demonstration under this paragraph in addition to, or in lieu of, submitting a permit amendment or modification application under subparagraph (D) of this paragraph; however, the owner or operator is not relieved of the requirement to submit a permit amendment or modification application within the time specified in subparagraph (D) of this paragraph unless the demonstration made under this paragraph successfully shows that a source other than a regulated unit caused the increase, or that the increase resulted from error in sampling, analysis, or evaluation. In making a demonstration under this paragraph, the owner or operator must:

(i) notify the executive director in writing within seven days of determining statistically significant evidence of contamination at the compliance point that he intends to make a demonstration under this paragraph;

(ii) within 90 days, submit a report to the executive director which demonstrates that a source other than a regulated unit caused the contamination or that the contamination resulted from error in sampling, analysis, or evaluation;

(iii) within 90 days, submit to the executive director an application for a permit amendment or modification to make any appropriate changes to the detection monitoring program at the facility; and

(iv) continue to monitor in accordance with the detection monitoring program established under this section.

(8) If the owner or operator determines that the detection monitoring program no longer satisfies the requirements of this section, he must, within 90 days, submit an application for a permit amendment or modification to make any appropriate changes to the program.

§335.165. Compliance Monitoring Program.

An owner or operator required to establish a compliance monitoring program must, at a minimum, discharge the following responsibilities.

(1) The owner or operator must monitor the groundwater to determine whether regulated units are in compliance with the groundwater protection standard under §335.158 of this title (relating to Groundwater Protection Standard). The commission will specify the groundwater protection standard in the compliance plan, including:

(A) a list of the hazardous constituents identified under §335.159 of this title (relating to Hazardous Constituents);

(B) concentration limits under §335.160 of this title (relating to Concentration Limits) for each of those hazardous constituents;

(C) the compliance point under §335.161 of this title (relating to Point of Compliance); and

(D) the compliance period under §335.162 of this title (relating to Compliance Period).

(2) The owner or operator must install a groundwater monitoring system at the compliance point as specified under §335.161 of this title. The groundwater monitoring system must comply with §335.163(1)(B), (2), and (3) of this title (relating to General Groundwater Monitoring Requirements).

(3) The commission will specify the sampling procedures and statistical methods appropriate for the constituents at the facility, consistent with §335.163(7) and (8) of this title.

(A) The owner or operator must conduct a sampling program for each chemical parameter or hazardous constituent in accordance with §335.163(7) of this title.

(B) The owner or operator must record groundwater analytical data as measured by and in a form necessary for the determination of statistical significance under §335.163(8) of this title for the compliance period of the facility.

(4) The owner or operator must determine whether there is statistically significant evidence of increased contamination for any chemical parameter or hazardous constituent specified in the permit, pursuant to paragraph (1) of this section, at a frequency specified under paragraph (6) under this section.

(A) In determining whether statistically significant evidence of increased contamination exists, the owner or operator must use the method(s) specified in the permit under §335.163(8) of this title. The method(s) must compare data collected at the compliance point(s) to a concentration limit developed in accordance with §335.163 of this title.

(B) The owner or operator must determine whether there is statistically significant evidence of increased contamination at each monitoring well at the compliance point within a reasonable time period after completion of sampling. The commission will specify that time period in the facility permit after considering the complexity of the statistical test and the availability of laboratory facilities to perform the analysis of groundwater samples.

(5) The owner or operator must determine the groundwater flow rate and direction in the uppermost aquifer at least annually.

(6) The commission will specify the frequencies for collecting samples and conducting statistical tests to determine statistically significant evidence of increased contamination in accordance with §335.163(7) of this title. [~~A sequence of at least four samples from each well (background and compliance wells) must be collected at least semiannually during the compliance period of the facility.~~]

(7) Annually, the owner or operator must determine whether additional hazardous constituents from Appendix IX of 40 Code of Federal Regulations Part 264, which could possibly be present but are not on the detection monitoring list in the permit, are actually present in the uppermost aquifer and, if so, at what concentration, pursuant to procedures in paragraph (6) of this section. To accomplish this, the owner or operator must consult with the executive director to determine on a case-by-case basis: [~~The owner or operator must analyze samples from all monitoring wells at the compliance point for all constituents contained in Appendix IX of 40 Code of Federal Regulations Part 264 reasonably expected to be in or derived from waste managed at the site at least annually to determine whether additional hazardous constituents are present in the uppermost aquifer and, if so, at what concentration, pursuant to procedures in §335.164(6) of this title (relating to Detection Monitoring Program). If the owner or operator finds Appendix IX constituents in the groundwater that are not already identified in the permit as monitoring constituents, the owner or operator may resample within one month and repeat the Appendix IX analysis. If the second analysis confirms the presence of new constituents, the owner or operator must report the concentration of these additional constituents to the executive director within seven days after the completion of the second analysis and add them to the monitoring list. If the owner or operator chooses not to resample, then he must report the concentrations of these additional constituents to the executive director within seven days after completion of the initial analysis and add them to the monitoring list.~~]

(A) Which sample collection event during the year will involve enhanced sampling;

(B) The number of monitoring wells at the compliance point to undergo enhanced sampling;

(C) The number of samples to be collected from each of these monitoring wells; and

(D) The specific constituents from Appendix IX of 40 Code of Federal Regulations Part 264 for which these samples must be analyzed.

(8) If the enhanced sampling event indicates that Appendix IX of 40 Code of Federal Regulations Part 264 constituents are present in the groundwater that are not already identified in the permit as monitoring constituents, the owner or operator may resample within one month or at an alternative site-specific schedule approved by the executive director, and repeat the analysis.

(9) If the second analysis confirms the presence of new constituents, the owner or operator must report the concentration of these additional constituents to the executive director within seven days after the completion of the second analysis and add them to the monitoring list.

(10) If the owner or operator chooses not to resample, then the concentrations of these additional constituents must be reported to

the executive director within seven days after completion of the initial analysis, and must be added to the monitoring list.

(11) [~~(8)~~] If the owner or operator determines, pursuant to paragraph (4) of this section, that any concentration limits under §335.160 of this title are being exceeded at any monitoring well at the point of compliance, he must:

(A) notify the executive director of this finding in writing within seven days. The notification must indicate what concentration limits have been exceeded;

(B) submit to the executive director an investigation report to establish a corrective action program meeting the requirements of §335.166 of this title (relating to Corrective Action Program) within 180 days, or within 90 days if an engineering feasibility study has been previously submitted to the executive director under §335.164(7)(E) of this title. The report must at a minimum include the following information:

(i) a detailed description of corrective actions that will achieve compliance with the groundwater protection standard specified in the permit under paragraph (1) of this section; and

(ii) a plan for a groundwater monitoring program that will demonstrate the effectiveness of the corrective action. Such a groundwater monitoring program may be based on a compliance monitoring program developed to meet the requirements of this section.

(12) [~~(9)~~] If the owner or operator determines, pursuant to paragraph (4) of this section, that the groundwater concentration limits are being exceeded at any monitoring well at the point of compliance, he may demonstrate that a source other than a regulated unit caused the contamination or that the detection is an artifact caused by error in sampling, analysis, or evaluation or natural variation in groundwater. In making a demonstration under this subsection, the owner or operator must:

(A) notify the executive director in writing within seven days that he intends to make a demonstration under this section;

(B) within 90 days submit a report to the executive director which demonstrates that a source other than a regulated unit caused the standard to be exceeded or that the apparent noncompliance with the standards resulted from error in sampling, analysis, or evaluation;

(C) within 90 days submit to the executive director an application for a compliance plan amendment or compliance modification to make any appropriate change to the compliance monitoring program at the facility; and

(D) continue to monitor in accord with the compliance monitoring program established under this section.

(13) [~~(10)~~] If the owner or operator determines that the compliance monitoring program no longer satisfies the requirements of this section, he must, within 90 days, submit an application for a plan modification to make any appropriate changes to the program.

(14) [~~(11)~~] The owner or operator shall prepare an annual summary to include the groundwater quality data and groundwater flow rate and direction required under paragraphs (3) and (5) of this section. Such annual summary shall be submitted to the executive director by January 21 of each year on forms provided or approved by the executive director. An owner or operator must keep a copy of the summary for a period of at least three years from the due date of the summary. The period of record retention required by this section is automatically extended during the course of any unresolved enforcement action regarding the regulated activity.

§335.166. Corrective Action Program.

An owner or operator required to establish a corrective action program must, at a minimum, discharge the following responsibilities.

(1) The owner or operator must take corrective action to ensure that regulated units are in compliance with the groundwater protection standard under §335.158 of this title (relating to Groundwater Protection Standard). The commission will specify the groundwater protection standard in the compliance plan, including:

(A) a list of the hazardous constituents identified under §335.159 of this title (relating to Hazardous Constituents);

(B) concentration limits under §335.160 of this title (relating to Concentration Limits) for each of those hazardous constituents;

(C) the compliance point under §335.161 of this title (relating to Point of Compliance); and

(D) the compliance period under §335.162 of this title (relating to Compliance Period).

(2) The owner or operator must implement a corrective action program that prevents hazardous constituents from exceeding their respective concentration limits at the compliance point by removing the hazardous waste constituents or treating them in place. The plan will specify the specific measures that will be taken.

(3) The owner or operator must begin corrective action within a reasonable time period after the groundwater protection standard is exceeded. The commission will specify that time period in the plan. If a compliance plan includes a corrective action program in addition to a compliance monitoring program, the plan will specify when the corrective action will begin and such a requirement will operate in lieu of §335.165(12)[~~(9)~~](B) of this title (relating to Compliance Monitoring Program).

(4) In conjunction with a corrective action program, the owner or operator must establish and implement a groundwater monitoring program to demonstrate the effectiveness of the corrective action program. Such a monitoring program may be based on the requirements for a compliance monitoring program under §335.165 of this title [~~(relating to Compliance Monitoring Program)~~] and must be as effective as that program in determining compliance with the groundwater protection standard under paragraph (5) of this section, where appropriate.

(5) In addition to the other requirements of this section, the owner or operator must conduct a corrective action program to remove or treat in place any hazardous constituents under §335.159 of this title [~~(relating to Hazardous Constituents)~~] that exceed concentration limits under §335.160 of this title [~~(relating to Concentration Limits)~~] in groundwater between the compliance point under §335.161 of this title [~~(relating to Point of Compliance)~~] and the downgradient facility property boundary and beyond the facility boundary, where necessary to protect human health and the environment, unless the owner or operator demonstrates to the satisfaction of the executive director that, despite the owner's or operator's best efforts, the owner or operator was unable to obtain the necessary permission to undertake such action. The owner/operator is not relieved of all responsibility to clean up a release that has migrated beyond the facility boundary where off-site access is denied. On-site measures to address such releases will be determined on a case-by-case basis. The plan will specify the measures to be taken.

(A) Corrective action measures under this section must be initiated and completed within a reasonable period of time considering the extent of contamination.

(B) Corrective action measures under this section may be terminated once the concentration of hazardous constituents under §335.159 of this title [~~(relating to Hazardous Constituents)~~] is reduced to levels below their respective concentration under §335.160 of this title [~~(relating to Concentration Limits)~~].

(6) The owner or operator must continue corrective action measures during the compliance period to the extent necessary to ensure that the groundwater protection standard is not exceeded. If the owner or operator is conducting corrective action at the end of the compliance period, he must continue that corrective action for as long as necessary to achieve compliance with the groundwater protection standard. The owner or operator may terminate corrective action measures taken beyond the period equal to the active life of the waste management area (including the closure period) if he can demonstrate, based on data from the groundwater monitoring program under paragraph (4) of this section, that the groundwater protection standard of §335.158 of this title [~~(relating to Groundwater Protection Standard)~~] has not been exceeded for a period of three consecutive years.

(7) The owner or operator must report in writing to the executive director on the effectiveness of the corrective action program. The owner or operator must submit these reports annually [~~semiannually~~].

(8) If the owner or operator determines that the corrective action program no longer satisfies the requirements of this section, he must, within 90 days, submit an application for a plan modification to make any appropriate changes to the program.

§335.173. Design and Operating Requirements (Landfills).

(a) Any landfill that is not covered by subsection (c) of this section or 40 Code of Federal Regulations (CFR) §265.301(a) must have a liner system for all portions of the landfill (except for existing portions of such landfill). The liner system must have:

(1) a liner that is designed, constructed, and installed to prevent any migration of wastes out of the landfill to the adjacent subsurface soil or groundwater or surface water at any time during the active life (including the closure period) of the landfill. The liner must be constructed of materials that prevent wastes from passing into the liner during the active life of the facility. The liner must be:

(A) constructed of materials that have appropriate chemical properties and sufficient strength and thickness to prevent failure due to pressure gradients (including static head and external hydrogeologic forces), physical contact with the waste or leachate to which they are exposed, climatic conditions, the stress of installation, and the stress of daily operation;

(B) placed upon a foundation or base capable of providing support to the liner and resistance to pressure gradients above and below the liner to prevent failure of the liner due to settlement, compression, or uplift; and

(C) installed to cover all surrounding earth likely to be in contact with the waste or leachate; and

(2) a liner that:

(A) prevents any migration of wastes out of the landfill to the adjacent subsurface soil or groundwater or surface water at any time prior to the end of the post-closure care period; and

(B) minimizes the rate of migration of wastes out of the landfill to the adjacent subsurface soil or groundwater or surface water so as not to pose a substantial present or potential hazard to human health and the environment; and

(3) a leachate collection and removal system immediately above the top liner that is designed, constructed, maintained, and operated to collect and remove leachate from the landfill. The commission will specify design and operating conditions in the permit to ensure that the leachate depth over the liner does not exceed 30 centimeters (one foot). The leachate collection and removal system must be:

(A) constructed of materials that are:

(i) chemically resistant to the waste managed in the landfill and the leachate expected to be generated; and

(ii) of sufficient strength and thickness to prevent collapse under the pressures exerted by overlying wastes, waste cover materials, and by any equipment used at the landfill; and

(B) designed and operated to function without clogging through the scheduled closure of the landfill.

(b) The owner or operator will be exempted from the requirements of subsection (a) of this section if the commission finds, based on a demonstration by the owner or operator, that alternative design and operating practices, together with location characteristics, will prevent the migration of any hazardous constituents (see §335.159 of this title (relating to Hazardous Constituents)) into the groundwater or surface water at any future time. In deciding whether to grant an exemption, the commission will consider:

(1) the nature and quantity of the wastes;

(2) the proposed alternate design and operation;

(3) the hydrogeologic setting of the facility, including the attenuative capacity and thickness of the liners and soils present between the landfill and groundwater or surface water; and

(4) all other factors which would influence the quality and mobility of the leachate produced and the potential for it to migrate to groundwater or surface water.

(c) The owner or operator of each new landfill unit on which construction commences after January 29, 1992, each lateral expansion of a landfill unit on which construction commences after July 29, 1992, and each replacement of an existing landfill unit that is to commence reuse after July 29, 1992, must comply with 40 CFR §264.301(c) as amended through January 29, 1992, at 57 FedReg 3489.

(d) The executive director may approve alternative design or operating practices to those specified in subsection (c) of this section if the owner or operator demonstrates to the executive director that such design and operating practices, together with location characteristics:

(1) will prevent the migration of any hazardous constituent into the groundwater or surface water at least as effectively as the liners and leachate collection and removal systems specified in subsection (c) of this section; and

(2) will allow detection of leaks of hazardous constituents through the top liner at least as effectively.

(e) The double liner requirement set forth in subsection (c) of this section may be waived by the commission for any monofill which contains only hazardous wastes from foundry furnace emission controls or metal casting molding sand, and such wastes do not contain constituents which would render the wastes hazardous for reasons other than the toxicity characteristics in 40 CFR [~~Code of Federal Regulations~~] §261.24, and is in compliance with either paragraph (1) or (2) of this subsection.

(1) The monofill:

(A) has at least one liner for which there is no evidence that such liner is leaking;

(B) is located more than 1/4 mile from an "underground source of drinking water" (as that term is defined in §331.2 of this title (relating to Definitions)); and

(C) is in compliance with groundwater monitoring requirements of this subchapter.

(2) The owner or operator demonstrates that the monofill is located, designed, and operated so as to assure that there will be no migration of any hazardous constituent into groundwater or surface water at any future time.

(f) The owner or operator of any replacement landfill unit is exempt from subsection (c) of this section if:

(1) The existing unit was constructed in compliance with the design standards of §3004(o)(1)(A)(i) and (o)(5) of the Resource Conservation and Recovery Act; and

(2) There is no reason to believe that the liner is not functioning as designed.

(g) The owner or operator must design, construct, operate, and maintain a run-on control system capable of preventing flow onto the active portion of the landfill during peak discharge from at least a 100-year storm.

(h) The owner or operator must design, construct, operate, and maintain a run-off management system to collect and control at least the water volume from active portions resulting from a 24-hour, 100-year storm.

(i) Collection and holding facilities (e.g., tanks or basins) associated with run-on and run-off control systems must be emptied or otherwise managed expeditiously after storms to maintain design capacity of the system.

(j) If the landfill contains any particulate matter which may be subject to wind dispersal, the owner or operator must cover or otherwise manage the landfill to control wind dispersal.

(k) The commission will specify in the permit all design and operating practices that are necessary to ensure that the requirements of this section are satisfied.

§335.175. Special Requirements for Bulk and Containerized Waste.

[~~(a) Bulk or non-containerized liquid waste or waste containing free liquids may be placed in a landfill prior to May 8, 1985, only if before disposal, the liquid waste or waste containing free liquids is treated or stabilized, chemically or physically (e.g., by mixing with a sorbent solid), so that free liquids are no longer present.~~]

(a) [~~(b)~~] The [~~Effective May 8, 1985, the~~] placement of bulk or non-containerized liquid hazardous waste or hazardous waste containing free liquids (whether or not sorbents have been added) in any landfill is prohibited.

(b) [~~(c)~~] To demonstrate the absence or presence of free liquids in either a containerized or bulk waste, the following test must be used: Method 9095B [~~Method 9095~~] (Paint Filter Liquids Test) as described in "Test Methods for Evaluating Solid Waste, Physical/Chemical Methods," EPA Publication SW-846, as incorporated by reference in 40 Code of Federal Regulations (CFR) §260.11 and in §335.31 [~~§335.30~~] of this title (relating to Incorporation of References).

(c) [~~(d)~~] The [~~Effective November 8, 1985, the~~] placement of any liquid which is not a hazardous waste in a landfill is prohibited, unless the owner or operator of such landfill demonstrates to the commission, or the commission determines[~~,~~] that:

(1) the only reasonably available alternative to the placement in such landfill is placement in a landfill or unlined surface impoundment, whether or not permitted or operating under interim status, which contains or may reasonably be anticipated to contain hazardous waste; and

(2) placement in such owner or operator's landfill will not present a risk of contamination of any "underground source of drinking water" (as that term is defined in §331.2 of this title (relating to Definitions)).

(d) [~~(e)~~] Containers holding liquid waste or waste containing free liquids must not be placed in a landfill unless:

(1) the container is very small, such as an ampule; or

(2) the container is designed to hold free liquids for use other than storage, such as a battery or capacitor; or

(3) the container is a lab pack as defined in 40 CFR §264.316 and is disposed of in accordance with 40 CFR §264.316.

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 8, 2009.

TRD-200901746
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 239-6090

SUBCHAPTER H. STANDARDS FOR THE MANAGEMENT OF SPECIFIC WASTES AND SPECIFIC TYPES OF FACILITIES
DIVISION 2. HAZARDOUS WASTE BURNED FOR ENERGY RECOVERY

30 TAC §335.221, §335.224

STATUTORY AUTHORITY

The amendments are proposed under Texas Water Code (TWC), §5.103 (relating to Rules) and §5.105 (relating to General Policy), which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the TWC or other laws of this state; and under Texas Health and Safety Code, (THSC), §361.017 (relating to Commission's Jurisdiction: Industrial Solid Waste and Hazardous Municipal Waste) and §361.024 (relating to Rules and Standards), which authorize the commission to regulate industrial solid waste and hazardous waste and to adopt rules consistent with the general intent and purposes of the THSC.

The proposed amendments implement THSC, Chapter 361.

§335.221. Applicability and Standards.

(a) The following regulations contained in 40 Code of Federal Regulations (CFR) Part 266 (including all appendices to Part 266) are adopted by reference, as amended and adopted in the CFR through April 8, 2008 (73 FR 18970) [~~February 14, 2002 (67 FR 6968)~~], except as noted in this section:

(1) §266.100--Applicability (as amended through July 14, 2006 (71 FR 40254)), except §266.100(c); and reference to "the applicable requirements of subparts A through H, BB, and CC of parts 264 and 265 of this chapter" is changed to "the applicable requirements of §§335.111 of this title (relating to Purpose, Scope, and Applicability), 335.112(a)(1) - (7), (20), and (21) of this title (relating to Standards), 335.151 of this title (relating to Purpose, Scope, and Applicability), and 335.152(a)(1) - (6), (18), and (19) of this title (relating to Standards)";

(2) §266.102(a)--Permit Standards for Burners - Applicability, excepting those portions of §266.102(a) containing references to §§264.56(d), 264.71 - 264.72, 264.75 - 264.77, 264.90, 264.101, and 264.142(a)(2);

(3) §266.102(b)--Permit Standards for Burners - Hazardous Waste Analysis;

(4) §266.102(c)--Permit Standards for Burners - Emission Standards;

(5) §266.102(d)--Permit Standards for Burners - Permits;

(6) §266.102(e)--Permit Standards for Burners - Operating Requirements (as amended through July 14, 2006 (71 FR 40254));

(7) §266.103(a)(1) - (3)--Interim Status Standards for Burners - Purpose, Scope, and Applicability--General; Exemptions; and Prohibition on Burning Dioxin-Listed Wastes, respectively, except §266.103(a)(1)(iii) and §266.103(a)(2);

(8) §266.103(a)(4)--Interim Status Standards for Burners--Purpose, Scope, and Applicability--Applicability of Part 265 Standards (as amended through (July 14, 2006 (71 FR 40254))), excepting those portions of §266.103(a)(4) containing references to §§265.56(d), 265.71 - 265.72, 265.75 - 265.77, 265.142(a)(2); facilities qualifying for a corporate guarantee for liability are subject to §265.147(g)(2) and §264.151(h)(2), as amended;

(9) §266.103(a)(5) - (6)--Interim Status Standards for Burners - Purpose, Scope, and Applicability: Special Requirements for Furnaces; and Restrictions on Burning Hazardous Waste That Is Not a Fuel;

(10) §266.103(b)--Interim Status Standards for Burners - Certification of Precompliance (as amended through (July 14, 2006 (71 FR 40254))), except §266.103(b)(1) and (6);

(11) §266.103(c)--Interim Status Standards for Burners - Certification of Compliance (as amended through (July 14, 2006 (71 FR 40254))), except §266.103(c)(3)(i);

(12) §266.103(f)--Interim Status Standards for Burners - Start-Up and Shut-Down;

(13) §266.103(g)(1) - (2)--Interim Status Standards for Burners - Automatic Waste Feed Cutoff (as amended through (July 14, 2006 (71 FR 40254)));

(14) §266.103(h) - (l)--Interim Status Standards for Burners: Fugitive Emissions; Changes; Monitoring and Inspections; Recordkeeping; and Closure, respectively, as amended through April 4, 2006 (71 FR 16862); [~~.~~]

(15) §266.104--Standards to Control Organic Emissions, except §266.104(h);

(16) §266.105--Standards to Control Particulate Matter, except §266.105(d);

(17) §266.106--Standards to Control Metals Emissions (as amended through (July 14, 2006 (71 FR 40254))), except §266.106(i);

(18) §266.107--Standards to Control Hydrogen Chloride (HCl) and Chlorine Gas ($C1_2$) Emissions, except §266.107(h);

(19) §266.108--Small Quantity On-Site Burner Exemption, except §266.108(d), and except that hazardous wastes subject to §335.78 of this title (relating to Special Requirements for Hazardous Waste Generated by Conditionally Exempt Small Quantity Generators) may not be burned in an off-site device under the exemption provided by §266.108;

(20) §266.109--Low-Risk Waste Exemption (as amended through (July 14, 2006 (71 FR 40254)));

(21) §266.110--Waiver of DRE Trial Burn for Boilers;

(22) §266.111--Standards for Direct Transfer; and

(23) §266.112--Regulation of Residues.

(b) The following hazardous wastes and facilities are not regulated under this division:

(1) used oil burned for energy recovery that is also a hazardous waste solely because it exhibits a characteristic of hazardous waste identified in 40 CFR Part 261, Subpart C, from use versus mixing. Such used oil is subject to regulation by the United States Environmental Protection Agency (EPA) under 40 CFR Part 279 and Chapter 324 of this title (relating to Used Oil Standards). This exception does not apply if the used oil has been made hazardous by mixing with characteristic or listed hazardous waste other than by a conditionally exempt small quantity generator or household generator;

(2) hazardous wastes that are exempt from regulation under the provisions of 40 CFR §261.4, and §335.24(c)(3) - (4) of this title (relating to Requirements for Recyclable Materials and Nonhazardous Recyclable Materials), and hazardous wastes that are subject to the special requirements for conditionally exempt small quantity generators under the provisions of §335.78 of this title [~~(relating to Special Requirements for Hazardous Waste Generated by Conditionally Exempt Small Quantity Generators)~~];

(3) gas recovered from hazardous or solid waste landfills when such gas is burned for energy recovery; and

(4) coke ovens, if the only hazardous waste burned is EPA Hazardous Waste No. K087, decanter tank tar sludge from coking operations.

§335.224. Additional Interim Status Standards for Burners.

In addition to the interim status standards for burners under §335.221(a)(7) - (14) of this title (relating to Applicability and Standards), owners and operators of "existing" boilers and industrial furnaces that burn hazardous waste are subject to the following provisions, including the applicable provisions of Subchapter A of this chapter (relating to Industrial Solid Waste and Municipal Hazardous Waste Management in General) and Subchapter E of this chapter (relating to Interim Standards for Owners and Operators of Hazardous Waste Storage, Processing, or Disposal Facilities), as follows:

(1) If a boiler or industrial furnace is located at a facility that already has a permit or interim status, then the owner or operator must comply with the applicable rules and regulations dealing with permit amendments or modifications under Chapter 305 of this title (relating to Consolidated Permits) and 40 Code of Federal Regulations (CFR) §270.42, or revisions of applications for hazardous waste permits and changes during interim status under Chapter 305 of this title and 40 CFR §270.72.

(2) The requirements of this section and §335.221(a)(7) - (14) of this title do not apply to hazardous wastes and facilities exempt

under §335.221(b) of this title or exempt under 40 CFR §266.108, as adopted under §335.221(a)(19) of this title.

(3) Owners and operators of existing boilers and industrial furnaces that burn hazardous waste are subject to the following provisions:

(A) §335.12 of this title (relating to Shipping Requirements Applicable to Owners or Operators of Storage, Processing, or Disposal Facilities);

(B) §335.15 of this title (relating to Recordkeeping and Reporting Requirements Applicable to Owners or Operators of Storage, Processing, or Disposal Facilities);

(C) §335.113 of this title (relating to Reporting of Emergency Situations by Emergency Coordinator);

[~~(D) §335.114 of this title (relating to Reporting Requirements);~~]

(D) [~~(E)~~] §335.115 of this title (relating to Additional Reports);

(E) [~~(F)~~] §335.127 of this title (relating to Cost Estimate for Closure);

(4) The owner or operator must provide complete and accurate information specified in 40 CFR §266.103(b)(2) to the executive director on or before August 21, 1992, and must establish limits for the operating parameters specified in 40 CFR §266.103(b)(3). Such information is termed a "certification of precompliance" and constitutes a certification that the owner or operator has determined that, when the facility is operated within the limits specified in 40 CFR §266.103(b)(3), the owner or operator believes that, using best engineering judgment, emissions of particulate matter, metals, HCl and $C1_2$ are not likely to exceed the limits provided under 40 CFR §§266.105, 266.106, and 266.107. The facility may burn hazardous waste only under the operating conditions that the owner or operator establishes under 40 CFR §266.103(b)(3) until the owner or operator submits a revised certification of precompliance under 40 CFR §266.103(b)(8) or a certification of compliance under 40 CFR §266.103(c), or until a permit is issued.

(5) On or before August 21, 1992, the owner or operator must submit a notice for publication in a newspaper regularly published, and generally circulated within the county and area wherein the facility is located and send a copy of the notice of those persons and entities listed under §39.413 of this title (relating to Mailed Notice). The owner and operator must provide to the executive director, with the certification of precompliance, evidence of submittal of the notice for publication. The public notice requirements of this section [~~subsection~~] do not apply to recertifications under 40 CFR §266.103(b)(8). The notice shall be entitled "Notice of Certification of Precompliance with Hazardous Waste Burning Requirements of 40 Code of Federal Regulations §266.103(b) and 30 TAC §335.224(4) and (5)." An owner or operator who satisfied the public notice requirements under 40 CFR §266.103(b)(6) will be considered compliant with this paragraph provided that the owner or operator submits evidence of such public notice on or before 30 days after the effective date of this paragraph. The notice shall include:

(A) name and address of the owner and operator of the facility as well as the location of the device burning hazardous waste;

(B) date that the certification of precompliance was submitted to the executive director;

(C) brief description of the regulatory process required to comply with the interim status requirements of this section, §335.221(a)(7) - (14) of this title, and 40 CFR §266.103, including required emissions testing to demonstrate conformance with emissions standards for organic compounds, particulate matter, metals, and HCl and Cl_2;

(D) types and quantities of hazardous waste burned including, but not limited to, source(s), whether solids or liquids, as well as an appropriate description(s) of the waste(s);

(E) type of device(s) in which the hazardous waste is burned including a physical description and maximum production rate of each device;

(F) types and quantities per year of other fuels and industrial furnace feedstocks fed to each unit;

(G) brief description of the basis for this certification of precompliance as specified in 40 CFR §266.103(b)(2);

(H) locations where the record for the facility can be viewed and copied by interested parties. These records and locations shall at a minimum include:

(i) The administrative record kept by the local Texas Commission on Environmental Quality (TCEQ) [~~Texas Natural Resource Conservation Commission~~] regional office; and

(ii) The Boiler and Industrial Furnace (BIF) correspondence file kept at the facility site where the device is located. The correspondence file must include all correspondence between the facility and the Regional Director of the United States Environmental Protection Agency (EPA), state and local regulatory officials, including copies of all certifications and notifications, such as the precompliance certification, precompliance public notice, notice of compliance testing, compliance test report, compliance certification, time extension requests and approvals or denials, enforcement notifications of violations, and copies of EPA and state site visit reports submitted to the owner or operator.

(I) notification of the establishment by the facility owner or operator of a facility mailing list whereby interested parties shall notify the facility owner or operator that they wish to be placed on the mailing list to receive future information and notices about this facility; and

(J) location (mailing address) of the local TCEQ [~~Texas Natural Resource Conservation Commission (TNRCC)~~] regional office, where further information can be obtained on TCEQ [~~TNRCC~~] regulation of hazardous waste burning.

(6) On or before August 21, 1992, the owner or operator shall conduct emissions testing to document compliance with the emissions standards of 40 CFR §§266.103(a)(5)(i)(D), 266.104(b) - (e), and 266.105 - 266.107, under the procedures prescribed by this paragraph and paragraphs (7) and (8) of this section and 40 CFR §266.103(c), except under extensions of time provided by 40 CFR §266.103(c)(7). Based on the compliance test, the owner or operator shall submit to the executive director a complete and accurate "certification of compliance," in accordance with 40 CFR §266.103(c)(4), with those emission standards establishing limits on the operating parameters specified in 40 CFR §266.103(c)(1). In accordance with paragraphs (12) and (13) of this section, the executive director may reject the certification of compliance or require additional information to be submitted within specified time frames.

(7) Compliance testing must be conducted under conditions for which the owner or operator has submitted a certification of precompliance under 40 CFR §266.103(b) and paragraphs (4) - (5) of this section, and under conditions established in the notification of compliance testing required by 40 CFR §266.103(c)(2). The

owner and operator may seek approval on a case-by-case basis to use compliance test data from one unit in lieu of testing a similar on-site unit. To support the request, the owner or operator must provide a comparison of the hazardous waste burned and other feedstreams, and the design, operation, and maintenance of both the tested unit and the similar unit. The director shall provide a written approval to use compliance test data in lieu of testing a similar unit if he finds that the hazardous wastes, the devices, and the operating conditions are sufficiently similar, and the data from the other compliance test is adequate to meet the requirements of §266.103(c).

(8) If the owner or operator chooses to submit a revised certification of compliance (recertification of compliance) under 40 CFR §266.103(c)(8), or if the owner or operator is required to submit a recertification of compliance under paragraphs (9) or (11) of this section, then the owner or operator shall submit the recertification of compliance to the executive director under the procedures in 40 CFR §266.103(c)(8)(i) - (iv). In accordance with paragraphs (12) and (13) of this section, the executive director may reject the recertification of compliance or require additional information to be submitted within specified time frames.

(9) The owner or operator must conduct compliance testing and submit to the executive director a recertification of compliance under the provisions of paragraph (8) of this section and 40 CFR §266.103(c), within 150 days of rejection by the executive director under this paragraph and paragraphs (6) and (8) of this section. In accordance with paragraphs (12) and (13) of this section, the executive director may reject the recertification of compliance or require additional information to be submitted within specified time frames. Except for the activities necessary for the owner or operator to conduct the compliance testing in accordance with 40 CFR §266.103(c)(8)(i) - (iv), and except for a rejection by the executive director of a recertification of compliance which was voluntarily submitted by the owner or operator pursuant to paragraph (8) of this section, upon rejection by the executive director and until a subsequent recertification of compliance is approved under paragraph (8) of this section, the owner or operator shall not burn hazardous waste in the unit for which a certification of compliance or recertification of compliance was rejected.

(10) Except for a rejection by the executive director of a recertification of compliance which was voluntarily submitted by the owner or operator pursuant to paragraph (8) of this section, upon receipt of the third rejection by the executive director of a certification of compliance and/or recertification of compliance for the burning of hazardous waste in a boiler or industrial furnace, the owner or operator shall stop burning hazardous waste in the unit for which the certification and/or recertification were rejected, begin closure activities under 40 CFR §266.103(l), and shall not resume the burning of hazardous waste except under an operating permit issued under Chapter 305 of this title [~~(relating to Consolidated Permits)~~];

(11) Notwithstanding any requirement for a recertification under paragraph (9) of this section, the owner or operator must conduct compliance testing and submit to the executive director a recertification of compliance under the provisions of paragraph (8) of this section and 40 CFR §266.103(c) within five [~~three~~] years from submitting the previous certification or recertification (excluding recertification(s) submitted under paragraph (9) of this section). If the owner or operator seeks to recertify compliance under new operating conditions, then the owner or operator must comply with the requirements of paragraph (8) of this section. In accordance with paragraphs (12) and (13) of this section, the executive director may reject the recertification of compliance or require additional information to be submitted within specified time frames.

(12) The executive director may reject certifications or recertifications of compliance based on the failure of the owner or operator to meet the substantive requirements under 40 CFR §266.103 or this section, including, but not limited to, the following:

(A) incorrect or inappropriate calculations or other mathematical techniques which lead to significant effects on operating condition limitations;

(B) incorrect or inappropriate sampling, physical measurements, or analysis techniques which lead to significant effects on operating condition limitations;

(C) equipment failure or malfunction during the compliance test which leads to inadequate results or incorrect results which significantly affects the limits on operating conditions;

(D) inappropriate feed rates of waste, raw production materials, and/or fuels which leads to significant effects on operating condition limitations;

(E) failure to operate the compliance test under steady-state conditions; or

(F) other significant deficiencies which, in the opinion of the executive director will lead to endangerment to public health and welfare or insufficient protection of public property or the environment.

(13) The owner or operator may appeal to the commission any rejection of a certification or recertification by the executive director. Owners and operators who appeal to the commission any rejection of a certification or recertification by the executive director may continue operations under the rejected certification or recertification until the rejection is upheld by the commission.

(14) If the owner or operator does not comply with the interim status compliance schedule provided by paragraphs (4) - (6), (9), or (11) of this section, hazardous waste burning must terminate on the date of the deadline, closure activities must begin under 40 CFR §266.103(l), and hazardous waste burning may not resume except under an operating permit issued under Chapter 305 of this title. For purposes of compliance with the closure provisions of paragraph (4) of this section [~~subsection~~] and 40 CFR §265.112(d)(2) and §265.113 (as adopted in §335.112(a)(6) of this title (relating to Standards)) the boiler or industrial furnace has received "the known final volume of hazardous waste" on the date that the deadline is missed.

(15) During the compliance test required by paragraph (7) of this section and 40 CFR §266.103(c)(3), and upon certification of compliance under 40 CFR §266.103(c), a boiler or industrial furnace must be operated with a functioning system that automatically cuts off the hazardous waste feed when the applicable operating conditions specified in 40 CFR §266.103(c)(1)(i) and (v) - (xiii) deviate from those established in the certification of compliance, and the boiler or industrial furnace must be operated in accordance with 40 CFR §266.103(g)(1) - (2).

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 8, 2009.

TRD-200901747
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 239-6090

♦ ♦ ♦

DIVISION 5. UNIVERSAL WASTE RULE

30 TAC §335.261

STATUTORY AUTHORITY

The amendment is proposed under Texas Water Code (TWC), §5.103 (relating to Rules) and §5.105 (relating to General Policy), which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the TWC or other laws of this state; and under Texas Health and Safety Code (THSC), §361.017 (relating to Commission's Jurisdiction: Industrial Solid Waste and Hazardous Municipal Waste) and §361.024 (relating to Rules and Standards), which authorize the commission to regulate industrial solid waste and hazardous waste and to adopt rules consistent with the general intent and purposes of the THSC.

The proposed amendment implements THSC, Chapter 361.

§335.261. Universal Waste Rule.

(a) This section establishes requirements for managing universal wastes as defined in this section, and provides an alternative set of management standards in lieu of regulation, except as provided in this section, under all otherwise applicable chapters under 30 Texas Administrative Code. Except as provided in subsection (b) of this section, 40 Code of Federal Regulations (CFR) Part 273 is adopted by reference as amended and adopted in the *Federal Register* through July 14, 2006 (71 FR 40254) [~~August 5, 2005 (70 FR 45508)~~].

(b) 40 CFR Part 273, except §273.1, is adopted subject to the following changes.

(1) The term "regional administrator" is changed to "executive director" or "commission" consistent with the organization of the commission as set out in the Texas Water Code, Chapter 5.

(2) The terms "U.S. Environmental Protection Agency" and "EPA" are changed to "the Texas Commission on Environmental Quality," "the agency," or "the commission" consistent with the organization of the commission as set out in Texas Water Code, Chapter 5. This paragraph does not apply to 40 CFR §273.32(a)(3) or §273.52 or to references to the following: "EPA Acknowledgment of Consent" or "EPA Identification Number."

(3) The term "treatment" is changed to "processing."

(4) The term "universal waste" is changed to "universal waste as defined under §335.261(b)(16)(F) of this title (relating to Universal Waste Rule)."

(5) The term "this part" is changed to "Chapter 335, Subchapter H, Division 5 of this title (relating to Universal Waste Rule)."

(6) In 40 CFR §273.2(a) and (b), references to "40 CFR part 266, subpart G," are changed to "§335.251 of this title (relating to Applicability and Requirements)."

(7) In 40 CFR §273.2(b)(2), the reference to "part 261 of this chapter" is changed to "Chapter 335 of this title (relating to Industrial Solid Waste and Municipal Hazardous Waste)."

(8) In 40 CFR §273.3(b)(1), the reference to "40 CFR §262.70" is changed to "§335.77 of this title (relating to Farmers)." Also, the phrase "(40 CFR §262.70 addresses pesticides disposed of on the farmer's own farm in a manner consistent with the disposal instructions on the pesticide label, providing the container is triple rinsed in accordance with 40 CFR 261.7(b)(3))" is deleted.

(9) In 40 CFR §273.3(b)(2), the reference to "40 CFR parts 260 through 272" is changed to "Chapter 335 of this title (relating to Industrial Solid Waste and Municipal Hazardous Waste)."

(10) In 40 CFR §273.3(b)(3), the reference to "part 261 of this chapter" is changed to "Chapter 335 of this title (relating to Industrial Solid Waste and Municipal Hazardous Waste)."

(11) In 40 CFR §273.3(d)(1)(i) and (ii), references to "40 CFR §261.2" are changed to "§335.1 of this title (relating to Definitions)."

(12) In 40 CFR §273.4(a), the reference to "§273.9" as it relates to the definition of "mercury-containing equipment" is amended to include the commission definition of "thermostats" as contained in §335.261(b)(16)(E) of this title (relating to Universal Waste Rule) and in 40 CFR §273.4(b)(1), the reference to "part 261 of this chapter" is changed to "Chapter 335 of this title (relating to Industrial Solid Waste and Municipal Hazardous Waste)."

(13) In 40 CFR §273.5(b)(1), the reference to "part 261 of this chapter" is changed to "Chapter 335 of this title (relating to Industrial Solid Waste and Municipal Hazardous Waste)."

(14) In 40 CFR §273.8(a)(1), the reference to "40 CFR §261.4(b)(1)" is changed to "§335.1 of this title (relating to Definitions)" and the reference to "§273.9" is changed to "§335.261(b)(16)(F) of this title (relating to Universal Waste Rule)."

(15) In 40 CFR §273.8(a)(1), the reference to "40 CFR §261.4(b)(1)" is changed to "§335.78 of this title (relating to Special Requirements for Hazardous Waste Generated by Conditionally Exempt Small Quantity Generators)" and to "§335.402(5) of this title (relating to Definitions)" and the reference to "§273.9" is changed to "§335.261(b)(16)(F) of this title (relating to Universal Waste Rule)."

(16) In 40 CFR §273.9, the following definitions are changed to the meanings described in this paragraph.

(A) Destination facility--A facility that treats, disposes, or recycles a particular category of universal waste, except those management activities described in 40 CFR §273.13(a) and (c) and 40 CFR §273.33(a) and (c), as adopted by reference in this section. A facility at which a particular category of universal waste is only accumulated is not a destination facility for purposes of managing that category of universal waste.

(B) Generator--Any person, by site, whose act or process produces hazardous waste identified or listed in 40 CFR Part 261 or whose act first causes a hazardous waste to become subject to regulation.

(C) Large quantity handler of universal waste--A universal waste handler (as defined in this section) who accumulates at any time 5,000 kilograms or more total of universal waste (as defined in this section), calculated collectively. This designation as a large quantity handler of universal waste is retained through the end of the calendar year in which 5,000 kilograms or more total universal waste is accumulated.

(D) Small quantity handler of universal waste--A universal waste handler (as defined in this section) who does not accumulate at any time 5,000 kilograms or more total of universal waste (as defined in this section), calculated collectively.

(E) Thermostat--A temperature control device that contains metallic mercury in an ampule attached to a bimetal sensing element, and mercury-containing ampules that have been removed from these temperature control devices in compliance with the requirements

of 40 CFR §273.13(c)(2) or §273.33(c)(2) as adopted by reference in this section.

(F) Universal waste--Any of the following hazardous wastes that are subject to the universal waste requirements of this section:

(i) batteries, as described in 40 CFR §273.2;

(ii) pesticides, as described in 40 CFR §273.3;

(iii) mercury-containing equipment, including thermostats, as described in 40 CFR §273.4;

(iv) paint and paint-related waste, as described in §335.262(b) of this title (relating to Standards for Management of Paint and Paint-Related Waste); and

(v) lamps, as described in 40 CFR §273.5.

(17) In 40 CFR §273.10, the reference to "40 CFR §273.9" is changed to "§335.261(b)(16)(D) of this title (relating to Universal Waste Rule)."

(18) 40 CFR §273.11(b) is changed to read as follows: "Prohibited from diluting or treating universal waste, except when responding to releases as provided in 40 CFR §273.17; managing specific wastes as provided in 40 CFR §273.13; or crushing lamps under the control conditions of §335.261(e) of this title (relating to Universal Waste Rule)."

(19) In 40 CFR §273.13(a)(3)(i), the reference to "40 CFR parts 260 through 272" and the reference to "40 CFR part 262" are changed to "Chapter 335 of this title (relating to Industrial Solid Waste and Municipal Hazardous Waste)."

(20) In 40 CFR §273.13(c)(2)(iii) and (iv), references to "40 CFR §262.34" are changed to "§335.69 of this title (relating to Accumulation Time)."

(21) In 40 CFR §273.13(d)(1), the phrase "adequate to prevent breakage" is changed to "adequate to prevent breakage, except as specified in §335.261(e) of this title (relating to Universal Waste Rule)."

(22) In 40 CFR §273.17(b), the reference to "40 CFR parts 260 through 272" and the reference to "40 CFR part 262" are changed to "Chapter 335 of this title (relating to Industrial Solid Waste and Municipal Hazardous Waste)."

(23) In 40 CFR §273.20(a), the reference to "40 CFR §§262.53, 262.56(a)(1) through (4), (6), and (b) and 262.57" is changed to "§335.13 of this title (relating to Recordkeeping and Reporting Procedures Applicable to Generators Shipping Hazardous Waste or Class 1 Waste and Primary Exporters of Hazardous Waste) and §335.76 of this title (relating to Additional Requirements Applicable to International Shipments)."

(24) In 40 CFR §273.20(b), the reference to "subpart E of part 262 of this chapter" is changed to "§335.13 of this title and §335.76 of this title."

(25) In 40 CFR §273.30, the reference to "§273.9" is changed to "§335.261(b)(16)(C) of this title (relating to Universal Waste Rule)."

(26) 40 CFR §273.31(b) is changed to read as follows: "Prohibited from diluting or treating universal waste, except when responding to releases as provided in 40 CFR §273.37; managing specific wastes as provided in 40 CFR §273.33; or crushing lamps under the control conditions of §335.261(e) of this title (relating to Universal Waste Rule)."

(27) In 40 CFR §273.33(a)(3)(i), the reference to "40 CFR parts 260 through 272" and the reference to "40 CFR part 262" are changed to "Chapter 335 of this title (relating to Industrial Solid Waste and Municipal Hazardous Waste)."

(28) In 40 CFR §273.33(c)(2)(iii) and (iv), the references to "40 CFR §262.34" are changed to "§335.69 of this title (relating to Accumulation Time)."

(29) In 40 CFR §273.33(c)(4)(i), the reference, "40 CFR part 261, subpart C," is changed to "Chapter 335, Subchapter R of this title (relating to Waste Classification)."

(30) In 40 CFR §273.33(c)(3)(ii), the reference, "40 CFR parts 260 through 272," is changed to "Chapter 335 of this title (relating to Industrial Solid Waste and Municipal Hazardous Waste)."

(31) In 40 CFR §273.33(d)(1), the phrase "adequate to prevent breakage" is changed to "adequate to prevent breakage, except as specified in §335.261(e) of this title (relating to Universal Waste Rule)."

(32) In 40 CFR §273.37(b), the reference to "40 CFR parts 260 through 272" and the reference to "40 CFR part 262" are changed to "Chapter 335 of this title (relating to Industrial Solid Waste and Municipal Hazardous Waste)."

(33) In 40 CFR §273.40(a), the reference to "40 CFR §§262.53, 262.56(a)(1) through (4), (6), and (b) and 262.57" is changed to "§335.13 of this title (relating to Recordkeeping and Reporting Procedures Applicable to Generators Shipping Hazardous Waste or Class 1 Waste and Primary Exporters of Hazardous Waste) and §335.76 of this title (relating to Additional Requirements Applicable to International Shipments)."

(34) In 40 CFR §273.40(b), the reference to "subpart E of part 262 of this chapter" is changed to "§335.13 of this title and §335.76 of this title."

(35) In 40 CFR §273.52(a), the reference to "40 CFR part 262" is changed to "Chapter 335 of this title (relating to Industrial Solid Waste and Municipal Hazardous Waste)."

(36) In 40 CFR §273.52(b), the reference to "40 CFR part 262" is changed to "Chapter 335 of this title (relating to Industrial Solid Waste and Municipal Hazardous Waste)."

(37) In 40 CFR §273.54(b), the reference to "40 CFR parts 260 through 272" and the reference to "40 CFR part 262" are changed to "Chapter 335 of this title (relating to Industrial Solid Waste and Municipal Hazardous Waste)."

(38) In 40 CFR §273.60(a), the reference to "§273.9" is changed to "§335.261(b)(16)(A) of this title (relating to Universal Waste Rule)" and the reference to "parts 264, 265, 266, 268, 270, and 124 of this chapter" is changed to " 30 Texas Administrative Code (relating to Environmental Quality)."

(39) In 40 CFR §273.60(b), the reference to "40 CFR §261.6(c)(2)" is changed to "§335.24 of this title (relating to Requirements for Recyclable Materials and Nonhazardous Recyclable Materials)."

(40) In 40 CFR §273.80(a), the reference to "40 CFR §260.20 and §260.23" is changed to "§20.15 of this title (relating to Petition for Adoption of Rules) and §335.261(c) of this title (relating to Universal Waste Rule)."

(41) In 40 CFR §273.80(b), the reference to "40 CFR §260.20(b)" is changed to "§20.15 of this title (relating to Petition for Adoption of Rules)."

(42) In 40 CFR §273.81(a), the reference to "40 CFR §260.10" is changed to "§335.1 of this title (relating to Definitions) and the reference to "§273.9" is changed to "§335.261(b)(16)(F) of this title (relating to Universal Waste Rule)."

(c) Any person seeking to add a hazardous waste or a category of hazardous waste to the universal waste rule may file a petition for rulemaking under this section, §20.15 of this title, and 40 CFR Part 273, Subpart G as adopted by reference in this section.

(1) To be successful, the petitioner must demonstrate to the satisfaction of the commission that regulation under the universal waste rule: is appropriate for the waste or category of waste; will improve management practices for the waste or category of waste; and will improve implementation of the hazardous waste program. The petition must include the information required by §20.15 of this title. The petition should also address as many of the factors listed in 40 CFR §273.81 as are appropriate for the waste or category of waste addressed in the petition.

(2) The commission will grant or deny a petition using the factors listed in 40 CFR §273.81. The decision will be based on the commission's determinations that regulation under the universal waste rule is appropriate for the waste or category of waste, will improve management practices for the waste or category of waste, and will improve implementation of the hazardous waste program.

(3) The commission may request additional information needed to evaluate the merits of the petition.

(d) Any waste not qualifying for management under this section must be managed in accordance with applicable state regulations.

(e) Crushing lamps is permissible only in a crushing system for which the following control conditions are met:

(1) an exposure limit of no more than 0.05 milligrams of mercury per cubic meter is demonstrated through sampling and analysis using Occupational Safety and Health Administration (OSHA) Method ID-140 or National Institute for Occupational Safety and Health Method Number 6009, based on an eight-hour time-weighted average of samples taken at the breathing zone height near the crushing system operating at the maximum expected level of activity;

(2) compliance with the notification requirements of §106.262 of this title (relating to Facilities (Emission and Distance Limitations) (Previously SE 118)) is demonstrated;

(3) documentation of the demonstrations under paragraphs (1) and (2) of this subsection is provided in a written report to the executive director; and

(4) the executive director approves the crushing system in writing.

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 8, 2009.

TRD-200901748
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 239-6090

SUBCHAPTER O. LAND DISPOSAL RESTRICTIONS

30 TAC §335.431

STATUTORY AUTHORITY

The amendment is proposed under Texas Water Code (TWC), §5.103 (relating to Rules) and §5.105 (relating to General Policy), which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the TWC or other laws of this state; and under Texas Health and Safety Code (THSC), §361.017 (relating to Commission's Jurisdiction: Industrial Solid Waste and Hazardous Municipal Waste) and §361.024 (relating to Rules and Standards), which authorize the commission to regulate industrial solid waste and hazardous waste and to adopt rules consistent with the general intent and purposes of the THSC.

The proposed amendment implements THSC, Chapter 361.

§335.431. Purpose, Scope and Applicability.

(a) Purpose. The purpose of this subchapter is to identify hazardous wastes that are restricted from land disposal and define those limited circumstances under which an otherwise prohibited waste may continue to be land disposed.

(b) Scope and Applicability.

(1) Except as provided in paragraph (2) of this subsection, the requirements of this subchapter apply to persons who generate or transport hazardous waste and owners and operators of hazardous waste treatment, storage, and disposal facilities.

(2) The requirements of this subchapter do not apply to any entity that is either specifically excluded from coverage by this subchapter or would be excluded from the coverage of 40 Code of Federal Regulations (CFR), Part 268 by 40 CFR, Part 261, if those parts applied.

(3) Universal waste handlers and universal waste transporters, as defined in and subject to regulation under Subchapter H, Division 5 of this chapter (relating to Universal Waste Rule) are exempt from 40 CFR §268.7 and §268.50.

(c) Adoption by Reference.

(1) except as provided in paragraph (2) of this subsection, and subject to the changes indicated in subsection (d) of this section, the regulations contained in 40 CFR Part 268, as amended through July 14, 2006 (71 FR 40254) [~~February 24, 2005 (70 FR 9138)~~] are adopted by reference.

(2) The following sections of 40 CFR Part 268 are excluded from the sections adopted in paragraph (1) of this subsection: §§268.1(f), 268.5, 268.6, 268.7(a)(10), 268.13, 268.42(b), and 268.44.

(3) Appendices IV, VI - IX, and XI of 40 CFR Part 268 are adopted by reference as amended through July 14, 2006 (71 FR 40254) [~~November 20, 2001 (66 FR 58258)~~].

(d) Changes to Adopted Parts. The parts of the CFR that are adopted by reference in subsection (c) of this section are changed as follows:

(1) The words "Administrator" or "Regional Administrator" are changed to "Executive Director;"

(2) The word "treatment" is changed to "processing;"

(3) The words "Federal Register," when they appear in the text of the regulation, are changed to "Texas Register;"

(4) In 40 CFR §268.7(a)(6) and (a)(7), the applicable definition of hazardous waste and solid waste is the one that is set out in this chapter rather than the definition of hazardous waste and solid waste that is set out in 40 CFR Part 261.

(5) In 40 CFR §268.50(a)(1), the citation to "§262.34" is changed to "§335.69."

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

Filed with the Office of the Secretary of State on May 8, 2009.

TRD-200901749
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 239-6090

SUBCHAPTER R. WASTE CLASSIFICATION

30 TAC §335.504

STATUTORY AUTHORITY

The amendment is proposed under Texas Water Code (TWC), §5.103 (relating to Rules) and §5.105 (relating to General Policy), which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the TWC or other laws of this state; and under Texas Health and Safety Code (THSC), §361.017 (relating to Commission's Jurisdiction: Industrial Solid Waste and Hazardous Municipal Waste) and §361.024 (relating to Rules and Standards), which authorize the commission to regulate industrial solid waste and hazardous waste and to adopt rules consistent with the general intent and purposes of the THSC.

The proposed amendment implements THSC, Chapter 361.

§335.504. Hazardous Waste Determination.

A person who generates a solid waste must determine if that waste is hazardous using the following method:

(1) Determine if the material is excluded from being a solid waste or hazardous waste per §335.1 of this title (relating to Definitions) or identified in 40 Code of Federal Regulations (CFR) Part 261, Subpart A, as amended through January 2, 2008 (73 FR 57) [~~February 24, 2005 (70 FR 9138)~~].

(2) If the material is a solid waste, determine if the waste is listed as, or mixed with, or derived from a listed hazardous waste identified in 40 CFR [~~Code of Federal Regulations (CFR)~~] Part 261, Subpart D, as amended through June 4, 2008 (73 FR 31756) [~~February 24, 2005 (70 FR 9138)~~].

(3) If the material is a solid waste, determine whether the waste exhibits any characteristics of a hazardous waste as identified in 40 CFR Part 261, Subpart C, as amended through July 14, 2006 (71 FR 40254) [~~March 13, 2002 (67 FR 11251)~~].

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 8, 2009.

TRD-200901750
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 239-6090

SUBCHAPTER T. PERMITTING STANDARDS FOR OWNERS AND OPERATORS OF COMMERCIAL INDUSTRIAL NONHAZARDOUS WASTE LANDFILL FACILITIES

30 TAC §§335.582 - 335.584, 335.590 - 335.593

STATUTORY AUTHORITY

The amendments are proposed under Texas Water Code (TWC), §5.103 (relating to Rules) and §5.105 (relating to General Policy), which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the TWC or other laws of this state; and under Texas Health and Safety Code (THSC), §361.017 (relating to Commission's Jurisdiction: Industrial Solid Waste and Hazardous Municipal Waste) and §361.024 (relating to Rules and Standards), which authorize the commission to regulate industrial solid waste and hazardous waste and to adopt rules consistent with the general intent and purposes of the THSC.

The proposed amendments implement THSC, Chapter 361.

§335.582. Prohibited Wastes.

The following wastes shall not be disposed:

(1) municipal solid waste, as defined in §330.3 [~~§330.2~~] of this title (relating to Definitions), but only in amounts such that the total volume of municipal solid waste accepted does not exceed 20%, unless specifically authorized by the facility permit, of the total amount of waste (not including municipal solid waste) accepted during the current or previous year. The amount of waste may be determined by volume or weight, but the same unit of measure shall be used for each year, unless a variance is authorized by the executive director;

(2) hazardous waste, as defined in §335.1 of this title (relating to Definitions), except as provided in §335.590(25) of this title (relating to Operational and Design Standards);

(3) polychlorinated biphenyl compounds (PCBs), as defined by the United States Environmental Protection Agency (EPA) in regulations issued pursuant to the Toxic Substance Control Act under Title 40 Code of Federal Regulations (CFR) Part 761 unless authorized by the EPA;

(4) putrescible waste, as defined in §330.3 [~~§330.2~~] of this title, unless the requirements of §330.151 [~~§330.126~~] of this title (relating to Disease Vector Control) and §330.545 [~~§330.300~~] of this title (relating to Airport Safety), and this subchapter are met;

(5) explosive material, as defined by the Department of Transportation in 49 CFR Part 173;

(6) radioactive or nuclear materials regulated under Texas Health and Safety Code, Chapter 401, or rules of the commission, the Texas Department of State Health Services, the Texas Railroad Commission, or any other applicable rules of state or federal authorities;

(7) medical waste, as defined in §330.3 [§330.2] of this title;

(8) liquid waste, as defined in §330.3 [§330.2] of this title;

(9) wastes identified in §330.15(e)(1) - (5) [§330.5(e)(1) - (5)] of this title (relating to General Prohibitions), except as allowed under that section; and

(10) wastes identified in §330.171(c)(3) and (4) [§330.136(b)(3) and (4)] of this title (relating to Disposal of Special Wastes), except as allowed under that section.

§335.583. Permit Procedures.

(a) The following requirements applicable to municipal solid waste facilities apply to permit applications for facilities subject to this subchapter:

(1) §330.53 [§330.50] of this title (relating to Pre-application Review);

(2) §330.57 [§330.51] of this title (relating to Permit and Registration Applications [Application] for Municipal Solid Waste Facilities [Facility]), except that the references and requirements relating to a land-use only public hearing do not apply;

(3) §330.59 [§330.52] of this title (relating to Contents [Technical Requirements] of Part I of the Application) except §330.63(j) [§330.52(b)(11)] of this title, concerning cost estimate for closure and post-closure care [financial assurance] shall not apply;

(4) §330.61 [§330.53] of this title (relating to Contents [Technical Requirements] of Part II of the Application);

(5) §330.63 [§330.54] of this title (relating to Contents [Technical Requirements] of Part III of the Application), except that the requirement in §330.61(b)(1)(A) [§330.54(3)] of this title, concerning an estimate of the population or population equivalent served at the site does not apply;

[(6) §330.55 of this title (relating to Site Development Plan), except that the reference to "§330.137 of this title (relating to Disposal of Industrial Wastes)" in §330.55(b)(10)(I) of this title does not apply and "§335.590(22) of this title (relating to Operational Standards)" applies instead;]

[(7) §330.56 of this title (relating to Attachments to the Site Development Plan), except that the requirements relating to Attachment 14 - landfill gas management plan under §330.56(n) of this title will not apply if an applicant provides a demonstration, approved in writing by the executive director, that such a plan is not necessary;]

(6) [(8)] §330.65 [§330.57] of this title (relating to Contents [Technical Requirements] of Part IV of the Application);

(7) §330.219(a) of this title (relating to Recordkeeping and Reporting Requirements);

[(9) §330.58 of this title (relating to Technical Requirements of Part V of the Application);]

(8) [(10)] §330.67 [§330.62] of this title (relating to Property Rights); and

(9) [(11)] §330.73 [§330.64] of this title (relating to Additional Standard Permit and Registration Conditions for Municipal Solid Waste Facilities), except that the reference to "§305.70 of this title (relating to Municipal Solid Waste Permit and Registration Modifications)" does not apply and "§305.69 of this title (relating to Solid Waste Permit Modification at the Request of the Permittee)" applies instead.

(b) In addition to the requirements in subsection (a) of this section, the permit application must include information to demonstrate compliance with the following requirements:

(1) §335.584(b) of this title (relating to Location Restrictions);

(2) §335.585 of this title (relating to General Inspection Requirements);

(3) §335.586 of this title (relating to Personnel Training);

(4) §335.587 of this title (relating to Waste Analysis);

(5) §335.588 of this title (relating to General Requirements for Ignitable, Reactive, or Incompatible Wastes); and

(6) §335.589 of this title (relating to Contingency Plan).

§335.584. Location Restrictions.

(a) The following location restrictions applicable to municipal solid waste facilities apply to facilities subject to this subchapter:

(1) §330.547 [§330.301] of this title (relating to Floodplains);

(2) §330.553 [§330.302] of this title (relating to Wetlands);

(3) §330.555 [§330.303] of this title (relating to Fault Areas);

(4) §330.557 [§330.304] of this title (relating to Seismic Impact Zones); and

(5) §330.559 [§330.305] of this title (relating to Unstable Areas).

(b) In addition to the location restrictions in subsection (a) of this section, a new commercial industrial nonhazardous waste landfill facility, or an areal or capacity expansion of an existing commercial industrial nonhazardous waste landfill unit, may not be located:

(1) in areas where underlying soil unit(s) within five feet of the base of the containment structure, which includes the sides and bottom of the containment structure, have a Unified Soil Classification of GW (well-graded gravel), GP (poorly-graded gravel), GM (silty gravel), GC (clayey gravel), SW (well-graded sand), SP (poorly-graded sand), or SM (silty sand), or a hydraulic conductivity greater than 1 x 10^{-5} cm/sec, unless:

(A) it is in an area where the average annual evaporation exceeds average annual rainfall by more than 40 inches; or

(B) the soil unit is not sufficiently thick and laterally continuous to provide a significant pathway for waste migration;

(2) in areas overlying a regional aquifer unless the regional aquifer is separated from the base of the containment structure, which includes the sides and bottom of the containment structure, by a minimum of ten feet of material with a hydraulic conductivity towards the aquifer not greater than 10^{-7} centimeters per second (cm/sec), or a thicker interval of more permeable material that provides equivalent or greater retardation to pollutant migration;

(3) on a barrier island or peninsula; or

(4) within 1,000 feet of an area subject to active coastal shoreline erosion, if the area is protected by a barrier island or peninsula, unless the design, construction, and operational features of the facility will prevent adverse effects resulting from storm surge and erosion or scouring by water. On coastal shorelines that are subject to active shoreline erosion and which are unprotected by a barrier island or peninsula, a separation distance from the shoreline to the facility must be at least 5,000 feet unless the design, construction, and operational

features of the facility will prevent adverse effects resulting from storm surge and erosion or scouring by water.

§335.590. Operational and Design Standards.

The following requirements, including those applicable to municipal solid waste facilities, apply to owners and operators of facilities subject to this subchapter:

(1) §330.121 [~~§330.111~~] of this title (relating to General);

(2) §330.123 [~~§330.112~~] of this title (relating to Pre-operation Notice [~~Notices~~]);

(3) §330.125 [~~§330.113~~] of this title (relating to Recordkeeping Requirements), except that the requirements under §330.125(b)(3) [~~§330.113(b)(3)~~] of this title concerning recordkeeping for gas monitoring and remediation plans relating to explosive and other gases do not apply, except as determined necessary by the executive director;

(4) §330.127 [~~§330.114~~] of this title (relating to Site Operating Plan);

(5) §330.129 [~~§330.115~~] of this title (relating to Fire Protection);

(6) §330.131 [~~§330.116~~] of this title (relating to Access Control);

(7) §330.133(a) - (c) [~~§330.117(a) - (c)~~] of this title (relating to Unloading of Waste [~~Wastes~~]);

(8) §330.137 [~~§330.119~~] of this title (relating to Site Sign);

(9) §330.139 [~~§330.120~~] of this title (relating to Control of Windblown Waste and Litter);

(10) §330.141 [~~§330.121~~] of this title (relating to Easements [~~Easement~~] and Buffer Zones);

(11) §330.143(a) [~~§330.122~~] of this title (relating to Landfill Markers and Benchmark [~~Benchmarks~~]);

(12) §330.149 [~~§330.125~~] of this title (relating to Odor Management Plan [~~Air Criteria~~]);

(13) §330.153 [~~§330.127~~] of this title (relating to Site Access Roads);

(14) §330.155 [~~§330.128~~] of this title (relating to Salvaging and Scavenging);

(15) §330.157 [~~§330.129~~] of this title (relating to Endangered Species Protection);

(16) §330.159 [~~§330.130~~] of this title (relating to Landfill Gas Control) as determined necessary by the executive director;

(17) §330.161 [~~§330.131~~] of this title (relating to Oil, Gas, and Water Wells [~~Abandoned Oil and Water Wells~~]);

(18) §330.163 [~~§330.132~~] of this title (relating to Compaction);

(19) §330.165 [~~§330.133~~] of this title (relating to Landfill Cover);

(20) §330.167 [~~§330.134~~] of this title (relating to Ponded Water);

(21) §330.175 [~~§330.138~~] of this title (relating to Visual Screening of Deposited Waste [~~Wastes~~]);

(22) §330.207 [~~§330.139~~] of this title (relating to Contaminated Water Management [~~Discharge~~]);

(23) the owner or operator shall have and follow procedures for the suppression and control of dust; and

(24) the owner or operator shall ensure that each commercial industrial nonhazardous waste landfill unit meets the requirements of subparagraphs (A) - (F) of this paragraph.

(A) Design criteria.

(i) Landfill cells shall be designed and constructed in accordance with subclause (I) or (II) of this clause, and shall also be constructed in accordance with subclause (III) of this clause.

(I) a design that ensures that the concentration values for constituents listed in §330.419(a) [~~Table 1 of §330.241~~] of this title (relating to Constituents for Detection Monitoring) will not be exceeded in the uppermost aquifer at the [~~relevant~~] point of compliance, as specified by the executive director under clause (iv) of this subparagraph; or

(II) a composite liner, as defined in clause (ii) of this subparagraph, and a leachate collection system that is designed and constructed in accordance with subparagraph (B) of this paragraph; and

(III) unless the executive director approves an engineered design that the applicant has demonstrated will provide equal or greater protection to human health and the environment, a landfill cell must be constructed where the base of the containment structure, which includes the sides and bottom of the containment structure, is at least five feet above the uppermost saturated soil unit having a Unified Soil Classification of GW (well-graded gravel), GP (poorly-graded gravel), GM (silty gravel), GC (clayey gravel), SW (well-graded sand), SP (poorly-graded sand), or SM (silty sand), or a hydraulic conductivity greater than 1×10^{-5} cm/sec, unless such saturated soil unit is not sufficiently thick and laterally continuous to provide a significant pathway for waste migration.

(ii) For purposes of this section, "composite liner" means a system consisting of two components. The upper component shall consist of a minimum 30-mil (0.75 mm) flexible membrane liner and the lower component shall consist of at least a three-foot layer of compacted soil with a hydraulic conductivity of no more than 1×10^{-7} cm/sec flexible membrane liner components consisting of high density polyethylene shall be at least 60-mil thick. The flexible membrane liner component must be installed in direct and uniform contact with the compacted soil component.

(iii) When approving a design that complies with clause (i)(I) of this subparagraph, the executive director may consider at least the following factors:

(I) the hydrogeologic characteristics of the facility and surrounding land;

(II) the climatic factors of the area; and

(III) the volume and physical and chemical characteristics of the leachate.

(iv) For purposes of this paragraph, the [~~relevant~~] point of compliance is defined in §330.3 [~~§330.2~~] of this title (relating to Definitions). In determining the [~~relevant~~] point of compliance, the executive director may consider at least the following factors:

(I) the hydrogeologic characteristics of the facility and surrounding land;

(II) the volume and physical and chemical characteristics of the leachate;

(III) the quantity, quality, and direction of flow of groundwater;

(IV) the proximity and withdrawal rate of the groundwater users;

(V) the availability of alternative drinking water supplies;

(VI) the existing quality of the groundwater, including other sources of contamination and their cumulative impacts on the groundwater and whether groundwater is currently used or reasonably expected to be used for drinking water;

(VII) public health, safety, and welfare effects; and

(VIII) practicable capability of the owner or operator.

(B) Landfill cells shall have a leachate-collection system designed and constructed to maintain less than a 30-cm depth of leachate over the liner. The leachate-collection and leachate-removal system shall be:

(i) constructed of materials that are chemically resistant to the leachate expected to be generated;

(ii) of sufficient strength and thickness to prevent collapse under the pressures exerted by overlying wastes, waste cover materials, and by any equipment used at the landfill; and

(iii) designed and operated to function through the scheduled closure and post-closure period of the landfill.

(C) Storm water run-on/run-off facilities such as berms and ditches shall be provided in accordance with §330.63 [~~§330.54~~] of this title (relating to Contents [~~Technical Requirements~~] of Part III of the Application).

(D) The site shall have a groundwater monitoring system installed that is capable of detecting the migration of pollutants from the landfill and is sampled semiannually for the parameters specified in Chapter 330, Subchapter J [~~I~~] of this title (relating to Groundwater Monitoring and Corrective Action).

(E) The final cover placed over the commercial industrial nonhazardous waste landfill unit shall consist of a minimum of 18 inches of uncontaminated topsoil overlying four feet of compacted clay-rich soil material meeting the requirements of §330.457 [~~§330.253~~] of this title (relating to Closure Requirements for Municipal Solid Waste Landfill [~~MSWLF~~] Units That Receive Waste on or after October 9, 1993 [~~and MSW Sites~~]). The final cover over the aerial fill shall meet the requirements of §330.457 [~~§330.253~~] of this title and shall include a flexible membrane component.

(F) Nonhazardous waste may be placed above natural grade in commercial industrial nonhazardous waste landfill units provided the conditions in clauses (i) - (vi) of this subparagraph are met, except as provided in clause (vii) of this subparagraph:

(i) waste placed above grade shall be laterally contained by dikes that are constructed to:

(I) prevent washout, release, or exposure of waste;

(II) be physically stable against slope failure, with a minimum safety factor of 1.5;

(III) prevent washout from hydrostatic and hydrodynamic forces from storms and floods;

(IV) prevent storm water from reaching the waste;

(V) minimize release of leachate; and

(VI) minimize long-term maintenance;

(ii) the liner required in paragraph (22) of this section shall extend to the crest of the dike;

(iii) waste placed against the dike is placed no higher that three feet below the crest of the dike;

(iv) the slope of the wastes placed in the commercial industrial nonhazardous waste landfill units does not exceed 3% to the center of the unit;

(v) no waste is placed higher than the lowest elevation of the dike crest; and

(vi) a dike certification report is submitted with Attachment 10 of Part III of the permit application. The certification shall be in the following form:
Figure: 30 TAC §335.590(24)(F)(vi)
[~~Figure: 30 TAC §335.590(24)(F)(vi)~~]

(vii) a commercial industrial nonhazardous waste landfill is not subject to the requirements of clauses (ii) - (v) of this subparagraph provided that the owner or operator submits a demonstration that the standards of clause (i) of this subparagraph can be met without meeting the requirements of clauses (ii) - (v) of this subparagraph, the demonstration is approved in writing by the executive director, and the owner or operator enters the approval into the facility operating record.

(25) Hazardous waste from a conditionally exempt small quantity generator as defined in §335.78(a) of this title (relating to Special Requirements for Hazardous Waste Generated by Conditionally Exempt Small Quantity Generators), may be accepted for disposal in any commercial industrial nonhazardous waste landfill facility provided the amount of hazardous waste accepted from each conditionally exempt small quantity generator does not exceed 220 pounds (100 kilograms) a calendar month, and provided the landfill owner or operator is willing to accept the hazardous waste.

§335.591. Groundwater Protection Design and Operation.

The following requirements applicable to municipal solid waste facilities apply to owners and operators of facilities subject to this subchapter:

(1) §330.333 [~~§330.201~~] of this title (relating to Leachate Collection System);

(2) §330.335 [~~§330.202~~] of this title (relating to Alternative Liner [~~Alternate~~] Design);

(3) §330.337 [~~§330.203~~] of this title (relating to Special Liner Design Constraints [~~Special Conditions (Liner Design Constraints)~~]);

(4) §330.555 [~~§330.204~~] of this title (relating to Fault Areas [~~Geological Faults~~]);

(5) §330.339 [~~§330.205~~] of this title (relating to [~~Soils and~~] Liner Quality Control Plan); and

(6) §330.341 [~~§330.206~~] of this title (relating to Soil Liner Evaluation Report and Geomembrane Liner Evaluation Report [~~Soils and Liner Evaluation Report (SLER) and Flexible Membrane Liner Evaluation Report (FMLER)~~]).

§335.592. Groundwater Monitoring and Corrective Action.

The following requirements applicable to municipal solid waste and hazardous waste facilities apply to owners and operators of facilities subject to this subchapter:

(1) §330.401 [~~§330.230~~] of this title (relating to Applicability);

(2) §330.403 [~~§330.231~~] of this title (relating to Groundwater Monitoring Systems);

(3) §330.405 [~~§330.233~~] of this title (relating to Groundwater Sampling and Analysis Requirements);

(4) §330.407 [~~§330.234~~] of this title (relating to Detection Monitoring Program for Type I Landfills);

(5) §330.409 [~~§330.235~~] of this title (relating to Assessment Monitoring Program);

(6) §330.411 [~~§330.236~~] of this title (relating to Assessment of Corrective Measures);

(7) §330.413 [~~§330.237~~] of this title (relating to Selection of Remedy);

(8) §330.415 [~~§330.238~~] of this title (relating to Implementation of the Corrective Action Program);

(9) §330.419 [~~§330.241~~] of this title (relating to Constituents for Detection Monitoring); and

(10) §330.421 [~~§330.242~~] of this title (relating to Monitor Well Construction Specifications).

§335.593. Closure and Post-Closure Care Requirements.

The owner or operator of a facility subject to this subchapter shall close the facility or any part of it in accordance with the requirements of §335.8 of this title (relating to Closure and Remediation). In addition to these requirements, the owner or operator shall meet the requirements for closure and post-closure of municipal solid waste facilities in §330.457 [~~§330.253~~] of this title (relating to Closure Requirements for Municipal Solid Waste Landfill [~~MSWLF~~] Units that [~~That~~] Receive Waste on or after October 9, 1993 [~~and MSW Sites~~]).

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 8, 2009.

TRD-200901751
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 239-6090

SUBCHAPTER U. STANDARDS FOR OWNERS AND OPERATORS OF HAZARDOUS WASTE FACILITIES OPERATING UNDER A STANDARD PERMIT

30 TAC §335.601, §335.602

STATUTORY AUTHORITY

The new sections are proposed under Texas Water Code (TWC), §5.103 (relating to Rules) and §5.105 (relating to General Policy), which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the TWC or other laws of this state; and under Texas Health and Safety Code (THSC), §361.017 (relating to Commission's Jurisdiction: Industrial Solid Waste and Hazardous Municipal Waste) and §361.024 (relating to Rules and Standards), which authorize the commission to regulate industrial solid waste and hazardous waste and to adopt rules consistent with the general intent and purposes of the THSC.

The proposed new sections implement THSC, Chapter 361.

§335.601. Purpose, Scope, and Applicability.

(a) The purpose of this subchapter is to establish minimum standards which define the acceptable management of hazardous waste under a standard permit.

(b) This subchapter applies to owners and operators of facilities who treat or store hazardous waste under this subchapter's standard permit, except as provided otherwise in 40 Code of Federal Regulations (CFR) Part 261, Subpart A.

(c) A facility owner or operator who has fully complied with the requirements for interim status - as defined in Resource Conservation Recovery Act (RCRA), §3005(e) and regulations under 40 CFR §270.70 - must also comply with the regulations specified in Subchapter E of this chapter (relating to Interim Standards for Owners and Operators of Hazardous Waste Treatment, Storage, or Disposal Facilities) instead of the regulations in 40 CFR Part 270, until final administrative disposition of the standard permit application is made, except as provided under §335.152(a)(14) of this title (relating to Standards).

(d) Notwithstanding any other provisions of this subchapter, imminent hazard enforcement actions may be brought pursuant to RCRA, §7003.

§335.602. Standards.

(a) The following regulations contained in 40 Code of Federal Regulations (CFR) Part 267 (including all appendices to 40 CFR Part 267) are adopted by reference as amended and adopted in the CFR through September 8, 2005 (70 Federal Register 53420) and as further amended and adopted as indicated in each paragraph of this subsection:

(1) 40 CFR Part 267, Subpart B--General Facility Standards;

(2) 40 CFR Part 267, Subpart C--Preparedness and Prevention;

(3) 40 CFR Part 267, Subpart D--Contingency Plan and Emergency Procedures;

(4) 40 CFR Part 267, Subpart E--Recordkeeping, Reporting, and Notifying;

(5) 40 CFR Part 267, Subpart F--Releases from Solid Waste Management Units;

(6) 40 CFR Part 267, Subpart G--Closure;

(7) 40 CFR Part 267, Subpart I--Use and Management of Containers;

(8) 40 CFR Part 267, Subpart J--Tank Systems;

(9) 40 CFR Part 267, Subpart DD--Containment buildings; and

(10) 40 CFR §267.142, concerning Cost estimate for closure.

(b) The regulations of the United States Environmental Protection Agency (EPA) that are adopted by reference in this section are adopted subject to the following changes.

(1) The term "regional administrator" is changed to the "executive director" of the Texas Commission on Environmental Quality

or to the commission, consistent with the organization of the commission as set out in Texas Water Code, Chapter 5, Subchapter B.

(2) Reference to:

(A) 40 CFR Part 261 is changed to §335.504 of this title (relating to Hazardous Waste Determination);

(B) 40 CFR Part 262 is changed to Subchapter C of this chapter (relating to Standards Applicable to Generators of Hazardous Waste);

(C) 40 CFR §264.1 is changed to §335.151 of this title (relating to Purpose, Scope, and Applicability);

(D) Reference to 40 CFR Part 264, Subpart D is changed to §335.152(a)(3) of this title (relating to Standards) and §335.153 of this title (relating to Reporting of Emergency Situations by Emergency Coordinator);

(E) 40 CFR Part 264, Subpart S is changed to §335.152(a)(14) of this title;

(F) 40 CFR Part 265 is changed to Subchapter E of this chapter (relating to Interim Standards for Owners and Operators of Hazardous Waste Treatment, Storage, or Disposal Facilities);

(G) 40 CFR Part 268 is changed to Subchapter O of this chapter (relating to Land Disposal Restrictions);

(H) 40 CFR Part 270, Subpart J is changed to Chapter 305, Subchapter R of this title (relating to Resource Conservation and Recovery Act Standard Permits for Storage and Treatment Units);

(I) 40 CFR §262.34 is changed to §335.69 of this title (relating to Accumulation Time);

(J) 40 CFR §264.101 is changed to §335.167 of this title (relating to Corrective Action for Solid Waste Management Units); and

(K) Reference to "standardized permit" is changed to "standard permit".

(3) 40 CFR Parts 260 - 270 means the commission's rules including, but not limited to, Chapters 50, 305, and 335 of this title (relating to Action on Applications and Other Authorizations; Consolidated Permits; and Industrial Solid Waste and Municipal Hazardous Waste, respectively), as applicable.

(c) An owner or operator of a unit that treats, stores, or disposes of hazardous waste in tanks, containers, and containment buildings authorized by a standard permit as specified in this section shall establish and maintain financial assurance in accordance with Subchapter P of this chapter (relating to Warning Signs and Contaminated Areas).

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

Filed with the Office of the Secretary of State on May 8, 2009.

TRD-200901752
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 239-6090

TITLE 34. PUBLIC FINANCE

PART 5. TEXAS COUNTY AND DISTRICT RETIREMENT SYSTEM

CHAPTER 103. CALCULATIONS OR TYPES OF BENEFITS

34 TAC §103.5

The Texas County and District Retirement System (TCDRS) proposes an amendment to §103.5, concerning compliance by governmental plans with the benefit distribution requirements under the Internal Revenue Code (IRC). Because of considerations specific to governmental plans and their operations, rather than strict conformance with the interpretation of the mandatory distribution requirement of IRC §401(a)(9) propounded by the IRS through its rules and regulations, §823 of the Pension Protection Act of 2006 instructed the IRS to issue regulations under which, for all years to which IRC §401(a)(9) applies, a governmental plan shall be treated as having complied with IRC §401(a)(9) if such plan complies with a reasonable, good-faith interpretation of that section. The proposed amendment articulates this standard. The proposed amendment makes no changes to the amount of benefits distributed.

Gene Glass, Director of the Texas County and District Retirement System, has determined that for the first five-year period the rule is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Mr. Glass has also determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of administering the rule will be the distribution of benefits in a manner that complies with the TCDRS Act and satisfies federal law. There will be no costs to small or micro businesses. There are no anticipated economic costs to persons who are required to comply with the rule as proposed.

Comments on the proposed amendment may be submitted to Gene Glass, Director, Texas County and District Retirement System, P.O. Box 2034, Austin, TX 78768-2034.

The amendment is proposed under the Government Code, §845.102, which provides the board of trustees with the authority to adopt rules necessary or desirable for efficient administration of the system.

The Government Code, §841.010, is affected by this proposed amendment.

§103.5. Benefit Distribution Requirements.

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

(1) Proportionate retirement system--A public retirement system other than the Texas County and District Retirement System (TCDRS) that participates in the Proportionate Retirement Program.

(2) (No change.)

(3) Separates from service--The termination of employment with a subdivision participating in the TCDRS [~~Texas County and District Retirement System ('TCDRS')~~].

(b) General Rules:

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

(6) For a distribution made by the retirement system to which §401(a)(9) of the Internal Revenue Code applies [after December 31, 2001], the system shall apply the minimum distribution requirements of §401(a)(9) of the Internal Revenue Code of 1986 in a manner that complies [accordance] with a reasonable good faith interpretation of §401(a)(9) [the regulations under that section].

(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 May 11, 2009.

TRD-200901806
Gene Glass
Director
Texas County and District Retirement System
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 637-3230

CHAPTER 107. MISCELLANEOUS RULES

34 TAC §107.3

The Texas County and District Retirement System (TCDRS) proposes an amendment to §107.3, concerning direct rollovers and trustee-to-trustee transfers of single sum benefit distributions to members, surviving spouses, alternate payees, and beneficiaries. The proposed amendment defines the eligible distributees who may elect a transfer and the eligible plans to which the single sum distributions may be directly transferred by TCDRS in accordance with the election. The rule as proposed reflects the options available to distributees under the Internal Revenue Code for deferring taxes on these single sum distributions by electing a direct transfer to an eligible plan. The proposed amendment makes no changes to the amount of benefits distributed.

Gene Glass, Director of the Texas County and District Retirement System, has determined that for the first five-year period the rule is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Mr. Glass has also determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of administering the rule will be the opportunity of eligible distributees to protect the distribution and preserve its tax deferred status until such future time as the distributee determines. There will be no costs to small businesses. There are no anticipated economic costs to persons who are required to comply with the rule as proposed.

Comments on the proposed amendment may be submitted to Gene Glass, Texas County and District Retirement System, P.O. Box 2034, Austin, TX 78768-2034.

The rule is proposed under the Government Code, §845.102, which provides the board of trustees with the authority to adopt rules necessary or desirable for efficient administration of TCDRS.

The Government Code, §842.108(c), is affected by this proposed rule.

§107.3. Direct Rollovers and Trustee-to-Trustee Transfers.

(a) The retirement system may establish procedures for the acceptance of an eligible rollover distribution, including a direct trustee-to-trustee transfer, from an eligible retirement plan for the payment of any portion of the deposit a member is permitted to make for the purchase of types of credit in the retirement system, except that the system may not accept the distribution if the system is to separately account for the amounts.

(b) Effective January 1, 1993, a distributee may elect, at the time and in the manner prescribed by the system, to have any portion of an eligible rollover distribution paid directly to an eligible retirement plan specified by the distributee in a direct rollover.

(c) Definitions:

(1) Eligible Rollover Distribution--An eligible rollover distribution is any distribution of all or any portion of the balance to the credit of the distributee, except that an eligible rollover distribution does not include:

(A) any distribution that is one of a series of substantially equal periodic payments (not less frequently than annually) made for the life (or life expectancy) of the distributee or the joint lives (or joint life expectancies) of the distributee and the distributee's designated beneficiary, or for a specified period of 10 years or more;

(B) any distribution to the extent such distribution is required under §401(a)(9) of the Internal Revenue Code of 1986; and

(C) the portion of any distribution that is not includable in gross income.

(2) Eligible Retirement Plan--An eligible retirement plan is:

(A) an individual retirement account described in §408(a) of the Internal Revenue Code of 1986;

(B) an individual retirement annuity described in §408(b) of the Internal Revenue Code of 1986;

(C) a qualified trust described in §401(a) of the Internal Revenue Code of 1986 or an annuity plan described in §403(a) of the Internal Revenue Code of 1986 that accepts the eligible rollover distribution;

(D) for distribution made on or after December 31, 2001, an annuity contract described in §403(b) of the Internal Revenue Code of 1986;

(E) for distributions made on or after December 31, 2001, an eligible plan under §457(b) of the Internal Revenue Code of 1986 which is maintained by a state, a political subdivision of a state, or any agency or instrumentality of a state or political subdivision of a state which agrees to separately account for amounts transferred into such plan from this system; and

(F) for distributions made on or after December 31, 2007, a Roth IRA described in §408A of the Internal Revenue Code of 1986;

(3) Distributee--A distributee includes a member or former member. In addition, the member's or former member's surviving spouse and the member's or former member's spouse or former spouse who is the alternate payee under a domestic relations order, as defined in §109.2 of this title (relating to Definitions), are distributees with regard to the interest of the spouse or former spouse.

(4) Direct Rollover--A direct rollover is a payment by the system to the eligible retirement plan specified by the distributee.

(d) The system shall, upon the request of a beneficiary of a deceased member who is not a distributee, within the meaning of subsection (c)(3) of this section, transfer a lump sum distribution to the trustee of an individual retirement account established under §408 of the Internal Revenue Code of 1986 in accordance with the provisions of §402(e)(11).

(e) Notwithstanding anything in this section to the contrary, a distribution shall not fail to be an eligible rollover distribution merely because a portion of the distribution consists of after-tax contributions which are not includible in gross income. However, such portion may be paid only to an individual retirement account or annuity described in Internal Revenue Code §408(a) or (b), or to a qualified defined contribution plan described in Internal Revenue Code §401(a) or §403(a) that agrees to separately account for amounts so transferred, including separate accounting for the portion of such distribution which is includible in gross income and the portion of such distribution which is not so includible.

(f) The retirement system shall implement this section in a manner that causes the retirement system to be considered a qualified plan under §401(a) of the Internal Revenue Code of 1986. It is the responsibility of the distributee or beneficiary to determine that the transferee plan is an eligible plan for receiving a transfer pursuant to this rule.

[(b) A distributee may elect to have any portion of an eligible rollover distribution within the meaning of Section 402(c)(4) of the Internal Revenue Code of 1986 paid in a direct rollover to an eligible retirement plan within the meaning of Section 402(c)(8)(B) of the Internal Revenue Code of 1986 specified by the distributee.]

[(c) The retirement system shall implement this section in a manner that causes the retirement system to be considered a qualified plan under Section 401(a) of the Internal Revenue Code of 1986.]

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 11, 2009.

TRD-200901807
Gene Glass
Director
Texas County and District Retirement System
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 637-3230

34 TAC §107.16

The Texas County and District Retirement System (TCDRS) proposes new §107.16, concerning the holding and managing of trust assets for the exclusive benefit of participants and their beneficiaries. The proposed rule expands on the language contained in the TCDRS Act by setting forth the requirement for qualification in its particulars and describing the limitations on the use of plan assets for anything other than the exclusive benefit of the participants and their beneficiaries. The proposed rule states in detailed language the absolute prohibition against the diversion of trust assets in violation of the qualification requirement.

Gene Glass, Director of the Texas County and District Retirement System, has determined that for the first five-year period the rule is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Mr. Glass has also determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of administering the rule will be the assurance and commitment of the Texas County and District Retirement System that the system be, and operate as a qualified plan for the exclusive benefit of plan participants and their beneficiaries. There will be no costs to small businesses. There are no anticipated economic costs to persons who are required to comply with the rule as proposed.

Comments on the proposed rule may be submitted to Gene Glass, Director, Texas County and District Retirement System, P.O. Box 2034, Austin, TX 78768-2034.

The rule is proposed under the Government Code, §845.102, which provides the board of trustees with the authority to adopt rules necessary or desirable for efficient administration of the system.

The Government Code, §841.002, is affected by this proposed rule.

§107.16. Exclusive Purpose.

The board of trustees shall hold the assets of the system in trust for the exclusive purpose of providing benefits to participants and paying reasonable expenses of administration. It shall be impossible at any time prior to the satisfaction of all liabilities to members and beneficiaries covered by the trust, by operation of the system, by termination, by power of revocation or amendment, by the happening of any contingency, by collateral arrangement or by other means, for any part of the corpus or income of the trust, or any funds contributed thereto, to inure to the benefit of any employer or otherwise be used for or diverted to purposes other than providing benefits to members and beneficiaries and defraying reasonable expenses of administering the 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 11, 2009.

TRD-200901808
Gene Glass
Director
Texas County and District Retirement System
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 637-3230

CHAPTER 109. DOMESTIC RELATIONS ORDERS

34 TAC §109.12

The Texas County and District Retirement System (TCDRS) proposes an amendment to §109.12 concerning the form of distribution to the alternate payee of a benefit awarded under a Domestic Relations Order qualified by TCDRS. Under Government Code, §804.004, a public retirement system may by rule provide that in lieu of the life annuity awarded the alternate payee under a qualified domestic relations order, TCDRS may pay the alternate payee the actuarial equivalent of that benefit. Alternate Payees may rollover such distributions to an IRA or other qualified plan. Currently, the board of trustees, by rule, allows (but does not require) such distributions when the present value of the annuity does not exceed $15,000. This saves TCDRS time and expense in administering an exceedingly modest annuity for the recipient's lifetime. However, few annuities fall under such

a modest limit. The proposed amendment raises that threshold to $25,000. This limit would include more annuities but still only those of very small monthly amounts. Often the alternate payee would prefer to receive a single sum rather than a small monthly payment. The board retains its sole and exclusive discretion to allow payments in this manner.

Gene Glass, Director of the Texas County and District Retirement System, has determined that for the first five-year period the rule is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Mr. Glass has also determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of administering the rule will be the savings to TCDRS in administering very small annuities. There will be no costs to small businesses. There are no anticipated economic costs to persons who are required to comply with the rule as proposed.

Comments on the proposed amendment may be submitted to Gene Glass, Director, Texas County and District Retirement System, P.O. Box 2034, Austin, TX 78768-2034.

The rule is proposed under the Government Code, §845.102, which provides the board of trustees with the authority to adopt rules necessary or desirable for efficient administration of TCDRS.

The Government Code, §804.004, is affected by this proposed rule.

§109.12. Payments to Alternate Payees.

(a) In the event that an eligible participant or surviving beneficiary of an eligible participant applies for a withdrawal of the participant's accumulated contributions after the date that a domestic relations order is received by the system, the system will make a lump-sum payment to the alternate payee if the domestic relations order so provides and the order has been determined to be a qualified domestic relations order.

(b) In the event that the participant or the participant's beneficiary begins receiving an annuity after the date that a qualified domestic relations order is received by the system, and the order provides for a division of the annuity in that event, the benefit payable to the alternate payee will be an annuity payable monthly during the lifetime of the alternate payee, which annuity is the actuarial equivalent of the portion of the participant's benefit that was awarded to the alternate payee under the domestic relations order.

(c) Subsection (b) of this section will apply to all domestic relations orders approved in accordance with this chapter after January 1, 1990, and to such domestic relations orders approved prior to that date as are construed to provide for such an annuity.

(d) If a qualified domestic relations order is received by the system after the participant begins receiving a retirement annuity under which the alternate payee is not the designated beneficiary-annuitant, the benefit awarded to the alternate payee may be paid as a portion of each payment, if, as, and when a payment is made under the retirement benefit to the retiree or the retiree's beneficiary. Payments to the alternate payee cease at the earliest of:

(1) The month in which the alternate payee dies;

(2) The month in which the final payment under the retirement benefit is made to the retiree or the retiree's beneficiary; or

(3) The month in which the alternate payee has cumulatively received all amounts awarded under the qualified domestic relations order.

(e) If a person's membership in the system has terminated, and under the terms of a qualified domestic relations order, an alternate payee would be entitled to receive a portion of the benefit that would be payable to the former member, or the former member's beneficiary, and if a valid application for the benefit has not been filed with the system within 60 days from the date the system mails notice of membership termination in accordance with Government Code, §845.505 so that payment can be made to the alternate payee, the director may commence payment of the benefit that would be payable to the alternate payee if the person entitled to apply for the former member's benefit had filed an application for a retirement annuity. If the person entitled to apply for the former member's benefit would be entitled to only the accumulated contributions of the former member, the alternate payee will receive the amount that would be payable to the alternate payee if the person had filed an application for withdrawal of accumulated contributions.

(f) In accordance with Government Code, §804.004, and in lieu of a life annuity described in §844.006(d) of that code or in subsection (b) or subsection (e) of this section that would otherwise be payable to an alternate payee under a qualified domestic relations order, the system is authorized, but not required, to make a single lump-sum payment to the alternate payee in an amount that is the actuarial equivalent of such life annuity if:

(1) The actuarially equivalent amount is not more than $25,000; or [~~$10,000 or less;~~]

[~~(2) The actuarially equivalent amount is $15,000 or less and the alternate payee has consented to the distribution in the form of a single lump-sum payment; or~~]

(2) [~~(3)~~] At the time the monthly annuity payments would commence, the alternate payee has directed that payment of the monthly annuity is to be delivered outside of the United States and any possession of the United States. The determination of whether to pay an amount authorized by this subsection in lieu of the interest awarded by the qualified domestic relations order is at the sole and exclusive discretion of the system.

(g) The mortality assumption for alternate payees for determining the actuarial equivalent of a benefit payable to an alternate payee shall be the same as the mortality assumption for beneficiaries as set forth in §103.1(a) of this title (relating to Actuarial Tables) with regard to service retirements.

(h) Except as provided in subsection (e) of this section, no payment shall be made by the system to an alternate payee before the time that the participant or the participant's beneficiary files a valid application for a refund or a retirement annuity.

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 11, 2009.

TRD-200901809
Gene Glass
Director
Texas County and District Retirement System
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 637-3230

TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 3. TEXAS YOUTH COMMISSION

CHAPTER 91. PROGRAM SERVICES

SUBCHAPTER D. HEALTH CARE SERVICES

The Texas Youth Commission (TYC) proposes the repeal of §§91.81, 91.83, and 91.85, new §§91.75, 91.81, and 91.83, and amendments to §§91.86, 91.92, and 91.94.

New §91.75 (concerning health care definitions) will consolidate definitions used throughout the subchapter into one rule.

New §91.81 (concerning medical consent) establishes standards whereby TYC exercises its authority to consent to particular medical services for youth in TYC jurisdiction.

New §91.83 (concerning health care services for youth) consolidates information currently contained in §91.83 and §91.85. The new rule will establish criteria for providing care, the scope of available healthcare services, and standards for the delivery of healthcare services to youth.

The repeal of §§91.81, 91.83, and 91.85 will allow for the publication of new §91.81 and §91.83 in their place.

Amended §91.86 (concerning infirmary admission and discharge) provides clarification regarding the level of authorization needed to admit or discharge a youth from the infirmary for period of longer than 24 hours, and establishes that an associate psychologist may conduct the required daily evaluation for a youth admitted to the infirmary in a psychiatric emergency when a Ph.D. level psychologist is unavailable.

Amended §91.92 (concerning involuntary emergency administration of psychotropic medication) adds that commitment to a state hospital will be initiated if continued involuntary administration of psychotropic medication is necessary, and requires TYC staff to notify a youth's parent/guardian any time psychotropic medication is administered against a youth's will.

Amended §91.94 (concerning automated external defibrillators) requires each facility to designate certain first responder staff who will be required to participate in hands-on training in the use of automated external defibrillators.

Robin McKeever, Director of Administrative Services, has determined that for the first five-year period the proposal is in effect, there will be no significant fiscal impact for state or local government as a result of enforcing or administering the repeal, new sections, and amendments.

Rajendra Parikh, M.D., Medical Director, has determined that for each year of the first five years the proposal is in effect, the public benefit anticipated as a result of enforcing the repeal, new sections, and amendments will be the availability of accurate and current policy information regarding healthcare services provided by TYC.

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 repeal, new sections, and amendments as proposed. No private real property rights are affected by adoption of this proposal.

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 §§91.75, 91.81, 91.83, 91.86, 91.92, 91.94

The new and amended sections are proposed under the Human Resources Code, §61.076, which provides the commission with the authority to provide any necessary medical or psychiatric treatment to youth committed to its care, as well as Family Code §32.001, which provides the commission with the authority to consent to the medical, dental, psychological, and surgical treatment of a child committed to it when the person having the right to consent has been contacted and that person has not given actual notice to the contrary.

The proposed new and amended sections implement the Human Resources Code, §61.034.

§91.75. Health Care Definitions.

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

(1) Automated External Defibrillator (AED)--a United States Food and Drug Administration approved electronic device which is programmed to analyze the heart's rhythm for any abnormalities and, if necessary, directs the rescuer to deliver an electrical shock (defibrillation) to assist the heart in reestablishing a normal rhythm.

(2) Health Care Professional--an individual who is licensed by a professional board to practice in the State of Texas in a field of health including nursing, medicine, psychiatry or dentistry.

(3) Health Services Administrator--an individual who is a licensed registered nurse who manages and coordinates, at the facility, the delivery of on and off-site health care services for youth.

(4) Medical Provider--a physician or mid-level practitioner who provides health care services to Texas Youth Commission (TYC) youth under a contractual agreement with TYC.

(5) Life-Threatening Medical Emergency--a situation that is either imminently life-threatening or that requires immediate health care to prevent the development of a life-threatening condition. Examples of an imminently life threatening situation would include a youth being unresponsive, being unconscious, not breathing or experiencing severe respiratory distress, or severe bleeding in streams or spurts.

(6) Medical Alert--a flagging or identifying process that alerts staff of a potentially dangerous or life-threatening diagnosed condition. Examples of these conditions include, but are not limited to, a history or current diagnosis of chronic/acute asthma, cardiac problems, diabetes, seizures, serious injury, anaphylactic allergic reactions, or any other condition affecting daily living activities and requiring special assistance or special attention.

(7) Psychiatric Emergency--a situation in which it may be necessary to administer psychotropic medication to prevent harmful behaviors associated with a diagnosed psychiatric condition.

(8) Sick Call--a routine time during which a health care professional addresses youth health care needs.

§91.81. Medical Consent.

(a) Purpose. The purpose of this rule is to establish a procedure by which the Texas Youth Commission (TYC) may exercise its authority to consent to particular medical services for youth in TYC jurisdiction in accordance with the Family Code, §32.001(b).

(b) Applicability.

(1) Definitions pertaining to this rule are under §91.75 of this title.

(2) TYC does not have the authority to consent to medical treatment of any nature for youth on parole status in a home placement. For purposes of this policy, the term "home placement" does not include the Independent Living Program as described in §87.23 of this title.

(c) Medical Consent.

(1) For Youth under Age 18.

(A) TYC has the authority to consent to the medical treatment of its youth under the age of 18 only when the person having the right to consent (youth's parent or guardian) has been notified and actual objection has not been received by TYC. Though TYC has the authority to consent to treatment other than that specified in §91.83 of this title, TYC will defer to and attempt to contact the person having authority to consent when such medical treatment may be necessary.

(B) When a medical or dental provider determines a youth needs a diagnostic or treatment procedure or treatment for a serious injury or illness that requires parental/guardian consent, the parent/guardian will be contacted to provide written or verbal consent directly to the medical provider. If this is not possible, the facility administrator has the authority to give his/her consent for treatment of the youth under certain conditions pursuant to §32.001, Family Code.

(C) If a parent or guardian notifies TYC that he/she objects to TYC having medical consent authority, the parent or guardian will be asked to provide written consent for routine physical, dental, mental health and chemical dependency examinations and/or evaluations, and certain immunizations required by law.

(D) When a youth is temporarily admitted to a facility of the Texas Department of State Health Services, the TYC medical director may consent to the specific care outlined in §91.83 of this title if the parent or guardian cannot be contacted directly for consent.

(2) For Youth Age 18 or Older. When a youth reaches age 18, he/she has the right to legally consent to medical treatment. The youth's consent with respect to treatment for non-life threatening conditions will prevail if there is a conflict between the youth and the parent/guardian and/or TYC.

(d) Notification. Notification regarding the provision of routine health care services and TYC's authority to consent to treatment will occur during the initial admission and recommitment to TYC and will be by certified mail to the last known address of the person having the right to consent.

§91.83. Health Care Services for Youth.

(a) Purpose. The purpose of this rule is to establish basic criteria, standards, and guidelines for delivery of health care services to youth who are assigned to Texas Youth Commission (TYC) operated residential facilities and certain identified contract care programs.

(b) Applicability.

(1) Definitions pertaining to this rule are under §91.75 of this title.

(2) For consent to treatment, see §91.81 of this title.

(c) Criteria for Medical Care.

(1) As established by the TYC medical director, primary medical care will be provided by medical providers according to the following criteria:

(A) life saving treatment;

(B) limb saving treatment;

(C) reasonable care to relieve pain; and

(D) reasonable care for a degenerative condition.

(2) Procedures outside these criteria for medical care must be approved by the TYC medical director in consultation with TYC's executive commissioner.

(d) Criteria for Dental Care.

(1) The dentist will assure equitable access to basic preventive services and essential treatment procedures based upon the occurrence of disease, significant malfunction or injury. Priority of treatment categories are:

(A) Emergency/urgent--treatment for conditions which will worsen or become life-threatening or acute without immediate intervention.

(B) Interceptive--intermediate treatment for asymptomatic advanced hard or soft tissue disease or loss of masticatory function.

(C) Rehabilitative--definitive treatment for chronic hard or soft tissue disease or loss of masticatory function.

(D) Elective or special needs.

(2) The attending dentist may vary from this prioritization on an individual basis if judged to be necessary for the protection of the youth's overall health.

(3) TYC will provide for necessary care of orthodontic braces to prevent injury to the mouth. Maintenance and treatment will be arranged by and paid for by the parent/guardian after notification of TYC policy. TYC staff will assist youth and parents/guardians in making appointments and providing transportation for orthodontic care.

(e) Services.

(1) TYC will administer the following services, either directly or through contractual arrangements. These services include but are not limited to the following:

(A) physical examinations and treatment;

(B) dental examinations and treatment;

(C) treatment of injuries;

(D) mental health evaluations;

(E) immunizations;

(F) laboratory and diagnostic tests;

(G) administration of prescription or non-prescription medication for an illness or condition;

(H) chemical dependency evaluations; and

(I) examination following use of physical force and/or contamination caused by use of oleoresin capsicum spray, also known as pepper spray.

(2) Each TYC-operated facility and certain identified contract care programs will have a health services administrator who is designated to act as the local health authority.

(3) The appropriate level of health care services will be provided in the infirmary at each institution through contract health care professionals for youth who are not in need of hospitalization, but who need increased observation or medical care.

(4) Nurses will provide services for routine sick call requests at least five days per week. Medical providers, dentists, and a psychiatrist will provide services on-site or via telemedicine/telepsychiatry at least once weekly.

(5) In halfway houses, nursing case management and consultation will be provided as needed. Medical providers, dentists, and psychiatrists will provide services as needed.

(6) Upon admission to TYC, all youth will receive a health screening, physical examination (if no documentation within the past 90 days), mental health screening and evaluation, a dental screening, examination, and dental cleaning as prescribed by the dentist. Youth will receive a health screening, physical examination, dental examination, and dental cleaning annually thereafter.

(7) Upon admission to TYC, all youth will receive a vision screening. If the vision screening indicates that the youth needs a new prescription, state-issued prescription eyewear will be provided. Youth whose placement is in a high restriction facility are prohibited from wearing contact lenses, except where medically necessary as a form of treatment and glasses are ineffective for correcting vision.

(8) In facilities housing females, obstetrical, gynecological, and family planning services will be available on-site or by referral.

(f) Limitation of Services.

(1) TYC is not responsible for medical costs incurred by a youth:

(A) on furlough with a parent, relative, or guardian; or

(B) on parole status, unless the youth's placement is in a TYC-operated/contract residential program; or

(C) on escape/abscond status; or

(D) in a detention center or a county facility.

(2) Pharmaceutical, cosmetic, and medical experiments are prohibited. This policy does not preclude individual treatment of a youth based on the need for a specific medical procedure which is not generally available.

(g) Health Care Requirements.

(1) Facilities housing more than 25 youth must have a central medical room with medical examination facilities.

(2) Youth present in the infirmary will be supervised by a TYC staff member at all times.

(3) The physician or dentist is the decision authority for medical/dental services at the respective facility.

(4) The medical provider will develop the youth's medical plan of care.

(5) A medical provider will be available once each week to respond to youth complaints regarding services which they did or did not receive.

(6) In each TYC-operated residential program and certain identified contract care programs, the superintendent, health services administrator, medical provider and dentist must have regularly scheduled meetings to review health care services, including any concerns or problems related to the provision of health care. If problems are identified, follow-up must occur to ensure that the recommended actions are implemented and the problem has been resolved.

(7) A youth, who by history or examination has a serious or life-threatening medical condition, may be placed on medical alert status by a medical provider. A nurse may place a youth on medical alert status if such conditions occur during movement from one facility to another until a medical provider can be notified.

(8) The medical provider or psychiatrist may authorize medical and pharmacological intervention when required in a life-threatening situation consistent with §91.81 of this title. When this intervention requires the use of psychotropic medication, the authorization must be consistent with criteria in §91.92 of this title.

(9) Each TYC-operated residential program and certain identified contract care programs will post procedures for providing health care to youth when there is not a nurse on duty, including how to contact the on-call nurse.

(10) Pharmaceutical procedures will comply with federal and state laws and accepted industry practices pertaining to the acquisition, storage, administration, and documentation of prescription drugs.

(h) Medical Concerns Reported by Youth.

(1) Any youth may request a sick call for the evaluation of health care concerns.

(2) Any youth may file a complaint related to his/her health care service through the youth grievance procedure in accordance with §93.31 of this title.

(i) Emergency Room Referrals. Emergency room referrals may only be authorized by a medical provider, health services administrator or designee or the medical or nursing director.

(j) Notification. Parents or guardians will immediately be notified of a youth's serious illness, injury, or recommended need for surgery.

§91.86. Infirmary Admission and Discharge.

(a) Purpose. The purpose of this rule is to establish conditions and procedures for use of infirmaries in Texas Youth Commission (TYC) facilities.

(b) General Provisions.

(1) [~~(b)~~] Nursing care will be provided in the infirmary at each institution through contract health care staff for youth who are not in need of hospitalization, but who need increased observation or medical care. Infirmary admissions include [~~includes~~] youth who are acutely ill, injured, or are recovering from surgery or illness; or youth who need increased observation as result of a psychiatric crisis (identified by a Ph.D. level psychologist or psychiatrist).

(2) [~~(c)~~] Juvenile Corrections Officers (JCO's) shall [~~at all times,~~] supervise youth admitted to the infirmary at all times. [~~for a psychiatric crisis. JCO's shall provide supervision as needed for youth admitted to the infirmary for medical conditions.~~]

(3) [~~(d)~~] Physician [~~Physician's~~] orders shall be received only by nursing staff directly from the physician.

(c) [~~(e)~~] Infirmary Admission for Medical Diagnosis.

(1) The medical provider or health services administrator or designee determines if a youth requires [~~Admission to the infirmary for youth in need of~~] observation or treatment for a medical diagnosis or condition [~~is determined by facility health care staff~~].

(2) The health services administrator may admit a youth for a medical diagnosis or condition to the infirmary for up to 24 hours. Admission to the infirmary for 24 hours or longer may only be authorized by the medical provider.

(3) [~~(2)~~] Discharge from the infirmary may be ordered only by a physician if the youth was admitted for 24 hours or longer. A

physician or nurse may discharge youth admitted for less than 24 hours. [or initiated by nursing staff when the youth is well enough to participate in daily program activities.]

(d) [(f)] Infirmary Admission for Psychiatric Crisis.

(1) Admission to the infirmary for youth needing close observation for a psychiatric crisis may be authorized by a psychiatrist, if available. The director of clinical services [psychology] may authorize the admission when a psychiatrist is not on-site, and will immediately notify the psychiatrist, or a physician if a psychiatrist is not available, and document the notification. Psychiatrist or physician [Physician's] orders shall be obtained for youth admitted to the infirmary within two hours of admission.

(2) In obtaining psychiatrist or physician [physician's] orders for youth experiencing a psychiatric crisis, [mental health disorders,] nursing staff should provide to the psychiatrist relevant medical information such as current medications, [any medical data, observations, information from the medical file as relevant, and any other objective data, such as] vital signs, subjective or objective data (e.g., laboratory values), observations, and assessment. The psychiatrist or physician [psychiatrist's] order should include instructions regarding any observations that nursing staff must make about the youth's mental status, as well as instructions for any other type of monitoring or medications that are to be administered.

(3) A Ph.D. level psychologist or psychologist associate (if a Ph.D. level psychologist is not available) will evaluate the youth at least once a day.

(4) Disposition (discharge or referral) will be made by the psychiatrist.

§91.92. Involuntary Emergency Administration of Psychotropic Medication [Medication-Related Emergencies].

(a) Purpose. The purpose of this rule is to establish criteria and procedure for administering [a] psychotropic medication to youth in TYC-operated high restriction residential facilities in a psychiatric [drug in a medication-related] emergency when the [a] youth cannot or will not give consent for the administration.

(b) References.

(1) For definitions pertaining to this rule, see §91.75 of this title.

(2) See §97.23 of this title for use of force procedures and approved techniques.

(c) [(b)] Criteria for the Involuntary Administration of Psychotropic Medication.

(1) Psychotropic medication may be administered in an injectable form to a youth in a psychiatric emergency [against the will of the youth in a medication-related emergency] when the youth cannot or will not give consent if the youth has a diagnosed psychiatric disorder and one or both of the following criteria [herein] are met.

[(2) A medication-related emergency is defined as a situation in which it is immediately necessary to administer the medication to prevent harmful behaviors associated with a diagnosed psychiatric condition and to prevent:]

(A) imminent and substantial harm to self [the youth] because the youth is overtly engaging in behaviors that could result in [serious] bodily harm or death; or

(B) imminent and substantial physical harm to another because of [attempts or] acts the youth overtly [or continually makes or] commits.

(2) Only a facility psychiatric provider (under the direction of a psychiatrist) or physician may prescribe the involuntary emergency use of psychotropic medication.

(d) [(c)] Restrictions for Administering Psychotropic Medication.

(1) Psychotropic drugs shall not be administered for the purposes of punishment or for program management or control. Pharmaceutical experimentation or research using TYC youth is strictly prohibited.

(2) Standing medication orders are prohibited in a psychiatric emergency.

[(2) The use of psychotropic medication in an emergency must be ordered by the responsible physician or facility psychiatrist. Medication for this purpose shall not be authorized through the use of standing orders.]

[(3) Psychotropic medication may be administered only to a youth who has a diagnosed psychiatric disorder and who has had a physical examination prior to psychotropic medication being prescribed.]

[(4) Psychotropic medication may be administered in either oral or injectable form.]

(e) Emergency Commitment to a State Hospital or Admission to Corsicana Stabilization Unit.

(1) For a youth who requires continued medication against his/her will, commitment to a state hospital will be initiated. See §87.69 of this title regarding procedures for commitment to a state hospital.

(2) If the youth qualifies for admission to Corsicana Stabilization Unit (CSU), staff shall immediately initiate an admission referral to CSU. See §87.67 of this title regarding admission to CSU.

(f) Notification.

(1) The facility administrator or designee will notify the parent/guardian of involuntary administration of psychotropic medication as soon as possible following the action.

(2) Psychiatric emergencies will be reported in accordance with agency procedures for reporting serious incidents.

§91.94. Automated External Defibrillators.

(a) Purpose. The purpose of this policy is to establish procedures and guidelines for the operation, storage, [and] maintenance, and training requirements associated with the use of Automated External Defibrillators (AEDs). [It is Texas Youth Commissions (TYC's) objective to provide immediate emergency response to a sudden cardiac arrest that occurs at a TYC-operated facility, designated TYC district offices, and Central Office/Annex.]

(b) Applicability.

[(1)] This rule applies to employees at TYC-operated facilities, designated district offices, and Central Office/Annex.

[(2) The use of AEDs applies to TYC youth, staff, volunteers, visitors, and contractors.]

(c) Definitions [Explanation of Terms Used]. Definitions pertaining to this rule are under §91.75 of this title.

[(1) Automated External Defibrillator (AED)--a United States Food and Drug Administration (FDA) approved electronic device, about the size of a laptop computer, which is programmed to analyze the heart's rhythm for any abnormalities and, if necessary,

directs the rescuer to deliver an electrical shock (defibrillation) to assist the heart in reestablishing a normal rhythm.]

[(2) Cardiac Arrest--a malfunction in the heart's electrical system (ventricular fibrillation or rapid ventricular tachycardia) that may cause the heart to stop suddenly.]

[(3) Myocardial Infarction--death of heart muscle tissue caused by lack of blood supply to the heart due to plaque or blood clot.]

(d) General Provisions.

(1) [(d)] The TYC medical director [Medical Director] authorizes the acquisition of AEDs for placement at all TYC-operated facilities, designated district [District] offices, and the Central Office/Annex.

(2) [(e)] Upon acquiring an AED, the chief local administrator or designee shall notify the local emergency medical service (EMS) [EMS] provider of the existence, location, and type of AED.

(e) [(f)] Cardiac Chain of Survival. Cardiac chain of survival is the current treatment for sudden cardiac arrest that includes the following four steps:

(1) Call 911 or facility gatehouse/control center and include notification that an AED will be used;

(2) begin Cardiopulmonary Resuscitation (CPR);

(3) provide early defibrillation; and

(4) provide Advanced Cardiac Life Support (to be preformed by EMS). [facilitate access to advanced medical care.]

(f) [(g)] Restrictions for Use.

(1) The AED is to be used only if the person is unresponsive and has no pulse.

(2) The AED is to be used only on persons over the age of eight [(8)] years old.

(3) The AED will provide voice prompts giving further instructions if it cannot read the cardiac rhythm due to improper electrode placement, motion of the person, low battery, or electromagnetic interference, etc.

(4) The AED voice prompt will not instruct the user to shock the person if the person's cardiac rhythm does not warrant a shock or if the person's cardiac rhythm suddenly changes and shock is no longer indicated.

(5) The AED voice prompts will not advise the user to shock the person if the person is experiencing a myocardial infarction.

(g) [(h)] AED Training.

(1) A qualified CPR/First Aid/AED TYC trainer or a qualified contracted trainer will provide American Red Cross CPR/First Aid training and instruction in the use of an AED to all TYC sole supervision staff annually. The facility administrator will designate staff to receive additional hands-on training on the use of AED. [AED training is incorporated into the American Red Cross CPR/First Aid training required for all TYC direct care staff. All TYC direct care staff are required to be trained annually by a qualified CPR/First Aid/AED TYC trainer or a qualified contracted trainer.]

(2) All TYC [non-direct care] staff [working in TYC facilities that house youth, designated district offices, and Central Office/Annex] are required to watch the AED training video [at least once] annually. Training will include the location of the AED[,] and [the training will] be documented and maintained by the local training officer.

(3) The AED training program is approved by the TYC medical director [Medical Director] and the Texas Department of State Health Services [Texas Department of Health] in accordance with the Health and [&] Safety Code, Chapter 779.

(h) [(i)] General Requirements.

(1) The AED shall be readily accessible to staff, but at [At] no time shall an AED be accessible to [a] TYC youth [be accessible to the AED].

(2) Each TYC-operated facility that houses youth, designated TYC district offices, and the Central Office/Annex will have an AED on-site. [Al Price State Juvenile Correctional Facility, Ron Jackson State Juvenile Correctional Complex, and McLennan County State Juvenile Correctional Facility will have two AEDs on-site (one for each unit and one for the medical dorm).]

(3) The AED should be stored in a protective case at all times. The storage area is free from water, dirt, extreme cold (less than 32 degrees F), and extreme heat (over 100 degrees F).

(4) The following equipment should be stored with each AED:

(A) carrying case;

(B) trauma shears or blunt-tipped (safety) scissors;

(C) defibrillation pads (2 sets; each facility/district office will keep on hand an additional set of AED replacement pads);

(D) razor;

(E) towel;

(F) CPR breathing barrier or resuscitation mask; and

(G) latex disposable gloves.

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 6, 2009.

TRD-200901729
Cheryln K. Townsend
Executive Commissioner
Texas Youth Commission
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 424-6014

37 TAC §§91.81, 91.83, 91.85

(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 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 repeals implement the Human Resources Code, §61.034.

§91.81. Medical Consent.

§91.83. Criteria for Healthcare.

§91.85. Medical Care.

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 6, 2009.

TRD-200901728

Cheryln K. Townsend
Executive Commissioner
Texas Youth Commission
Earliest possible date of adoption: June 21, 2009
For further information, please call: (512) 424-6014

ADOPTED RULES

Adopted rules include new rules, amendments to existing rules, and repeals of existing rules. A rule adopted by a state agency takes effect 20 days after the date on which it is filed with the Secretary of State unless a later date is required by statute or specified in the rule (Government Code, §2001.036). If a rule is adopted without change to the text of the proposed rule, then the *Texas Register* does not republish the rule text here. If a rule is adopted with change to the text of the proposed rule, then the final rule text is included here. The final rule text will appear in the Texas Administrative Code on the effective date.

TITLE 1. ADMINISTRATION

PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 354. MEDICAID HEALTH SERVICES

SUBCHAPTER A. PURCHASED HEALTH SERVICES

DIVISION 33. TELEMEDICINE SERVICES

The Texas Health and Human Services Commission (HHSC) adopts the repeal of 1 Texas Administrative Code (TAC) §354.1430, concerning Definitions, §354.1432, concerning Benefits and Limitations, and §354.1434, concerning Requirements for Telemedicine Providers, and new §354.1430, concerning Definitions, and §354.1432, concerning Benefits and Limitations. New §354.1430 is adopted with minor changes to the proposed text as published in the January 2, 2009, issue of the *Texas Register* (34 TexReg 9). The changes update incorrect citations. The repeal of §§354.1430, 354.1432, 354.1434 and new §354.1432 are adopted without changes and will not be republished.

Background and Justification

Senate Bill (SB) 24 and SB 760, 80th Legislature, Regular Session, 2007, required HHSC to make policy changes to the Medicaid telemedicine program. SB 24 instructs HHSC to add office visits as an additional telemedicine service for which distant site providers may receive reimbursement. This bill also directs HHSC to either: (1) allocate reimbursement between the distant site provider and the patient site provider; or (2) establish a facility fee that the distant site provider is required to pay the patient site provider. SB 760 changes the Medicaid telemedicine terminology and directs HHSC to encourage all health-care providers and health-care facilities to provide services via telemedicine.

In order to implement SB 24 and SB 760, and further align Texas Medicaid telemedicine policies with Medicare, thereby reducing provider confusion, HHSC proposed the repeal of §§354.1430, 354.1432, and 354.1434, related to Medicaid telemedicine, and their replacement with new §354.1430 and §354.1432. The proposed new rules implement the legislative requirements.

Comments

The 30-day comment period ended February 2, 2009. During this period, HHSC did not receive any comments regarding the proposed repeal and replacement of the rules.

1 TAC §§354.1430, 354.1432, 354.1434

Legal Authority

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

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 6, 2009.

TRD-200901726
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Effective date: May 26, 2009
Proposal publication date: January 2, 2009
For further information, please call: (512) 424-6900

1 TAC §354.1430, §354.1432

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

§354.1430. Definitions.

The following words and terms, when used in this chapter, have the following meanings.

(1) Telemedicine--The practice of health care delivery, by a provider who is located at a site other than the site where the patient is located, for the purposes of evaluation, diagnosis, consultation, or treatment that requires the use of advanced telecommunications technology. Telephone conversations, chart reviews, electronic mail messages, and facsimile transmissions are not considered telemedicine.

(2) Distant site provider--The distant site provider uses telemedicine to provide health care services to the patient. The distant site provider must be a physician who is licensed to practice medicine in Texas under Subtitle B, Title 3, Occupations Code.

(3) Distant site location--The distant site location is where the distant site provider is physically located.

(4) Patient site presenter--The patient site presenter is the individual at the patient site who introduces the patient to the distant site provider for examination, and to whom the distant site provider may delegate tasks and activities in accordance with 22 TAC §174.6 (relating to Delegation to and Supervision of Patient Site Presenters). The patient site presenter must be:

(A) Licensed or certified in this state to perform health care services and must present and/or be delegated tasks and activities only within the scope of the individual's licensure or certification; and/or

(B) A qualified mental health professional (QMHP) as defined in 25 TAC §412.303(48) (relating to Definitions).

(5) Patient site location--The patient site location is where the client is physically located. It is limited to the following locations:

(A) State hospital;

(B) State school;

(C) One of the following locations in a rural or underserved area:

(i) Physician office;

(ii) Hospital;

(iii) Rural health clinic (RHC);

(iv) Federally qualified health center (FQHC);

(v) Intermediate care facility for persons with mental retardation (ICF/MR) that is not a state school;

(vi) Community center as defined in Health and Safety Code §534.001 or outreach site associated with a community center; or

(vii) Local health department established under Health and Safety Code §121.031, or public health district established under Health and Safety Code §121.041.

(6) State hospital--A state hospital is a hospital with an inpatient component and operated by the Department of State Health Services.

(7) State school--Also referred to as a "State MR Facility." A state school or state center with a mental retardation residential component as defined in 40 TAC §2.253(44) (relating to Definitions).

(8) Rural area--A rural area is defined as a county that is not included in a metropolitan statistical area as defined by the U.S. Office of Management and Budget (OMB) according to the most recent United States Census Bureau population estimates.

(9) Underserved area--An underserved area is an area that meets the current definition of a medically underserved area or medically underserved population (MUP) by the U.S. Department of Health and Human Services (DHHS), until DHHS adopts and implements the rule proposed in the *Federal Register* on February 29, 2008, that would revise and consolidate the criteria and processes for designating MUPs and health professional shortage areas. At that time, an underserved area will be defined as an area that meets the DHHS Index of Primary Care Underservice criteria.

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 6, 2009.

TRD-200901727
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Effective date: May 26, 2009
Proposal publication date: January 2, 2009
For further information, please call: (512) 424-6900

♦ ♦ ♦

TITLE 10. COMMUNITY DEVELOPMENT

PART 1. TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

CHAPTER 80. MANUFACTURED HOUSING

The Manufactured Housing Division of the Texas Department of Housing and Community Affairs (Department) adopts 10 TAC Chapter 80, §§80.2, 80.20, 80.22, 80.25, 80.32, and 80.33, without changes to the proposal. The text of the adopted rules will not be republished in the *Texas Register.* The following rules are adopted with non-substantive changes and will be republished: §80.21 and §80.100. The proposed rules were published in the April 3, 2009, issue of the *Texas Register* (34 TexReg 2212).

The adopted rules are necessary to comply with requirements of the Federal Installation Standards that became effective on January 1, 2009.

The rules relating to installation standards are effective sixty (60) days following the date of publication and all other rules are effective thirty (30) days following the date of publication with the *Texas Register* of notice that the rules are adopted.

No requests were received for a public hearing to take comments on the proposed rules.

The Texas Board of Professional Engineers and one retailer submitted comments on the proposed rules.

Set forth below are comments suggesting revisions to specific subsections and the analysis and recommendations of staff.

General Comment: A commenter suggested the Department show the effective date of the forms in the footer of each form.

Department Response: All of the forms currently list the effective date (date the form was last revised) in the right corner of the footer.

§80.21(i)(2)(C) and (D). The Texas Board of Professional Engineers suggested the Department change the term "registered engineer" to "licensed professional engineer."

Department Response: The Department agrees to change the term to "licensed professional engineer."

§80.100(b)(8). A commenter suggested revising the Proper Site Preparation section of the disclosure by having a separate paragraph for new and used homes and to shorten the name of the disclosure form.

Department Response: The Department believes additional revisions are not necessary at this time.

§80.100(b)(10). A commenter suggested revising the Retail Monitoring Checklist to clarify that the Dispute Resolution Form required by 24 CFR §3288.5 is only for new homes.

Department Response: The Department agrees to clarify the form as suggested.

§80.100(b)(46). A commenter does not believe the form is necessary since the language is in the HUD code and thinks it could be reduced to one page.

Department Response: The Department disagrees because the Department created the form to ensure that the HUD language is conveyed to the consumer.

Except as noted below, the rules as proposed on April 3, 2009, are adopted as final rules with the following non-substantive changes.

§80.21(i)(2)(C) and (D). Changed the term "registered engineer" to "licensed professional engineer."

Figure: 10 TAC §80.100(b)(8). Removed "Proposed Form" and the revision marks indicating new text in the proposed form. The content of the form was not changed from the proposed version.

Figure: 10 TAC §80.100(b)(10). Added that the HUD required Dispute Resolution Form and Installation Program Disclosure are only for new homes, added 1201 in the 162 disclosure requirement, and removed deletion of the insulation disclosure requirement and added that the requirement is per the Federal Trade Commission. Also removed "Proposed Form" and the revision marks indicating new and/or deleted text in the proposed form.

Figure: 10 TAC §80.100(b)(12). Removed "Proposed Form" and the revision marks indicating new text in the proposed form. The content of the form was not changed from the proposed version.

Figure: 10 TAC §80.100(b)(16). Removed "Proposed Form" and the revision marks indicating new text in the proposed form. The content of the form was not changed from the proposed version.

Figure: 10 TAC §80.100(b)(17). Added additional information relating to electrical testing and operational testing. Also removed "Proposed Form" and the revision marks indicating new text in the proposed form.

Figure: 10 TAC §80.100(b)(33). Removed "Proposed Form" and the revision marks indicating new text in the proposed form. The content of the form was not changed from the proposed version.

Figure: 10 TAC §80.100(b)(38). Removed "Proposed Form" and the revision marks indicating new and deleted text in the proposed form. The content of the form was not changed from the proposed version.

Figure: 10 TAC §80.100(b)(45). Removed "Proposed Form" and the revision marks indicating new text in the proposed form. The content of the form was not changed from the proposed version.

Figure: 10 TAC §80.100(b)(46). Removed "Proposed Form" from the form. The content of the form was not changed from the proposed version.

The following is a restatement of the rules' factual basis:

Section 80.2(16) is adopted (without changes) to add definition for Frost Line Zone and renumber definitions (17) through (26).

Section 80.20(b) is adopted (without changes) to indicate the section is only relating to used manufactured homes.

Section 80.20(e) is adopted (without changes) to remove subsection.

Section 80.21(a) is adopted (without changes) to add new subsection to reference installation of new homes.

Section 80.21(b) is adopted (without changes) to move previous (a) to (b) and indicate that this section pertains to used homes.

Section 80.21(c) is adopted (without changes) to reletter (b) to (c).

Section 80.21(d) is adopted (without changes) to reletter (c) to (d).

Section 80.21(e) is adopted (without changes) to reletter (d) to (e) and revise section to differentiate site preparation responsibility for new and used homes.

Section 80.21(f) is adopted (without changes) to reletter (e) to (f).

Section 80.21(g) is adopted (without changes) to reletter (f) to (g).

Section 80.21(h) is adopted (without changes) to reletter (g) to (h) and revise section to differentiate drainage responsibility for new and used homes.

Section 80.21(i) is adopted (with changes) relating to Frost Line Zone.

Section 80.22(a) is adopted (without changes) to clarify that this section only pertains to used homes.

Section 80.25(i)(1) is adopted (without changes) to clarify that the last sentence of paragraph only relates to used homes.

Section 80.32(g) is adopted (without changes) to clarify in last sentence of subsection that the installer of a new home is responsible for the required site preparation.

Section 80.33(k)(1) is adopted (without changes) to clarify that the site preparation notice is only for used homes.

Section 80.33(k)(3) is adopted (without changes) to reference §1201.255 of the Standards Act as requirement to promulgate disclosure form.

Section 80.100(a)(12) is adopted (without changes) to revise name of form to clarify it is for used homes.

Section 80.100(a)(33) is adopted (without changes) to revise name of form to clarify it is for used homes.

Section 80.100(a)(45) and (46) is adopted (without changes) to add new form number (45) and (46) to the list of forms.

Figure: 10 TAC §80.100(b)(8) is adopted (with changes) to revise the site preparation section in the Consumer Disclosure Statement.

Figure: 10 TAC §80.100(b)(10) is adopted (with changes) to update the Retail Monitoring Checklist to include additional requirements and remove the Wind Zone Notice and Insulation Disclosure that are no longer required.

Figure: 10 TAC §80.100(b)(12) is adopted (with changes) to update the form to clarify it only pertains to used homes.

Figure: 10 TAC §80.100(b)(16) is adopted (with changes) to clarify installation requirements of new and used homes.

Figure: 10 TAC §80.100(b)(17) is adopted (with changes) to update the Installation Checklist to clarify the reference to the site preparation notice is only for used homes, added information regarding electrical testing and operational testing.

Figure: 10 TAC §80.100(b)(33) is adopted (with changes) to clarify the site preparation notice is only for used homes.

Figure: 10 TAC §80.100(b)(38) is adopted (with changes) to clarify installation requirements of new and used homes.

Figure: 10 TAC §80.100(b)(45) is adopted (with changes) to add new Spanish version of the Consumer Disclosure Statement.

Figure: 10 TAC §80.100(b)(46) is adopted (with changes) to add new HUD required installation program disclosure.

SUBCHAPTER A. CODES, STANDARDS, TERMS, FEES AND ADMINISTRATION

10 TAC §80.2

The amended rule is adopted under the Texas Manufactured Housing Standards Act, Occupations Code, Chapter 1201, §1201.052, which provides the Department with authority to amend, add, and repeal rules governing the Manufactured Housing Division of the Department and under Texas Government Code, Chapter 2306, §2306.6014 and §2306.6020, which authorizes the board to adopt rules as necessary to administer and enforce the manufactured housing program through the Manufactured Housing Division.

No other statute, code, or article is affected by the adoption of the amended rule.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on May 11, 2009.

TRD-200901802
Joe A. Garcia
Executive Director, Manufactured Housing Division
Texas Department of Housing and Community Affairs
Effective date: June 21, 2009
Proposal publication date: April 3, 2009
For further information, please call: (512) 475-2206

SUBCHAPTER B. INSTALLATION STANDARDS AND DEVICE APPROVALS

10 TAC §§80.20 - 80.22, 80.25

The amended rules are adopted under the Texas Manufactured Housing Standards Act, Occupations Code, Chapter 1201, §1201.052, which provides the Department with authority to amend, add, and repeal rules governing the Manufactured Housing Division of the Department and under Texas Government Code, Chapter 2306, §2306.6014 and §2306.6020, which authorizes the board to adopt rules as necessary to administer and enforce the manufactured housing program through the Manufactured Housing Division.

No other statute, code, or article is affected by the adoption of the amended rules.

§80.21. Requirements for the Installation of Manufactured Homes.

(a) All new manufactured homes shall be installed by a licensed installer and in accordance with the home manufacturer's DAPIA-approved installation instructions.

(b) All used manufactured homes shall be installed by a licensed installer to resist overturning and lateral movement of the home, and the installation must be completed in accordance with instructions appropriate for the Wind Zone where the home is to be installed as per one of the following:

(1) the home manufacturer's DAPIA-approved installation instructions;

(2) the state's generic standards set forth in §§80.22, 80.23, 80.24, and 80.25 of this subchapter (relating to Installation Standards and Device Approvals);

(3) the instructions for a stabilization system registered with the Department in accordance with §80.26 of this subchapter (relating to Registration of Stabilizing Components and Systems); or

(4) the instructions for a special stabilization system which:

(A) may or may not be a permanent foundation;

(B) is for a particular manufactured home or an identified class of manufactured homes to be installed at a particular area with similar soil properties according to county soil survey or other geotechnical reports; and

(C) is either:

(i) a pre-existing foundation for which a professional engineer or architect licensed in Texas has issued written approval for the installation of a particular home, and the written approval shall be submitted to the Department with the installation report; or

(ii) installed in accordance with a custom designed stabilization system drawing that is stamped by a Texas licensed professional engineer or architect. A copy of the stabilization system drawing must be forwarded to the Department along with the installation report.

(c) When a home is installed on a stabilization system registered with the Department or a special stabilization system, the installer must follow the home manufacturer's DAPIA-approved installation instructions for any aspect of the installation that is not covered by the system's installation instructions or drawings.

(d) The installer must use stabilizing components that have the required capacity and install them according to the anchor or stabilizing component manufacturer's current installation instructions. All stabilizing components must be resistant to all effects of weathering including that encountered along the Texas gulf coast. Anchors must be made resistant to corrosion. Nonconcrete stabilizing components and systems for use within 1500 feet of the coastline shall be specifically certified for this use. Preservative treated (PT) wood components shall conform to the applicable standards issued by the American Wood Preserver's Association and referenced by the latest edition of the International Residential Code. The use of re-conditioned equipment (i.e. anchor, strap, and clip) or any anchoring component by licensed installer on the new installations is not permitted. Homeowners are exempt from this requirement provided the integrity of the component is acceptable and approved by the state and the original product number, vendor name, and/or patent number must be legible on the product.

(e) Site Preparation Responsibilities and Requirements:

(1) The responsible installer of a new manufactured home is responsible for the proper preparation of the site where the manufactured home will be installed.

(2) A consumer acquiring a used manufactured home to be installed is responsible for the proper preparation of the site where the manufactured home will be installed except as set forth in §80.22 of this chapter (relating to Generic Standards for Moisture and Ground Vapor Controls).

(3) Whenever a licensed retailer intends to sell a used manufactured home, regardless of where it is located or is to be located, the retailer is required to give the consumer the Site Preparation Notice, for signature by the consumer, in the form set forth in Subchapter I of this chapter (relating to Forms) PRIOR to the execution of any binding sales agreement.

(4) Whenever a licensed installer proposes to move a used manufactured home, the installer is required to give the consumer the Site Preparation Notice, for signature by the consumer, in the form set

forth in Subchapter I of this chapter PRIOR to entering into a binding agreement to move that home.

(f) If at the time of installation or within 90 days thereafter as stated on the contract, the retailer or installer provides the materials for skirting or contracts for the installation of skirting, the retailer or installer is responsible for installing any required moisture and ground vapor control measures in accordance with the home installation instructions, specifications of a registered stabilization system, or the generic standards and shall provide for the proper cross ventilation of the crawl space. If the consumer contracts with a person other than the retailer or installer for the skirting, the consumer is responsible for installing the moisture and ground vapor control measures and for providing for the proper cross ventilation of the crawl space.

(g) Clearance: If the manufactured home is installed according to the state's generic standards, a minimum clearance of 18 inches between the ground and the bottom of the floor joists must be maintained. In addition, the installer shall be responsible for installing the home with sufficient clearance between the I-Beams and the ground so that after the crossover duct prescribed by the manufacturer is properly installed it will not be in contact with the ground. Refer to §80.25 of this chapter (relating to Generic Standards for Multi-Section Connections Standards) for additional requirements for utility connections. The Installer must remove all debris, sod, tree stumps and other organic materials from all areas where footings are to be located.

(h) Drainage: The Installer is responsible for proper site drainage where a new manufactured home is to be installed unless the home is installed in a rental community. The consumer is responsible for proper site drainage where a used manufactured home is to be installed unless the home is installed in a rental community. Drainage prevents water build-up under the home. Water build-up may cause shifting or settling of the foundation, dampness in the home, damage to siding and bottom board, buckling of walls and floors, delamination of floor decking and problems with the operation of windows and doors.

(i) Frost Line Zone.

(1) The following Texas counties have a 12 inch frost line depth to consider for the installation of a new manufactured home: Armstrong, Bailey, Briscoe, Carson, Castro, Childress, Cochran, Collingsworth, Cottle, Crosby, Dallam, Deaf Smith, Dickens, Donley, Floyd, Foard, Gray, Hale, Hall, Hansford, Hardeman, Hartley, Hemphill, Hockley, Hutchinson, King, Knox, Lamb, Lipscomb, Lubbock, Moore, Motley, Ochiltree, Oldham, Parmer, Potter, Randall, Roberts, Sherman, Swisher, Wheeler, and Wilbarger.

(2) For a new home to be installed in a Frost Line Zone county, footings placed in freezing climates must be designed using methods and practices that prevent the effects of frost heave by one of the following methods:

(A) Conventional footings. Conventional footings must be placed below the frost line depth for the site unless an insulated foundation or monolithic slab is used (refer to 24 CFR §3285.312(b)(2) and (3)).

(B) This is not subject to the provisions in 24 CFR §3285.2(c) that also require review by the manufacturer and approval by its DAPIA for any variations to the manufacturer's installation instructions for support and anchoring.

(C) Monolithic slab systems. A monolithic slab is permitted above the frost line when all relevant site-specific conditions, including soil characteristics, site preparation, ventilation, and insulative properties of the under floor enclosure, are considered and anchorage requirements are accommodated as set out in 24 CFR §3285.401. The monolithic slab system must be designed by a licensed professional engineer or registered architect:

(i) In accordance with acceptable engineering practice to prevent the effects of frost heave; or

(ii) In accordance with SEI/ASCE 32-01 as defined in 24 CFR §3285.4.

(D) Insulated foundations. An insulated foundation is permitted above the frost line, when all relevant site-specific conditions, including soil characteristics, site preparation, ventilation, and insulative properties of the under floor enclosure, are considered, and the foundation is designed by a licensed professional engineer or registered architect:

(i) In accordance with acceptable engineering practice to prevent the effects of frost heave; or

(ii) In accordance with SEI/ASCE 32-01 as defined in 24 CFR §3285.4.

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 11, 2009.

TRD-200901803
Joe A. Garcia
Executive Director, Manufactured Housing Division
Texas Department of Housing and Community Affairs
Effective date: July 21, 2009
Proposal publication date: April 3, 2009
For further information, please call: (512) 475-2206

SUBCHAPTER C. LICENSEES' RESPONSIBILITIES AND REQUIREMENTS

10 TAC §80.32, §80.33

The amended rules are adopted under the Texas Manufactured Housing Standards Act, Occupations Code, Chapter 1201, §1201.052, which provides the Department with authority to amend, add, and repeal rules governing the Manufactured Housing Division of the Department and under Texas Government Code, Chapter 2306, §2306.6014 and §2306.6020, which authorizes the board to adopt rules as necessary to administer and enforce the manufactured housing program through the Manufactured Housing Division.

No other statute, code, or article is affected by the adoption of the amended rules.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on May 11, 2009.

TRD-200901804
Joe A. Garcia
Executive Director, Manufactured Housing Division
Texas Department of Housing and Community Affairs
Effective date: June 21, 2009
Proposal publication date: April 3, 2009
For further information, please call: (512) 475-2206

♦ ♦ ♦

SUBCHAPTER I. FORMS

10 TAC §80.100

The amended rule is adopted under the Texas Manufactured Housing Standards Act, Occupations Code, Chapter 1201, §1201.052, which provides the Department with authority to amend, add, and repeal rules governing the Manufactured Housing Division of the Department and under Texas Government Code, Chapter 2306, §2306.6014 and §2306.6020, which authorizes the board to adopt rules as necessary to administer and enforce the manufactured housing program through the Manufactured Housing Division.

No other statute, code, or article is affected by the adoption of the amended rule.

§80.100. List of Forms.

(a) The following list is in numerical order with the forms located in subsection (b) of this section.

(1) Application for Manufacturer's License.

(2) Application for Retailer, Broker, Installer and/or Rebuilder's License.

(3) Application for Retailer with Branch Locations License.

(4) Application for Salesperson's License.

(5) Licensing Surety Bond.

(6) Licensing Security Agreement.

(7) Manufacturer's Certificate of Origin (MCO).

(8) Consumer Disclosure Statement.

(9) Warranty and Disclosure for a Used Manufactured Home.

(10) Retail Monitoring Checklist.

(11) Consumer Notice of Licensed and Bonded Location.

(12) Notice and Informed Consent to the Installation of a Used Manufactured Home on an Improperly Prepared Site.

(13) Formaldehyde Notice.

(14) Texas Inventory Finance Security Form.

(15) Broker Disclosure Form.

(16) Notice of Installation (Form T).

(17) Installation Checklist.

(18) Estimate for Reassigned Warranty Work.

(19) Application for Statement of Ownership and Location.

(20) Affidavit of Fact for Real Property.

(21) Affidavit of Fact.

(22) Affidavit of Error.

(23) Affidavit of Fact for Right of Survivorship.

(24) Addendum to Application for SOL.

(25) Release or Foreclosure of Lien (Form B).

(26) Statement of Inheritance (Form C).

(27) Taxing Entity Application for Texas Seal (Form S).

(28) Multiple Application Log (Form M).

(29) Instructions to Third Party Closer.

(30) Notice of Lien for Tax Lien/Release Form.

(31) Notice of Lien to Perfect a Lien (Other than Tax Lien) Form.

(32) Notification of filing status as a Central Tax Collector.

(33) Site Preparation Notice for Used Homes Form.

(34) Sample of Statement of Ownership and Location.

(35) Application for License Renewal (other than a salesperson).

(36) Right of Rescission Waiver Form.

(37) List of Unlicensed Installers Form.

(38) Probationary Notice of Installation (Form T).

(39) Notice of Intent to Acquire Ownership of an Abandoned Home.

(40) Affidavit of Fact for Abandonment.

(41) Disclosure to Consumer (Possible Need to Vacate Home if Financing does not Close).

(42) Application for Salesperson's License Renewal.

(43) Application for License Instruction Provider.

(44) Statement from Tax Assessor-Collector.

(45) Consumer Disclosure Statement (Spanish Version).

(46) HUD Required Installation Program Disclosure to Consumer.

(b) Forms.

(1) Application for Manufacturer's License.
Figure: 10 TAC §80.100(b)(1) (No change.)

(2) Application for Retailer, Broker, Installer and/or Rebuilder's License.
Figure: 10 TAC §80.100(b)(2) (No change.)

(3) Application for Retailer with Branch Locations License.
Figure: 10 TAC §80.100(b)(3) (No change.)

(4) Application for Salesperson's License.
Figure: 10 TAC §80.100(b)(4) (No change.)

(5) Licensing Surety Bond.
Figure: 10 TAC §80.100(b)(5) (No change.)

(6) Licensing Security Agreement.
Figure: 10 TAC §80.100(b)(6) (No change.)

(7) Manufacturer's Certificate of Origin (MCO).
Figure: 10 TAC §80.100(b)(7) (No change.)

(8) Consumer Disclosure Statement.
Figure: 10 TAC §80.100(b)(8)

(9) Warranty and Disclosure for a Used Manufactured Home.
Figure: 10 TAC §80.100(b)(9) (No change.)

(10) Retail Monitoring Checklist.
Figure: 10 TAC §80.100(b)(10)

(11) Consumer Notice of Licensed and Bonded Location.

Figure: 10 TAC §80.100(b)(11) (No change.)

(12) Notice and Informed Consent to the Installation of a Used Manufactured Home on an Improperly Prepared Site.
Figure: 10 TAC §80.100(b)(12)

(13) Formaldehyde Notice.
Figure: 10 TAC §80.100(b)(13) (No change.)

(14) Texas Inventory Finance Security Form.
Figure: 10 TAC §80.100(b)(14) (No change.)

(15) Broker Disclosure Form.
Figure: 10 TAC §80.100(b)(15) (No change.)

(16) Notice of Installation (Form T).
Figure: 10 TAC §80.100(b)(16)

(17) Installation Checklist.
Figure: 10 TAC §80.100(b)(17)

(18) Estimate for Reassigned Warranty Work.
Figure: 10 TAC §80.100(b)(18) (No change.)

(19) Application for Statement of Ownership and Location.
Figure: 10 TAC §80.100(b)(19) (No change.)

(20) Affidavit of Fact for Real Property.
Figure: 10 TAC §80.100(b)(20) (No change.)

(21) Affidavit of Fact.
Figure: 10 TAC §80.100(b)(21) (No change.)

(22) Affidavit of Error.
Figure: 10 TAC §80.100(b)(22) (No change.)

(23) Affidavit of Fact for Right of Survivorship.
Figure: 10 TAC §80.100(b)(23) (No change.)

(24) Addendum to Application for SOL.
Figure: 10 TAC §80.100(b)(24) (No change.)

(25) Release or Foreclosure of Lien (Form B).
Figure: 10 TAC §80.100(b)(25) (No change.)

(26) Statement of Inheritance (Form C).
Figure: 10 TAC §80.100(b)(26) (No change.)

(27) Taxing Entity Application for Texas Seal (Form S).
Figure: 10 TAC §80.100(b)(27) (No change.)

(28) Multiple Application Log (Form M).
Figure: 10 TAC §80.100(b)(28) (No change.)

(29) Instructions to Third Party Closer.
Figure: 10 TAC §80.100(b)(29) (No change.)

(30) Notice of Lien for Tax Lien/Release Form.
Figure: 10 TAC §80.100(b)(30) (No change.)

(31) Notice of Lien to Perfect a Lien (Other than Tax Lien) Form.
Figure: 10 TAC §80.100(b)(31) (No change.)

(32) Notification of filing status as a Central Tax Collector.
Figure: 10 TAC §80.100(b)(32) (No change.)

(33) Site Preparation Notice for Used Homes Form.
Figure: 10 TAC §80.100(b)(33)

(34) Sample of Statement of Ownership and Location.
Figure: 10 TAC §80.100(b)(34) (No change.)

(35) Application for License Renewal (other than a salesperson).
Figure: 10 TAC §80.100(b)(35) (No change.)

(36) Right of Rescission Waiver Form.
Figure: 10 TAC §80.100(b)(36) (No change.)

(37) List of Unlicensed Installers Form.
Figure: 10 TAC §80.100(b)(37) (No change.)

(38) Probationary Notice of Installation (Form T).
Figure: 10 TAC §80.100(b)(38)

(39) Notice of Intent to Acquire Ownership of an Abandoned Home.
Figure: 10 TAC §80.100(b)(39) (No change.)

(40) Affidavit of Fact for Abandonment.
Figure: 10 TAC §80.100(b)(40) (No change.)

(41) Disclosure to Consumer (Possible Need to Vacate Home if Financing does not Close).
Figure: 10 TAC §80.100(b)(41) (No change.)

(42) Application for Salesperson's License Renewal.
Figure: 10 TAC §80.100(b)(42) (No change.)

(43) Application for License Instruction Provider.
Figure: 10 TAC §80.100(b)(43) (No change.)

(44) Statement from Tax Assessor-Collector.
Figure: 10 TAC §80.100(b)(44) (No change.)

(45) Consumer Disclosure Statement (Spanish Version).
Figure: 10 TAC §80.100(b)(45)

(46) HUD Required Installation Program Disclosure to Consumer.
Figure: 10 TAC §80.100(b)(46)

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 11, 2009.

TRD-200901805
Joe A. Garcia
Executive Director, Manufactured Housing Division
Texas Department of Housing and Community Affairs
Effective date: June 21, 2009
Proposal publication date: April 3, 2009
For further information, please call: (512) 475-2206

PART 7. TEXAS RESIDENTIAL CONSTRUCTION COMMISSION

CHAPTER 304. WARRANTIES AND BUILDING AND PERFORMANCE STANDARDS

SUBCHAPTER A. GENERAL PROVISIONS

10 TAC §304.1

To correct a cross reference, the Texas Residential Construction Commission ("commission") adopts amendments to 10 TAC §304.1(c)(9), regarding the term "habitable area." In defining the term "habitable area," §304.1(c)(9) cross references the term "living space," which is found in §300.10(18) rather than in §301.1(14). The commission adopts the amendments to delete the reference to §301.1(14) and to provide the correct citation of §300.10 with minor non-substantive changes to the proposed

text as published in the February 27, 2009, issue of the *Texas Register* (34 TexReg 1333).

The commission received no comments on the proposed amendment.

The amendment is adopted pursuant to Property Code §408.001, which provides general authority for the commission to adopt rules necessary for the implementation of Title 16 of the Property Code; Property Code Chapter 430, which authorizes the commission to adopt rules to implement statutory warranties and building and performance standards; and the Administrative Procedure Act, Texas Government Code, Chapter 2001.

No other statutes, articles, or codes are affected by the adopted rule amendment.

§304.1. General Provisions.

(a) Scope. This chapter describes the minimum standards of performance for the various elements or components of a home as described. Third-party inspectors appointed pursuant to §313.11 of this title will make recommendations for repair or replacement of those elements or components of a home that do not meet these standards during the applicable warranty period based upon the expected level of performance described in these standards for residential construction to which the standards apply. If an element or component of a home is not described particularly in this chapter, the element or component shall be constructed in accordance with any written agreement or, if there is no agreement, in accordance with usual and customary residential construction practices and the element or component shall perform for the purpose for which it is intended for the period of the applicable warranty. All home construction shall comply with applicable Codes.

(b) Effective Date. The provisions of this chapter shall apply to all applicable residential construction projects that must be registered with the commission pursuant to chapter 303, subchapter B, of this title if the construction commences on or after June 1, 2005. Construction commences on the earlier of the date that the parties enter into an agreement for a transaction governed by the Act or the date that work commences.

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

(1) Adverse effect--A tangible condition that substantially impairs the functionality of the habitable areas of the home.

(2) Builder Responsibility--A statement of the corrective action required by the builder to repair the construction defect and any other damage resulting from making the required repair. Parties may agree to an alternative remedy.

(3) Code--The International Residential Code or, if the context requires, the National Electrical Code.

(4) Electrical Standard--a standard contained in the version of the National Electrical Code (NEC), as follows:

(A) for residential construction located in a municipality or the extraterritorial jurisdiction of a municipality, the version of the NEC applicable to electrical aspects of residential construction in the municipality under Local Government Code §214.214 and which is effective on the date of commencement of construction of the home;

(B) for residential construction located in an unincorporated area not in the extraterritorial jurisdiction of a municipality, the version of the NEC applicable to electrical aspects of residential construction in the municipality that is the county seat of the county in which the construction is located and which is effective on the date of commencement of construction of the home; and

(C) for residential construction located in an unincorporated area in a county that does not contain an incorporated area, the version of the NEC that existed on May 1, 2001.

(5) Excessive or excessively--a quantity, amount or degree that exceeds that which is normal, usual or reasonable under the circumstance.

(6) Exclusion--items, conditions or situations not warranted or not covered by a performance standard.

(7) Extreme Weather Condition(s)--weather conditions in excess of or outside of the scope of the design criteria stated or assumed for the circumstance or locale in the Code.

(8) The International Residential Code (IRC)--substantial compliance with the non-electrical standards contained in the version of the *IRC for One- and Two-Family Dwellings* published by the International Code Council (ICC) as follows:

(A) for residential construction located in a municipality or the extraterritorial jurisdiction of a municipality, the version of the IRC applicable to non-electrical aspects of residential construction in the municipality under Local Government Code §214.212 and which is effective on the date of commencement of construction of the home;

(B) for residential construction located in an unincorporated area not in the extraterritorial jurisdiction of a municipality, the version of the IRC applicable to non-electrical aspects of residential construction in the municipality that is the county seat of the county in which the construction is located and which is effective on the date of commencement of construction of the home; and

(C) for residential construction located in an unincorporated area in a county that does not contain an incorporated area, the version of the IRC that existed on May 1, 2001.

(9) Habitable Area--a living space as defined in §300.10 of this title.

(10) Homeowner Responsibility--an action required by the homeowner for proper maintenance or care of the home or the element or component of the home concerned. A homeowner's failure to substantially comply with a stated homeowner responsibility creates an exclusion to the warranty for the performance standard.

(11) Major Structural Components--the load-bearing portions of the following elements of a home:

(A) Footings and Foundations;

(B) Beams;

(C) Headers;

(D) Girders;

(E) Lintels;

(F) Columns (other than a column that is designed to be cosmetic);

(G) Load-Bearing portions of walls and partitions;

(H) Roof framing systems, to include ceiling framing;

(I) Floor systems; and

(J) Masonry Arches.

(12) Manufactured Product--a component of the home that was manufactured away from the site of the home and that was in-

stalled in the home without significant modifications to the product as manufactured. Manufactured products commonly installed in residential construction include but are not limited to dishwashers, cook tops, ovens, refrigerators, trash compactors, microwave ovens, kitchen vent fans, central air conditioning coils and compressors, furnace heat exchangers, water heaters, carpet, windows, doors, light fixtures, fireplace inserts, pipes and electrical wires. For purposes of this chapter, a manufactured product includes any component of a home for which the manufacturer provides a warranty, provided that the manufacturer permits transfer of the warranty to the homeowner.

(13) Original Construction Elevations--actual elevations of the foundation taken prior to substantial completion of the residential construction project. Such actual elevations shall include elevations of porches and garages if those structures are part of a monolithic foundation. To establish original construction elevations, elevations shall be taken at a rate of approximately one elevation per 100 square feet showing a reference point, subject to obstructions. Each elevation shall describe the floor. If no such actual elevations are taken then the foundation for the habitable areas of the home are presumed to be level +/- 0.75 inch (three-quarters of an inch) over the length of the foundation.

(14) Performance Standard(s)--the standard(s) to which a home or an element or component of a home constructed as a part of new home construction or a material improvement or interior renovation must perform.

(15) Span--the distance between two supports.

(16) Substantial Completion--the later of:

(A) the stage of construction when a new home, addition, improvement, or alteration to an existing home is sufficiently complete that the home, addition, improvement or alteration can be occupied or used for its intended purpose; or

(B) if required, the issuance of a final certificate of inspection or occupancy by the applicable governmental authority.

(d) Resolving conflicts among standards. When an inconsistency exists between the Code, manufacturer's instructions and specifications, the standard required by the United States Department of Housing and Urban Development for Federal Housing Administration or Veterans Administration programs, ANSI/ASHRAE Standard (62.2-2003) or the commission-adopted performance standards, the most restrictive requirement shall apply.

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 11, 2009.

TRD-200901871
Susan K. Durso
General Counsel
Texas Residential Construction Commission
Effective date: May 31, 2009
Proposal publication date: February 27, 2009
For further information, please call: (512) 463-3926

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

10 TAC §313.20

The Texas Residential Construction Commission ("commission") adopts amendments to Texas Administrative Code, Title 10, Part 7, §313.20, related to the appeal of the State-Sponsored Inspection and Dispute Resolution Process (SIRP). The commission adopts the amendments without changes to the proposed text as published in the March 6, 2009, issue of the *Texas Register* (34 TexReg 1511). The commission received no comments on the published text.

The amendments are needed to correct errors in the text published for adoption in the December 26, 2008, issue of the *Texas Register.*

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

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

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

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

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

The adopted amendments to 10 TAC §313.20(d) track the language adopted by the commission in its order published in the December 26, 2008, issue of the *Texas Register.* In the pream-

ble of the order the commission stated its intent to adopt 10 TAC §313.20(d), as follows:

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

The commission adopts the amendments under Property Code §408.001, which provides general authority for the commission to adopt rules necessary for the implementation of Title 16, Property Code. The commission adopts the rule amendments to implement Subtitle D, Title 16 of the Property Code, specifically chapter 429 which describes the appeal of the third-party inspector's report described in chapter 428.

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

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

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 11, 2009.

TRD-200901870
Susan K. Durso
General Counsel
Texas Residential Construction Commission
Effective date: May 31, 2009
Proposal publication date: March 6, 2009
For further information, please call: (512) 463-3926

♦ ♦ ♦

TITLE 16. ECONOMIC REGULATION

PART 3. TEXAS ALCOHOLIC BEVERAGE COMMISSION

CHAPTER 34. SCHEDULE OF SANCTIONS AND PENALTIES

16 TAC §34.1

The Texas Alcoholic Beverage Commission (commission) adopts an amendment to §34.1, relating to the general provisions of the commission's schedule of sanctions and penalties rule, without changes to the proposed text as published in the February 6, 2009, issue of the *Texas Register* (34 TexReg 783).

The adopted amendment to §34.1(j) deletes "section" from the sentence and replaces it with "chapter". The provisions of Chapter 34, by its terms, apply only to settlements entered into by "agents, compliance officers or other specifically designated commission personnel." The use of the term "section" in subsection (j) has been erroneously interpreted to limit the exclusion of contested cases, complaints, or violations referred to the legal division to §34.1 of the chapter. The adopted change clarifies that the exclusion of cases referred to the legal division applies to the entire chapter, not just the general provisions section.

No comments were received as a result of the publication of the proposed amendment.

The adopted amendment to §34.1 is authorized by §5.362 of the Texas Alcoholic Beverage Code (code), which provides the commission with authority to adopt by rule the schedule of sanctions and penalties, and by §5.31 of the code, which provides the commission with authority to prescribe and publish rules necessary to carry out the provisions of the code.

Cross Reference: Sections 5.31 and 5.362, of the Alcoholic Beverage Code and Chapter 34 of the commission rules are affected by the adopted 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 May 5, 2009.

TRD-200901700
Alan Steen
Administrator
Texas Alcoholic Beverage Commission
Effective date: May 25, 2009
Proposal publication date: February 6, 2009
For further information, please call: (512) 206-3204

♦ ♦ ♦

TITLE 22. EXAMINING BOARDS

PART 8. TEXAS APPRAISER LICENSING AND CERTIFICATION BOARD

CHAPTER 153. RULES RELATING TO PROVISIONS OF THE TEXAS APPRAISER LICENSING AND CERTIFICATION ACT

22 TAC §153.5

The Texas Appraiser Licensing and Certification Board (TALCB or Board) adopts an amendment to §153.5 regarding Fees without changes to the proposed text as published in the March 13, 2009, issue of the *Texas Register* (34 TexReg 1778), which will not be republished.

The amendment waives licensing and certification fees for employees of the TALCB who only use the license or certification for Board appraisal work.

The reasoned justification for the rule as adopted is enhanced ability to fulfill the Board's mission due to availability of additional funds without additional cost to the public.

No comments were received regarding the amendments as proposed.

The amendment is adopted under the Texas Occupations Code, §1103.156, Fees.

The statute affected by this adoption is Texas Occupations Code, Chapter 1103. No other statute, code, or article is affected by the adoption.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on May 11, 2009.

TRD-200901810
Devon V. Bijansky
Counsel
Texas Appraiser Licensing and Certification Board
Effective date: May 31, 2009
Proposal publication date: March 13, 2009
For further information, please call: (512) 465-3900

22 TAC §153.20

The Texas Appraiser Licensing and Certification Board (TALCB or Board) adopts amendments to §153.20 regarding revocation, suspension, or denial of license or certification without changes to the proposed text as published in the March 13, 2009, issue of the *Texas Register* (34 TexReg 1778), which will not be republished.

The amendments clarify that a person seeking reinstatement of a license or certification must meet all requirements that would apply if the person's license or certification was expired. The amendments also allow the Board to pursue credit card charge backs and other reversed payments in the same manner as bad checks.

The reasoned justification for the amendments is increased clarity regarding the requirements for reinstatement of a license or certification, as well as equal application of policies regarding reversed payments to the Board.

No comments were received regarding the amendments as proposed.

The amendments are adopted under Texas Occupations Code, Chapter 1103, Subchapter D, Board Powers and Duties.

The statute affected by this adoption is Texas Occupations Code, Chapter 1103. No other statute, code, or article is affected by the adoption.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on May 11, 2009.

TRD-200901811
Devon V. Bijansky
Counsel
Texas Appraiser Licensing and Certification Board
Effective date: May 31, 2009
Proposal publication date: March 13, 2009
For further information, please call: (512) 465-3900

PART 39. TEXAS BOARD OF PROFESSIONAL GEOSCIENTISTS

CHAPTER 851. TEXAS BOARD OF PROFESSIONAL GEOSCIENTISTS LICENSING RULES

SUBCHAPTER A. LICENSING

22 TAC §851.30

The Texas Board of Professional Geoscientists (TBPG or Board) adopts an amendment to 22 TAC §851.30, regarding firm registration. It is adopted without changes to the proposed text as published in the February 6, 2009, issue of the *Texas Register* (34 TexReg 785).

The adopted amendment clarifies procedures for renewing an expired firm registration. Firms that have expired registrations may renew by submitting a completed firm renewal statement with the applicable fees.

No comments from the public were received.

This amendment is adopted under the Texas Occupations Code §1002.151, which authorizes the Board to adopt and enforce rules consistent with the Texas Geoscience Practice Act and necessary for the performance of its duties, and §1002.351, which authorizes the Board to regulate the public practice of geoscience by firms and corporations.

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.

TRD-200901688
Charles Horton
Interim Executive Director
Texas Board of Professional Geoscientists
Effective date: May 24, 2009
Proposal publication date: February 6, 2009
For further information, please call: (512) 936-4405

TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 3. TAX ADMINISTRATION

SUBCHAPTER X. PARI-MUTUEL WAGERING RACING REVENUE

34 TAC §3.641

The Comptroller of Public Accounts adopts amendments to §3.641, concerning pari-mutuel wagering, without changes to the proposed text as published in the March 27, 2009, issue of the *Texas Register* (34 TexReg 2096). The adopted amendment allows the association to file the pari-mutuel wagering forms and reports to the comptroller by electronic transmission. Subsection (b)(4), (6), and (7) are amended accordingly. Also, subsection (e)(4) is being amended for consistency in referencing statute.

No comments were received regarding adoption of the amendment.

This amendment is adopted under Tax Code, §111.002 and §111.0022, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2, and taxes, fees, or other charges which the comptroller administers under other law.

The adoption implements Texas Racing Act, Texas Civil Statutes, Title 6, Article 179e, §4.03.

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 5, 2009.

TRD-200901701
Martin Cherry
General Counsel
Comptroller of Public Accounts
Effective date: May 25, 2009
Proposal publication date: March 27, 2009
For further information, please call: (512) 475-0387

TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 3. TEXAS YOUTH COMMISSION

CHAPTER 105. JUVENILE CORRECTIONAL OFFICERS

37 TAC §105.5

The Texas Youth Commission adopts new §105.5, concerning Juvenile Correctional Officer Staffing Requirements, with changes to the proposed text as published in the November 28, 2008, issue of the *Texas Register* (33 TexReg 9657). Changes to the proposed text consist of adding subsection (d)(2), which clarifies that continuity in providing specialized treatment will be considered when scheduling the rotation of juvenile correctional officers (JCOs).

The justification for the new rule is the protection of youth through enhanced supervision procedures, as well as compliance with legislative mandates.

The new rule will establish certain requirements that must be met when JCOs are scheduled for work assignments. Specifically, the rule requires the rotation of JCO work assignments at least twice per year, as well as a three-year age differential between JCOs and the youth they supervise. The new rule also specifies that staffing plans will provide for at least one JCO for every 12 youth. Finally, the new rule requires the placement of a JCO near any room or location where education services are being provided.

No comments were received regarding adoption of the new rule.

The new rule is adopted under the Human Resources Code, §61.0356, which requires the commission to: (1) ensure, to the extent practicable, that an officer or employee is not supervising a child who is not more than three years younger than the officer or employee; (2) rotate the assignment of each JCO at an interval determined by the commission so that a JCO is not assigned to the same station for an extended period of time; (3) ensure at least one JCO is assigned to supervise in or near a classroom or other location in which children receive education services or training; and (4) maintain a ratio of not less than one JCO performing direct supervisory duties for every 12 persons committed to the facility.

§105.5. JCO Staffing Requirements.

(a) Purpose. This rule establishes requirements for scheduling station assignments for Juvenile Correctional Officers (JCOs) employed by the Texas Youth Commission (TYC).

(b) Applicability. This rule applies to high restriction facilities operated by TYC.

(c) Definitions.

(1) Extended Period of Time--more than 12 months.

(2) Station--any JCO duty assignment at a facility.

(3) Regular Interval--six months, or other interval less than an extended period of time if approved by the regional director.

(d) General Provisions.

(1) JCOs will rotate station assignments at regular intervals so that a JCO is not assigned to the custodial supervision of the same youth for an extended period of time.

(2) The rotation of staff will be scheduled to ensure continuity in the delivery of specialized treatment programs.

(3) A wing or pod of a dormitory may be considered a station if the population of that wing or pod does not routinely interact with the population of the other wings or pods during activities occurring at the dormitory.

(4) JCOs will be assigned to dormitory stations in a manner that provides for at least a 3-year age differential between the staff and the youth they supervise. When it is not practical to meet the 3-year age differential for an individual JCO station assignment, justification for the assignment must be documented and approved in accordance with agency policy and procedures.

(5) Except as approved by the regional director, a JCO shall not return to a previously assigned station until he/she has served at least one regular interval at another station.

(6) JCO staffing plans will provide for at least one JCO to be stationed to supervise in or near any classroom or other location in which youth receive education services or training at the time the youth are receiving the education services or training.

(7) JCO staffing plans for each facility will provide for a ratio of at least one JCO performing direct supervisory duties for every 12 youth committed to the facility.

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 5, 2009.

TRD-200901702
Cheryln K. Townsend
Executive Commissioner
Texas Youth Commission
Effective date: June 1, 2009
Proposal publication date: November 28, 2008
For further information, please call: (512) 424-6014

TABLES & GRAPHICS

Graphic images included in rules are published separately in this tables and graphics section. Graphic images are arranged in this section in the following order: Title Number, Part Number, Chapter Number and Section Number.

Graphic images are indicated in the text of the emergency, proposed, and adopted rules by the following tag: the word "Figure" followed by the TAC citation, rule number, and the appropriate subsection, paragraph, subparagraph, and so on.

Figure: 1 TAC §358.371

Type of Resource	**Section(s) in 20 CFR:**
Assistance received due to a major disaster	416.1237
Certain housing assistance	416.1238
Crime-related compensation	416.1229
Earned income tax credit	416.1235
Funds in a dedicated account in a financial institution established and maintained in accordance with 20 CFR §416.640(e)	416.1247
Funds set aside for burial expenses for an applicant or recipient and the applicant's or recipient's spouse	416.1231(b)
Gifts from a nonprofit organization to a child with life-threatening conditions	416.1248
Grants, scholarships, fellowships, and gifts	416.1250
Household goods and personal effects	416.1216
Indian lands	416.1234
Life insurance	416.1230
Liquid resources	416.1201(b)
Property essential to self-support	416.1220, 416.1222, 416.1224
Payments or benefits provided under a federal statute, other than Title XVI of the Social Security Act, if required by federal statute	416.1210(j) 416.1236
Relocation assistance from a state or local government	416.1239
Replacement value of lost, damaged, or stolen excluded resources	416.1232
Resources in an approved plan to achieve self-support (PASS) for a person who is blind or disabled	416.1225 - 416.1227
Restitution for misuse of benefits for Title II, Title VIII, or Title XVI benefits by a representative payee	416.1249
Title II or Title XVI retroactive payments	416.1233

Figure: 1 TAC §358.391

Type of Income	Section(s) in 20 CFR:
Assistance received due to a major disaster; repair or replacement of lost, damaged, or stolen resources due to a disaster	416.1150 416.1151
Earned income	416.1110 - 416.1112
Support and maintenance assistance, including home energy assistance	416.1157
Income used to fulfill a plan to achieve self-support (PASS) for a person who is blind or disabled	416.1180 - 416.1182
In-kind support and maintenance	416.1130 - 416.1148
Unearned income	416.1120 - 416.1124

Figure: 1 TAC §372.153

Type of household:	Section(s) in 7 CFR:
Households with boarders	273.11(b)
Households with persons disqualified from receiving SNAP benefits	273.11(c)
Migrant and seasonal farm workers	273.10(e)(3)
People in group living arrangements	273.11(f)
Residents of shelters for battered women	273.11(g)
Students	273.5
Households with people on strike	273.1(e)
People receiving TANF or SSI benefits	273.2(j)(2)
People who are homeless	273.11(h) 278.1(i)
People who are elderly or disabled	273.1(b)(2) 273.1(b)(7)(vi) 273.9(a) 273.9(d)(3) 273.9(d)(6)(ii)
Residents of alcoholic and narcotic treatment centers	273.11(e)

Figure: 1 TAC §372.408(a)(2)

NUMBER IN CERTIFIED GROUP	NO CARETAKER IN CERTIFIED GROUP		CARETAKER IN CERTIFIED GROUP		CARETAKER AND SECOND PARENT	
	Budgetary Needs	**Recognizable Needs**	**Budgetary Needs**	**Recognizable Needs**	**Budgetary Needs**	**Recognizable Needs**
1	256	64	313	78*	---	---
2	369	92	650	163	498	125*
3	518	130	751	188	824	206
4	617	154	903	226	925	231
5	793	198	1003	251	1073	268
6	856	214	1153	288	1176	294
7	1068	267	1252	313	1319	330
8	1173	293	1425	356	1422	356
9	1346	337	1528	382	1595	399
10	1450	363	1701	425	1698	425
11	1623	406	1804	451	1871	468
12	1726	432	1977	494	1975	494
13	1899	475	2080	520	2147	537
14	2003	501	2253	563	2251	563
15	2174	544	2356	589	2423	606
Per each additional member	173	43	173	43	173	43
*Caretaker only in certified group - a child as described in §372.102(b)(1)(B) or (C) of this subchapter (relating to Caretaker)						

Figure: 1 TAC §372.1513

TANF

Last Digit of Case Number	Benefit Issuance Day
0, 1, 2, 3	1
4, 5, 6	2
7, 8, 9	3

SNAP Benefits

Last Digit of Case Number	Benefit Issuance Day
0	1
1	3
2	5
3	6
4	7
5	9
6	11
7	12
8	13
9	15

Figure: 10 TAC §80.100(b)(8)

Texas Department of Housing and Community Affairs
MANUFACTURED HOUSING DIVISION
P. O. BOX 12489 Austin, Texas 78711-2489
(800) 500-7074, (512) 475-2200 FAX (512) 475-1109
Internet Address: www.tdhca.state.tx.us/mh/index.htm

MAKING AN INFORMED DECISION ABOUT BUYING A MANUFACTURED HOME

IF YOU HAVE QUESTIONS CALL 1-800-500-7074

WWW.TDHCA.STATE.TX.US/MH

Ownership of ANY home brings many responsibilities. Buying a manufactured home involves many important and unique considerations. This disclosure is to assist you in recognizing and understanding many of those factors. Please read it carefully.

CHOOSING A MANUFACTURED HOME AS YOUR HOME: Manufactured homes come in a variety of sizes, styles, design features, amenities, and price ranges. All manufactured homes are built to federal standards established by the federal Department of Housing and Urban Development (HUD). Also, the federal government and the state of Texas requires manufacturers, retailers and installers to give certain warranties on manufactured homes. The type of warranties you receive will depend on whether you are purchasing a new or used manufactured home. You have the right to see the manufacturer's warranty and the retailer's warranty before entering into a binding agreement to purchase a manufactured home.

_____
initials

CHOOSING A MANUFACTURED HOME RETAILER: The State of Texas licenses and oversees manufacturers, retailers, brokers, salespersons, rebuilders, and installers of manufactured homes. The agency responsible for this licensing and oversight is the Texas Department of Housing and Community Affairs, Manufactured Housing Division (the "Department"). Your properly licensed manufactured home retailer should display, or be willing to show you, its license in its sales office. **Dealing with licensed parties can provide important consumer protections.**

_____
initials

DEPOSITS: You may be required by a manufactured home retailer to place a deposit on a home, regardless of whether the home is on the retailer's sales lot, is being sold at another location, or will be ordered from a factory. The amount of the deposit is determined between you and your retailer. The deposit becomes a down payment upon execution of a binding written purchase agreement. You have the right to demand a refund of the deposit or down payment, and receive that refund within 15 days thereafter, if you timely and properly rescind the purchase agreement.

______
initials

FINANCING OPTIONS: A manufactured home in Texas has tremendous flexibility when it comes to financing because it can be financed as personal property (typically a consumer loan secured by the home only) or, if you own the land the home is on (or have a qualifying long term lease on the land) as real property (typically a mortgage loan secured by the home and the land). You should talk to possible lenders about the terms they can offer. If you think one lender is offering too high a rate, talk to another lender.

Consumer lenders must generally be registered with the Office of the Consumer Credit Commissioner. Mortgage loans are usually originated by mortgage brokers (licensed with the Savings and Mortgage Lending Department), mortgage bankers (registered with the Savings and Mortgage Lending Department), or financial institutions (regulated by state and/or federal regulators, depending on the type of financial institution).

WHEN YOU MAKE A DECISION ABOUT BUYING A MANUFACTURED HOME, PLAN FOR FLEXIBILITY AND CHANGE.

YOUR LOAN WILL BE A **MAJOR** FACTOR IN DETERMINING YOUR PAYMENTS, BUT THERE ARE OTHER IMPORTANT FACTORS YOU SHOULD ALSO THINK ABOUT, SUCH AS:

- Adjustable rate loans – If rates go up, your loan payments will go up.
- Property taxes – Changes in property valuation and changes in tax rate can result in changes in your payments.
- Insurance – If premiums increase, your payments will go up.
- Lot rent – If you are renting the lot your home is on, your rent may be subject to increase.

______
initials

LOCAL RESTRICTIONS AND REQUIREMENTS (ZONING): Depending on where a home is to be located it may be subject to special local requirements, including zoning and deed restrictions. These local requirements may affect where the home can be placed and may also involve other related requirements (and expenses) such as size requirements, construction requirements. Contact the local municipality, county, and subdivision manager to find out what, if any, requirements of this sort may apply to any site where you are going to place a manufactured home.

______
initials

Form: Consumer Disclosure Statement *Form Page 2 of 6*

SITE PREPARATION: The installer is responsible for proper preparation of the site where a new manufactured home is to be installed. A consumer is responsible for proper preparation of the site where a used manufactured home is to be installed. If you do not think you can prepare your site properly, consider hiring someone else with the right experience and equipment to do it for you. Proper site preparation includes a site for placement of the home that has good drainage so that water will not collect or run under or around the home; and firm compacted soil with no stumps, debris, or other matter. The site that is selected and prepared also needs to meet any setback or other placement requirements and have access to any required water, septic system, and utilities.

PROPER SITE PREPARATION IS ESSENTIAL!

______
initials

INSTALLATION: If you are purchasing a NEW manufactured home. Installation must be included. If you are purchasing a USED manufactured home, installation may or may not be included. If installation is not included and you arrange for it yourself, remember, ONLY A LICENSED INSTALLER may install a manufactured home. The installer who actually installs the home must also provide a warranty.

PROPER INSTALLATION BY A LICENSED INSTALLER IS REQUIRED BY LAW IN ORDER FOR A HOME TO BE OCCUPIED.

If you are buying a home that has already been installed, you should ask the selling retailer if they will check the leveling, check for the presence (if required) and condition of any vapor retarder, check anything else regarding the foundation/stabilization system, or provide any other installation-related services.

If you acquire a used manufactured home that is already installed in a Wind Zone II county but the home is a Wind Zone I home, which means that home was not designed or constructed to withstand a hurricane force wind occurring in a Wind Zone II or III area, the home cannot be installed in a Wind Zone II area unless it was constructed before September 1, 1997.

______
initials

UPKEEP AND MAINTENANCE: ANY home requires regular upkeep and maintenance – things like periodic checking of and repairs to the roof, keeping vents and filters clear, maintaining septic systems and wells in safe and sanitary working order, caulking to prevent leaks, and periodic painting. Also, depending on the foundation system you choose, a manufactured home may require periodic checking to be sure that it is still level and that the anchors and straps are secure.

______
initials

FOUNDATION MAINTENANCE: You must accept all responsibility for maintenance of the site upon closing. These responsibilities include: maintaining good drainage around the home, preventing soil erosion, periodic inspections of foundation supports and anchorage, and any leveling or adjustment that may be required unless contractually agreed otherwise. Homes located in areas that have soils with high clay content that expands and contracts must maintain consistent moisture levels. This may include watering around the foundation during dry summer months and managing the size and proximity of the vegetation near the foundation.

______
initials

LOT RENT: If you rent the lot your home is on, in addition to the possibility of rent increases, it is possible that the property owner could decide to change the use of the land and not renew your lease. Although you would be given advance notice, this would mean that you would have to move your home and have it installed somewhere else.

______
initials

WATER AND UTILITIES: Be sure that your lot has access to water. If you must drill a well, consider contacting several drillers for bids. If water is available through a municipality, utility district, water district, or cooperative, you should inquire about the rates you will have to pay and the costs necessary to join the water system. Be sure that any utilities you will need are available at your site and, if they are not, find out what will be involved in getting them delivered and connected.

______
initials

SEWER CONNECTIONS OR SEPTIC SYSTEMS: If your lot is not serviced by a municipal sewer system or utility district, you will have to install an on-site sewer facility (commonly known as a septic system). There are a number of concerns or restrictions that will determine if your lot is adequate to support a septic system. Check with the local county or a licensed private installer to determine the requirements that apply to your lot and the cost to install such a system.

______
initials

HOMEOWNERS ASSOCIATIONS AND FEES: Many subdivisions' have mandatory assessments and fees that lot owners must pay. Check with the manager of the subdivision in which your lot is located to determine if any fees apply to your lot.

______
initials

PROPERTY TAXES: Manufactured homes are appraised and subject to property taxes. Depending on the type of loan you have, your lender may escrow for these taxes, and this will increase your monthly payments. Whether you select personal property or real property status for your home may impact any homestead exemption that you may obtain to reduce your tax liability. Talk with the county tax office if you have any questions. Failing to pay your taxes or make arrangements with the tax assessor-collector may place you at risk of having tax liens recorded on your home and, possibly, having the home foreclosed for non-payment of taxes. If you do not have a lender that escrows for the taxes, the tax assessor-collector will work out an escrow arrangement with you if requested.

______
initials

INSURANCE: Your lender will almost certainly require you to obtain insurance. You should request quotes from the agent of your choice to obtain the insurance. Even if you do not have a lender, it is a good idea to obtain insurance to protect your home and yourself.

______
initials

THE TEXAS MANUFACTURED HOMEOWNERS' RECOVERY TRUST FUND (the "FUND"): The Fund is established by law to protect consumers who incur certain actual damages arising from specified violations of law involving acts or omissions of licensees. To learn more about the Fund you can check the Department's website at: www.tdhca.state.tx.us/mh or call the Department for a printed description of the Fund and how it works. Claims on the Fund must be verified and must be made within two years from the date of the act or omission or when it was discovered or reasonably should have been discovered.

______
initials

RIGHT OF RESCISSION: Once you enter into a contract with a selling retailer to acquire a manufactured home, you have a right to rescind the contract. You may, not later than the third day after the applicable contract is signed, rescind the contract without penalty or charge. The right to rescind may be modified or waived only if you have a *bona fide* emergency. The Department has rules about the detailed requirements for waivers and modifications. If you grant someone other than the retailer a lien on the home you are buying, the right of rescission automatically goes away when the lien is recorded with the TDHCA.

______
initials

This **Six Page Disclosure** was provided to me/us by the retailer and/or lender shown below on this date. It was provided to me/us before I/we completed a credit application (if a financed transaction), or before I/we signed a contract to purchase, exchange, or lease-purchase a manufactured home.

______________________ DATE

______________________ RETAILER or LENDER

______________________ LICENSE NUMBER (if a retailer)

______________________ CUSTOMER signature

______________________ CUSTOMER signature

______________________ CUSTOMER printed name

______________________ CUSTOMER printed name

Date:______________________

Date:______________________

Form: Consumer Disclosure Statement *Form Page 6 of 6*

Figure: 10 TAC §80.100(b)(10)

Texas Department of Housing and Community Affairs
MANUFACTURED HOUSING DIVISION
P. O. BOX 12489 Austin, Texas 78711-2489
(800) 500-7074, (512) 475-2200 FAX (512) 475-1109
Internet Address: www.tdhca.state.tx.us/mh/index.htm

RETAIL MONITORING CHECKLIST

In accordance with Tex. Occ. Code Chapter 1201 (the "Standards Act") and Title 10 Texas Administrative Code, Subchapter C. of Chapter 80, for each manufactured home that is sold or transferred to one or more consumers by sale, exchange, or lease purchase, the retailer must maintain a file with this checklist on top and, as applicable, each of the following documents, executed and dated:

- ☐ All the loan documents were given at least 24 hours prior to execution of the loan documents. If the consumer(s) waived or modified the right to these advance copies, a copy of their written waiver.
- ☐ The disclosure required by Section 1201.162 of the Standards Act.
- ☐ Dispute Resolution Disclosure required by 24 CFR Sec. 3288.5 of the Manufactured Home Procedural and Enforcement Regulations (new home only).
- ☐ Installation Program Disclosure required by 24 CFR Sec. 3286.7 of the Manufactured Home Program (new home only).
- ☐ Disclosure to Consumer of Possible Need to Vacate Home if Financing does not close.
- ☐ The Texas Retail Installment Contract and Security Agreement or other applicable sale agreement (not required for real estate transactions where the home being sold has ALREADY been converted to real property) and, if applicable, any financing agreement if financing was provided or arranged by the retailer.
- ☐ If the retailer was responsible for any disclosures under the Federal Truth in Lending Act, Federal Reserve Regulation Z, the Real Estate Settlement Procedures Act, or HUD Regulation X, copies of such disclosures.
- ☐ Broker Disclosure Statement.
- ☐ Cash Receipts to Support Down Payment.
- ☐ A complete list of all alterations with DAPIA Approval on file (if any).
- ☐ Notice of Air Conditioning Installation.
- ☐ The Formaldehyde Notice (Health Notice).
- ☐ For Used Homes Only -- Warranty and Disclosure for a Used Manufactured Home.
- ☐ The Notice of Installation (Form T) (required on all new homes and, on used homes, if installation is provided).
- ☐ The Manufacturer's New Home Warranty was delivered to the Consumer (New Home Only).

Form: Retail Monitoring Checklist *Form Page 1 of 2*

- [ ] Documentation that any required Installation Warranty was delivered to the Consumer (New and Used Homes) and a copy of the warranty.
- [ ] The date that the Manufactured Home information card was mailed to the Manufacturer (New Home Only).
- [ ] For Used Homes Only - Notice and Informed Consent to Installation on an Improperly Prepared Site.
- [ ] Copies of the Application for Statement of Ownership and Location.
- [ ] Insulation Disclosure (for new home only) per the Federal Trade Commission, 16 CFR Sec. 460.16.
- [ ] For Used Homes Only - Site Preparation Notice.
- [ ] 3rd Party Instruction letter (if applicable).
- [ ] Information concerning inventory payoff (if applicable).
- [ ] Right of Rescission Waiver (if applicable).
- [ ] List of Unlicensed Installers Form (if applicable).

Form: Retail Monitoring Checklist *Form Page 2 of 2*

Figure: 10 TAC §80.100(b)(12)

Texas Department of Housing and Community Affairs
MANUFACTURED HOUSING DIVISION
P. O. BOX 12489 Austin, Texas 78711-2489
(800) 500-7074, (512) 475-2200 FAX (512) 475-1109
Internet Address: www.tdhca.state.tx.us/mh/index.htm

NOTICE AND INFORMED CONSENT TO THE INSTALLATION OF A USED MANUFACTURED HOME ON AN IMPROPERLY PREPARED SITE

Consumer: ____

RE: Site Location

Before installing your used manufactured home on your site as requested, a visual inspection of the site was performed, and the following problems (as checked) were observed:

[ ] The site has evidence of ponding

Ponding is where water collects and does not drain properly. It can cause a variety of problems including, but not limited to, reducing the load bearing capacity of soil and allowing piers or other parts of the foundations system to sink; reducing the ability of anchors to hold the home firmly; and causing moisture build up under the home and possibly in the home.

[ ] The site has evidence of runoff under heavy rains

Runoff is where the slope of the home site and/or the land around the home site have slope and/or other conditions, such as gullies and ditches, in which rains trigger rapid build up of quickly flowing streams. Such rapidly flowing water may erode and/or damage the stabilization system for your home and possibly cause other damage.

[ ] The site has evidence of bare uncompacted soil

Bare uncompacted soil is subject to compression and rapid settlement when anything heavy, such as a manufactured home is placed on it. Because a manufactured home must be installed in accordance with the applicable instructions, a site with bare uncompacted soil may require a greater number of piers than was originally planned. It may also necessitate the use of other anchoring devices than were originally planned. These things may increase the cost of your installation. Even with such additional measures, bare uncompacted soil may lead to rapid settlement and other problems with your home.

If you elect to proceed with the installation of your home on this site without correcting these conditions, **you accept these risks** by signing this waiver notifying you of problems with the site location.

Executed this______ day of __________________,________.

______________________________	______________________________
Signature	**Signature**
______________________________	______________________________
Name(print or type)	**Name(print or type)**

Form: Important Notice and Consent Form *Form Page 1 of 1*

Figure: 10 TAC §80.100(b)(16)

Texas Department of Housing and Community Affairs
MANUFACTURED HOUSING DIVISION
P. O. BOX 12489 Austin, Texas 78711-2489
(800) 500-7074, (512) 475-2200 FAX (512) 475-3506
Internet Address: www.tdhca.state.tx.us/mh/index.htm

NOTICE OF INSTALLATION (FORM T)

HUD Label or Texas Seal # (s): ______________________ ***Serial # (s):*** ____________________

Manufacturer Name: __________________________________ ***License No.*** ______________

Home Size - Width / Length: _____ X _____ *Weight* _______ *Date of Manufacture:* ____/____/_____ *Model / Name:* ______________

Draw A Map To Provide Directions To Home On Page 2

Consumer: ____________________________ Phone Numbers: Home: (___) __________ Work: (___) __________

Mailing Address: ______________________________________ City ________________ ZIP: ___________

Site Address: ______________________________________ City ________________ ZIP: ___________

County Where Home is Installed: ______________________________________

Actual Installation Date: ____/____/_____ Wind Zone on Data Plate: I (__) II (__) III (__)

Is the home installed in a Humid & Fringe Climate Yes (__) No (__) Was the home labeled for alternate construction. Yes (__) No (__)

	Name	Address	License #	Expiration Date	Phone #
Retailer					
Installer					

Is home installed in Frost Line Zone? (__) Yes (__) No Does retailer or installer provide skirting? Yes (__) No (__)

Is installation part of sales contract of used home? Yes (__) No (__) Not Applicable (__)

(__) New Home - The home has been installed in accordance with:

(__) 1. Manufacturer's Home Installation Instructions (provide page number or option ____________________).

(__) 2. A Special Foundation System ***(attach a copy of the drawing for this system and provide a reference, if applicable, to any drawing previously submitted).***

(__) Used Home:

(__) 1. Manufacturer's Home Installation Instructions (provide page number or option ____________________).

(__) 2. State Generic Standards - Title 10 Texas Administrative Code (10 TAC) §§80.22, 80.23, 80.24, and 80.25.

(__) 3. A stabilization system registered with the Department in accordance with 10 TAC §80.26 - ***provide name of system or reference to MHD Approval Letter or registration____________________.***

(__) 4. A Special Foundation System ***(attach a copy of the drawing for this system and provide a reference, if applicable, to any drawing previously submitted).***

FOR USED HOMES, IF NO METHOD IS CHECKED, IT WILL BE PRESUMED THAT OPTION 2 (STATE GENERIC STANDARDS) WAS USED.

Form: Notice of Installation (Form T) *Form Page 1 of 2*

To be submitted to the Department along with the required fee no later than the 7th day after which the installation is completed. The Installation Report (Form T) should no longer be submitted with the title documents.

Per §1201.206(i): **On secondary moves the notice must be accompanied by either the original notice of installation or a certification that a true and correct copy of the notice of installation has been provided to the chief appraiser of the county where the home is installed. The delivery of the copy of the notice to the chief appraiser may be accomplished by either certified mail or by electronic mailing of the electronically reproduced document in a commonly readable format.**

____

I verify that I am a licensed installer, that I am responsible for the installation described, and that the information supplied is true and correct. Executed this______ day of ________,_____.

_________________________________ _________________________________

Signature (Retailer/Installer) **Name (print or type)**

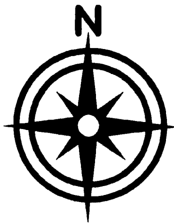
Department Use Only	
☐ **Inspected Without Violations**	☐ **Not Inspected, Unable to Locate**
☐ **Inspected With Violations**	☐ **Not Inspected, No Unit At Location**
☐ **Not Inspected, Unit Skirted**	☐ **Not Inspected, Unit Not Accessible**

Inspection Date: ________________________ **HUD/Seal #:** ______________________________

I hereby certify on this______ day of__________________, 20_______ that the above inspection results are true and correct to the best of my knowledge and belief.

Inspector Signature: ________________________ **Printed Name:** ___________________________

DRAW MAP BELOW



Form: Notice of Installation (Form T) *Form Page 2 of 2*

Figure: 10 TAC §80.100(b)(17)

Texas Department of Housing and Community Affairs
MANUFACTURED HOUSING DIVISION
P. O. BOX 12489 Austin, Texas 78711-2489
(800) 500-7074, (512) 475-2200 FAX (512) 475-3506
Internet Address: www.tdhca.state.tx.us/mh/index.htm

INSTALLATION CHECKLIST

Home HUD label or Texas seal number: ____________________

Date of installation: ____________________

Wind Zone: ____________________

Humid/fringe status: ____________________

Electrical testing - At the time of installation, the following tests must be performed:

___ All site installed or shipped loose fixtures must be polarity tested to determine that the connections have been properly made.

___ All grounding and bonding conductors installed or connected during the home installation must be tested for continuity.

___ An operational test must be performed on all electrical lights, equipment, ground fault circuit interrupters and appliances to demonstrate that all equipment is connected and functioning properly.

Method of installation – if a copy is not included because the installation was done to a method that the licensed installer uses from time to time, where is a copy of the actual methods in the installer's records?

- SITE PREPARATION (FOR USED HOMES)
- LOAD BEARING CAPACITY OF SOIL
- SPACING OF PIERS (IF APPLICABLE)
- SPACING OF ANCHORS (IF APPLICABLE)
- NUMBER OF DIAGONAL TIES (IF APPLICABLE)
- LIST OF EACH DEVICE USED
- VAPOR RETARDER REQUIRED?

Was the installer contracting directly with the consumer or were they subcontracted by another retailer or installer? Attach a copy of each contract.

Attach a list of each person who worked on the installation and how to contact them.

If A/C was provided, name and license number of A/C installer: ____________________

Once the home installation is complete an Operational Test will be performed to ensure that all doors and windows are operational.

Copy of any required move permits.

Form: Installation Checklist *Form Page 1 of 1*

Figure: 10 TAC §80.100(b)(33)

SITE PREPARATION NOTICE FOR USED HOMES

FAILURE TO PREPARE THE SITE PROPERLY BEFORE INSTALLING YOUR MANUFACTURED HOME MAY INVALIDATE YOUR WARRANTY AND MAY CAUSE PROBLEMS WITH YOUR HOME.

IF YOU ARE ACQUIRING LAND FOR A MANUFACTURED HOME AND WILL NOT HAVE THE ABILITY TO OVERSEE SITE PREPARATION YOURSELF, BE SURE THAT YOUR AGREEMENT WITH THE PARTY PROVIDING THE LAND COVERS THEIR RESPONSIBILITIES FOR SITE PREPARATION.

If you are acquiring a manufactured home you need to be sure that the site is properly prepared **BEFORE the home is installed**. If you will be having your home installed in a rental community, you should first be sure that the community has prepared the site properly and assumed that responsibility. If you are acquiring a manufactured home that is already installed, you should satisfy yourself that the site was properly prepared first.

Site Preparation includes AT LEAST the following: (1) selecting a site where the home will not be affected by rising or running water, as in the case of heavy rains, (2) grading the site, as needed, so that the land slopes away from the home, (3) making sure that the site will not create puddles or moisture build-up under the home by filling any depressions and, as needed, providing for drainage, (4) clearing away any plants, stumps, or debris on the site where the home will be placed, and (5) installing any required vapor retarder (and, if such a retarder is to be installed, trimming any grasses or other organic materials to a suitable height, not greater than 8").

The footing must be placed on firm, undisturbed soil, or fill compacted to at least 90% of its maximum relative density. Installation on loose, noncompacted fill may invalidate the home's limited warranty.

If, at the time of installation or within 90 days thereafter your retailer is providing skirting, the retailer must also provide and install any required vapor retarder and insure that there is adequate ventilation under the home. If the retailer is not providing these things, you should be sure that you have provided for any required vapor retarder and that you have provided adequately for ventilation under the home.

FAILURE TO PREPARE THE SITE PROPERLY AND/OR FAILURE TO TAKE APPROPRIATE MEASURES TO GUARD AGAINST MOISTURE BUILD-UP MAY CAUSE SERIOUS PROBLEMS WITH YOUR MANUFACTURED HOME INCLUDING, BUT NOT LIMITED TO, MOISTURE IN THE HOME, DE-LAMINATION OF FLOOR DECKING, BUCKLING OF WALLS AND FLOORS, WARPAGE THAT WILL MAKE DOORS AND WINDOWS NOT OPERATE PROPERLY, FAILURE OF ANCHORS TO HOLD THE HOME AS INTENDED, AND EVEN SERIOUS STRUCTURAL DAMAGE.

______________________	______________________
consumer's signature	consumer's signature
______________________	______________________
type or print name	type or print name
______________________	______________________
date	date

Form: Site Preparation Notice for Used Homes *Form Page 1 of 1*

Figure: 10 TAC §80.100(b)(38)

PROBATIONARY INSTALLATION

Texas Department of Housing and Community Affairs
MANUFACTURED HOUSING DIVISION
P. O. BOX 12489 Austin, Texas 78711-2489
(800) 500-7074, (512) 475-2200 FAX (512) 475-3506
Internet Address: www.tdhca.state.tx.us/mh/index.htm

Fax this report within 3 working days from the date of installation to your assigned field office. Mail the original and fee by regular mail to the address on the letterhead.

NOTICE OF INSTALLATION (FORM T)

HUD Label or Texas Seal # (s): ____________________ ***Serial # (s):*** ____________________

Manufacturer Name: ____________________ ***License No.*** ____________________

Home Size - Width / Length: _____ *X* _____ *Weight* _______ *Date of Manufacture:* ____/____/____ *Model / Name:* ____________

Draw A Map To Provide Directions To Home On Page 2

Consumer: ____________________ Phone Numbers: Home: (   ) __________ Work: (   ) __________

Mailing Address: ____________________ City __________ ZIP: __________

Site Address: ____________________ City __________ ZIP: __________

County Where Home is Installed: ____________________

Actual Installation Date: ____/____/____ Wind Zone on Data Plate: I ( ) II ( ) III ( )

Is the home installed in a Humid & Fringe Climate Yes ( ) No ( ) Was the home labeled for alternate construction. Yes ( ) No ( )

	Name	Address	License #	Expiration Date	Phone #
Retailer					
Installer					

Is home installed in Frost Line Zone? ( ) Yes ( ) No Does retailer or installer provide skirting? Yes ( ) No ( )

Is installation part of sales contract of used home? Yes ( ) No ( ) Not Applicable ( )

( ) New Home - The home has been installed in accordance with:

( ) 1. Manufacturer's Home Installation Instructions (provide page number or option ____________________).

( ) 2. A Special Foundation System ***(attach a copy of the drawing for this system and provide a reference, if applicable, to any drawing previously submitted).***

( ) Used Home:

( ) 1. Manufacturer's Home Installation Instructions (provide page number or option ____________________).

( ) 2. State Generic Standards - Title 10 Texas Administrative Code (10 TAC) §§80.22, 80.23, 80.24, and 80.25.

( ) 3. A stabilization system registered with the Department in accordance with 10 TAC §80.26 - ***provide name of system or reference to MHD Approval Letter or registration____________________.***

( ) 4. A Special Foundation System ***(attach a copy of the drawing for this system and provide a reference, if applicable, to any drawing previously submitted).***

FOR USED HOMES, IF NO METHOD IS CHECKED, IT WILL BE PRESUMED THAT OPTION 2 (STATE GENERIC STANDARDS) WAS USED.

Form: Probationary Notice of Installation (Form T) *Form Page 1 of 2*

To be submitted to the Department along with the required fee no later than the 3rd day after which the installation is completed. The Installation Report (Form T) should no longer be submitted with the title documents.

Per §1201.206(i): On secondary moves the notice must be accompanied by either the original notice of installation or a certification that a true and correct copy of the notice of installation has been provided to the chief appraiser of the county where the home is installed. The delivery of the copy of the notice to the chief appraiser may be accomplished by either certified mail or by electronic mailing of the electronically reproduced document in a commonly readable format.

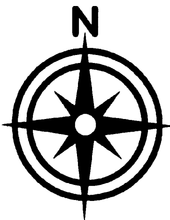
I verify that I am a licensed installer, that I am responsible for the installation described, and that the information supplied is true and correct. Executed this______ day of ________,_____.

____________________________	____________________________
Signature (Retailer/Installer)	**Name (print or type)**

NOTE: A minimum of five (5) probationary installations must be inspected without violations for a probationary installer's license to become a full installer's license.

Department Use Only	
☐ **Inspected Without Violations**	☐ **Not Inspected, Unable to Locate**
☐ **Inspected With Violations**	☐ **Not Inspected, No Unit At Location**
☐ **Not Inspected, Unit Skirted**	☐ **Not Inspected, Unit Not Accessible**
Inspection Date: ____________________	**HUD/Seal #:** ____________________
I hereby certify on this______ day of__________________, 20______ that the above inspection results are true and correct to the best of my knowledge and belief.	
Inspector Signature: ____________________	**Printed Name:** ____________________

DRAW MAP BELOW



Form: Probationary Notice of Installation (Form T) *Form Page 2 of 2*

Figure: 10 TAC §80.100(b)(45)

Texas Department of Housing and Community Affairs
MANUFACTURED HOUSING DIVISION
P. O. BOX 12489 Austin, Texas 78711-2489
(800) 500-7074, (512) 475-2200 FAX (512) 475-1109
Internet Address: www.tdhca.state.tx.us/mh/index.htm

TOMANDO UNA DECISIÓN BIEN INFORMADA SOBRE LA COMPRA DE UNA VIVIENDA PREFABRICADA

SI TIENE ALGUNA PREGUNTA LLAME AL 1-800-500-7074

Ser dueño de CUALQUIER vivienda trae muchas responsabilidades. La compra de una vivienda prefabricada implica muchas consideraciones importantes y únicas. Esta divulgación es para ayudarle a reconocer y entender muchos de estos factores. **Por favor léalo con cuidado.**

ESCOGIENDO UNA VIVIENDA PREFABRICADA COMO SU VIVIENDA: Las viviendas prefabricadas vienen a una variedad de tamaños, estilos, diseños, comodidades, servicios, y diferentes escalas de precios. Todas las viviendas prefabricadas son construidas de acuerdo con las normas federales establecidas por el Departamento Federal de Vivienda y Desarrollo Urbano (HUD). También, el gobierno federal y el estado de Texas requieren que los fabricantes, vendedores e instaladores ofrezcan cierto tipo de garantías para viviendas prefabricadas. El tipo de garantías que recibirá depende de que si usted está comprando una vivienda prefabricada nueva o usada. Usted tiene el derecho a ver la garantía del fabricante y la garantía del vendedor antes de establecer un acuerdo obligatorio para comprar una vivienda prefabricada.

_____
Iniciales

ESCOGIENDO UN VENDEDOR DE VIVIENDA PREFABRICADA: El Estado de Texas da licencia y supervisa a fabricantes, vendedores, minoristas, comisionistas, reconstructores, e instaladores de vivienda prefabricada. La agencia responsable por esta licensura y vigilancia es el Departamento de Vivienda y Asuntos Comunitarios, División de Vivienda Prefabricada (el "departamento"). Su vendedor de vivienda prefabricada debe exhibir su licencia o estar dispuesto a mostrarla en su oficina de ventas. **Tratar con individuos con licencia puede proporcionar protecciones importantes al consumidor.**

_____
Iniciales

Form: Consumer Disclosure (Spanish Version) *Forma Página 1 de 6*

DEPÓSITOS: El vendedor de la vivienda prefabricada puede requerirle que ponga un depósito para una vivienda, sin tener en cuenta de que si la vivienda está en el lote de ventas del vendedor, está siendo vendida en otra locación, o será ordenada a la fábrica. La cantidad del depósito es determinada entre usted y el vendedor. El depósito se convierte a un enganche una vez que se ejecute el acuerdo obligatorio de compra. Usted tiene el derecho de exigir un reembolso de su depósito o el enganche, y recibirlo dentro un período de 15 días, si usted oportunamente y correctamente decide rescindir del acuerdo de compra.

_____
Iniciales

OPCIONES DE FINANCIAMIENTO: Una vivienda prefabricada en Texas tiene una flexibilidad enorme cuando se trata de financiamiento porque puede ser financiada como una propiedad personal (típicamente un préstamo al consumidor asegurado solamente con la vivienda) o, si usted es dueño del terreno donde está ubicada la vivienda prefabricada (o tiene un contrato de arrendamiento a largo término sobre el terreno) como bienes raíces (típicamente un préstamo hipotecario asegurado por la vivienda y el terreno). Debe hablar con posibles prestamistas sobre los términos o condiciones que ellos pueden ofrecer. Si usted piensa que un prestamista ofrece una tasa de interés demasiada alta, entonces hable con otro prestamista.

Generalmente, los prestamistas a consumidores deben estar registrados con la Oficina del Consumer Credit Commissioner. Los préstamos hipotecarios por lo general son originados por agentes de hipotecas (autorizados por el Departamento de Savings and Mortgage Lending), los bancos hipotecarios (registrados con el Departamento de Savings and Mortgage Lending), o instituciones financieras (reguladas por el gobierno estatal y/o federal, dependiendo del tipo de institución financiera).

Cuando Decida Comprar una Vivienda Prefabricada,
Prepare para la Flexibilidad y el Cambio

SU PRÉSTAMO SERÁ UN FACTOR MAYOR EN DETERMINAR SUS PAGOS, PERO TAMBIÉN HAY OTROS FACTORES IMPORTANTES QUE DEBE TOMAR EN CUENTA, TAL COMO:

- Préstamos de Tarifa Ajustable - Si las tarifas suben, los pagos de su préstamo también subirán.
- Impuestos sobre la Propiedad – Cambios en el valor de su vivienda y en la tasa de impuesto puede causar cambios en sus pagos.
- Seguro - Si el precio de cobertura sube, también subirá su pago.
- Alquiler del Terreno - Si usted alquila el terreno donde se encuentrá la vivienda, su alquiler puede ser sujeto a aumentar.

_____
Iniciales

RESTRICCIONES LOCALES Y EXIGENCIAS (ZONIFICACIÓN): La vivienda puede ser sujeto a exigencias locales especiales dependiente de donde se va a localizar, incluyendo restricciones de zonificación y escritura. Estas exigencias locales pueden afectar donde la vivienda puede ser colocada y también pueden implicar otras exigencias relacionadas (y gastos) como exigencias de tamaño y exigencias de construcción. Comuníquese con el municipio local, el condado, y el gerente de la subdivisión para averiguar qué tipo de exigencias pueden ser aplicadas al sitio donde usted va a colocar la vivienda prefabricada.

______ *Iniciales*

PREPARACIÓN ADECUADA DEL SITIO: El instalador es responsable por la preparación apropiada del sitio en donde se instalará una vivienda prefabricada nueva. El consumidor es responsable por la preparación apropiada del sitio en donde se instalará una vivienda prefabricada usada. Si usted no piensa que puede preparar su sitio apropiadamente, considere contratar a alguien más con la experiencia necesaria y el equipo necesario para hacerlo por usted. La preparación apropiada del sitio incluye el lugar correcto para colocar la vivienda para que pueda tener un buen drenaje de modo que el agua no se estanque o corra debajo o alrededor de la vivienda; además tierra comprimida firme sin troncos o basura. El sitio que ha seleccionado y preparado también necesita cumplir cualquier exigencia de colocación y tener acceso a cualquier sistema requerido de agua, tanque séptico, y servicios.

¡LA PREPARACIÓN APROPIADA DEL SITIO ES ESENCIAL!

______ *Iniciales*

INSTALACIÓN: Si usted está comprando una vivienda prefabricada NUEVA, la instalación tiene que ser incluida. Si está comprando una vivienda prefabricada USADA, la instalación puede estar incluida o no. Si la instalación no está incluida y hace el arreglo usted mismo, recuerde que SOLAMENTE UN INSTALADOR AUTORIZADO puede instalar la vivienda prefabricada. El instalador que actualmente instala la vivienda también debe proporcionar una garantía.

LA LEY EXIGE QUE UNA VIVIENDA SEA INSTALADA POR UN INSTALADOR AUTORIZADO ANTES DE QUE PUEDA SER OCUPADA.

Si usted compra una vivienda que ya ha sido instalada, debería preguntarle al vendedor si ellos comprobarán la nivelación, la presencia (si es requerido) y la condición de cualquier agente retardador de vapor, revisarán todo lo relacionado con la fundación/sistema de estabilización, o proporcionarán cualquier otro servicio relacionado con la instalación.

Si usted adquiere una vivienda prefabricada usada que ya está instalada en un condado de Zona de Viento II, pero la vivienda es de Zona de Viento I, lo que significa que la vivienda no fue diseñada o construida para resistir vientos fuertes de huracán que ocurren en una Zona de Viento II o III, la vivienda no podrá ser instalada en una Zona de Viento II a menos que la vivienda haya sido construida antes del 1 de Septiembre, 1997.

______ *Iniciales*

Form: Consumer Disclosure (Spanish Version) *Forma Página 3 de 6*

MANTENIMIENTO: CUALQUIER vivienda requiere mantenimiento – cosas como revisar y reparar el techo, mantener respiraderos y filtros despejados, mantenimiento regular a los sistemas sépticos y pozos para asegurarse que funcionan apropiadamente y de manera sanitaria, calafatear para evitar escapes y pintar periódicamente. También, dependiendo del sistema de fundación que escoja, una vivienda prefabricada puede requerir revisiones periódicas para comprobar que está aún nivel y que las anclas y correas están seguras.

_____

Iniciales

MANTENIMIENTO DE FUNDACIÓN: Debe aceptar toda la responsabilidad por el mantenimiento del sitio al momento de cierre. Estas responsabilidades incluyen: buen mantenimiento del drenaje alrededor de la vivienda, la prevención de la erosión de tierra, inspecciones periódicas del apoyo de la fundación y el anclaje, y cualquier nivelación o ajuste que se puede requerir a menos que se haya acordado de otra manera. Las viviendas localizadas en las áreas que tienen suelos con el alto contenido de arcilla que se expanda deben mantener niveles de humedad constantes. Esto puede incluir el regar alrededor de la fundación durante meses secos del verano y controlando adecuadamente el tamaño y proximidad de plantas cerca de la fundación.

_____

Iniciales

ALQUILER DE SOLAR: Si usted alquila el solar donde su vivienda será instalada, existe la posibilidad de que el alquiler aumente, y es posible que el arrendador pueda decidir cambiar el uso del terreno y no renovar su contrato de renta. Aunque se le de un preaviso, esto significaría que usted tendría que mover su vivienda y tener que instalarla en otro lugar.

_____

Iniciales

AGUA Y SERVICIOS: Asegúrese que su terreno tiene acceso al agua. Si usted taladre un pozo, piense en buscar ofertas de varios perforadores. Si hay agua disponible por medio del municipio, distrito de servicios, distrito de agua, o cooperativa, usted debería informarse sobre las tarifas que tendrá que pagar y los gastos necesarios para poder ser parte del sistema de agua. Asegúrese que cualquier servicio que necesitará está disponible en el terreno, y si no lo están, averigüe que implicará para que usted pueda adquirirlos y conectarlos.

_____

Iniciales

CONEXIONES DE ALCANTARILLADO O SISTEMAS SÉPTICOS: Si el terreno no es parte de un sistema de alcantarillado municipal o de los servicios del distrito, tendrá que instalar un sistema séptico. Hay varios preocupaciones o restricciones que determinarán si su terreno es adecuado para poder tener un sistema séptico. Compruebe con el condado local o un instalador autorizado privado para determinar las exigencias que se aplican en su terreno y el costo para instalar dicho sistema.

_____

Iniciales

ASOCIACIÓN DE PROPIETARIOS Y HONORARIOS: Muchas subdivisiones tienen evaluaciones obligatorias y honorarios que los propietarios del terreno deben pagar. Compruebe con el gerente de la subdivisión donde está ubicado su lote para determinar si los honorarios se aplican a su terreno.

_____

Iniciales

IMPUESTOS DE PROPIEDAD: Las viviendas prefabricadas son avaluadas y sujetas a impuestos de propiedad. Según el tipo de préstamo que usted obtenga, su prestamista puede incluir los impuestos junto con su pago, y esto aumentará su mensualidad. Elegir el tratamiento de su vivienda como propiedad personal o bienes raíces puede impactar cualquier exención que podría obtener para reducir sus impuestos. Comuníquese con la oficina de impuestos del condado si tiene alguna pregunta. Si no cumple con su pago de impuestos o no arregla con el agente de colecciones para hacer los pagos, lo puede colocar en riesgo de tener un embargo sobre su vivienda, y posiblemente perder la vivienda por no hacer los pagos de impuestos. Si usted no tiene un prestamista que le retenga los impuestos del pago, el agente de colección calculará un acuerdo para retención de pagos si usted lo solicita.

_____

Iniciales

SEGURO: Su prestamista seguramente requerirá que obtenga seguro. Usted debería solicitar cotizaciones de un agente. Incluso si usted no tiene un prestamista, es buena idea obtener el seguro para proteger su vivienda y a usted mismo.

_____

Iniciales

FONDO FIDUCIARIO DE RECUPERACION PARA PROPIETARIOS DE VIVIENDA PREFABRICADA EN TEXAS (EL FONDO): El Fondo establecido por la ley es para proteger a los consumidores que incurren daños actuales debido a violaciones de ley especificas que impliquen actos u omisiones de agentes autorizados. Para aprender más sobre el Fondo usted puede visitar la página internet del departamento en: www.tdhca.state.tx.us/mh/index.htm o llamar al departamento para una descripción impresa del Fondo y como funciona. Los reclamos sobre el Fondo tienen que ser verificados y tienen que ser hecho dentro de dos años de la fecha del acto o la omisión o cuando fue descubierto o debió ser descubierto razonablemente.

_____

Iniciales

Form: Consumer Disclosure (Spanish Version) *Forma Página 5 de 6*

DERECHO DE RESCINDIR CONTRATO DE COMPRA: Una vez que usted hace un contrato con un vendedor para adquirir una vivienda prefabricada, usted tiene el derecho de rescindir el contrato. Usted puede, no más tarde del tercer día después de que el contrato haya sido firmado, rescindir el contrato sin multas ni cargos. El derecho de rescindir puede ser modificado o cancelado sólo si usted tiene una emergencia auténtica. El departamento tiene reglas sobre las exigencias detalladas para renuncias y modificaciones. Si usted concede a alguien más que el vendedor un derecho de embargo sobre la vivienda que usted está comprando, el derecho de rescisión automáticamente ya no aplica cuando el gravamen se registra con el TDHCA.

_____

Iniciales

Esta **Divulgación de Seis Paginas** fue proporcionada a mí/nosotros por el vendedor y/o prestamista identificado debajo en esta fecha. Fue proporcionado a yo/nosotros antes de que yo/nosotros cumplí/cumplimos una solicitud de crédito (si la compra es financiada) o antes de que yo/nosotros firmamos un contrato para comprar, para intercambiar, o de arriendo con opción a compra de una vivienda prefabricada.

____________________ FECHA	______________________________ VENDEDOR O PRESTAMISTA
	______________________________ NÚMERO DE LICENCIA (del vendedor)
______________________________ Firma del CLIENTE	______________________________ Firma del CLIENTE
______________________________ Nombre del Cliente (escrito)	______________________________ Nombre del Cliente (escrito)
Fecha:__________________________	Fecha:__________________________

Form: Consumer Disclosure (Spanish Version) *Forma Página 6 de 6*

Figure: 10 TAC §80.100(b)(46)

Texas Department of Housing and Community Affairs
MANUFACTURED HOUSING DIVISION
P. O. BOX 12489 Austin, Texas 78711-2489
(800) 500-7074, (512) 475-2200 FAX (512) 475-1109
Internet Address: www.tdhca.state.tx.us/mh/index.htm

HUD Required Installation Program Disclosure to Consumer

Name of Retailer or Installer: ______________________________

License No.: ________________

Effective 10/20/08 24 CFR § 3286.7 Consumer information.

(b) ***Retailer disclosures before sale or lease.***

Prior to execution of the sales contract to purchase or agreement to lease a manufactured home, the retailer must provide the purchaser or lessee with a consumer disclosure. This disclosure must be in a document separate from the sales or lease agreement. The disclosure must include the following information, as applicable:

(1) When the installation of the home is in a state that administers its own qualifying installation program, the consumer disclosure must clearly state that the home will be required to comply with all state requirements for the installation of the home;

This home will be installed to the Texas Administered Installation Program guidelines and in accordance with all the requirements of Chapter 80, Administrative Rules.

(2) When the installation of the home is in a state that does not administer its own qualifying installation program, the consumer disclosure must clearly state that the home will be required to comply with federal requirements, including installation in accordance with federal installation standards set forth in 24 CFR part 3285 and certification by a licensed installer of installation work, regardless of whether the work is performed by the homeowner or anyone else, and when certification includes inspection by an appropriate person;

(3) For all homes, the home may also be required to comply with additional state and local requirements for its installation;

In Accordance with Chapter 80, Administrative Rules; any new home installed in Texas shall be installed to Manufacture's Specifications or an engineered approved custom foundation.

(4) For all homes, additional information about the requirements disclosed under paragraphs (b)(1) through (b)(4) of this section is available from the retailer and, in the case of the federal requirements, is available in part 3286 of Title 24 of the Code of Federal Regulations and from the U.S. Department of Housing and Urban Development;

(5) For all homes, compliance with any additional federal, state, and local requirements, including a requirement for inspection of the installation of the home, may involve additional costs to the purchaser or lessee; and

(6) For all homes, a recommendation that any home that has been reinstalled after its original installation should be professionally inspected after it is set up, in order to assure that it has not been damaged.

Secondary installations are allowed to be set to the Texas State Generic Standards, Chapter 80.23 Subchapter C.

____

Consumer Signature:

____

Consumer Printed Name:

____

Date:

Form: HUD Required Inst. Disclosure to Consumer *Form Page 2 of 2*

Figure: 30 TAC §305.69(k)

Modifications	Class
A. General Permit Provisions	
1. Administrative and informational changes	1
2. Correction of typographical errors	1
3. Equipment replacement or upgrading with functionally equivalent components (e.g., pipes, valves, pumps, conveyors, controls)	1
4. Changes in the frequency of or procedures for monitoring, reporting, sampling, or maintenance activities by the permittee:	
a. To provide for more frequent monitoring, reporting, sampling, or maintenance	1
b. Other changes	2
5. Schedule of compliance	
a. Changes in interim compliance dates, with prior approval of the executive director	1[1]
b. Extension of final compliance date	3
6. Changes in expiration date or permit to allow earlier permit expiration, with prior approval of the executive director	1[1]
7. Changes in ownership or operational control of a facility, provided the procedures of §305.64(g) of this title (relating to Transfer of Permits) are followed	1[1]
8. Six months or less extension of the construction period time limit applicable to commercial hazardous waste management units in accordance with §305.149(b)(2) or (4) of this title (relating to Time Limitation for Construction of Commercial Hazardous Waste Management Units)	2
9. Greater than six-month extension of the commercial hazardous waste management unit construction period time limit in accordance with §305.149(b)(3) or (4) of this title	3
10. Any extension in accordance with §305.149(b)(3) of this title of a construction period time limit for commercial hazardous waste management units which has been previously authorized under §305.149(b)(2) of this title	3
11. Changes to remove permit conditions that are no longer applicable (i.e., because the standards upon which they are based are no longer applicable to the facility)	1[1]

B. General Facility Standards

1. Changes to waste sampling or analysis methods:

   a. To conform with agency guidance or regulations..1
   b. To incorporate changes associated with F039 (multi-source leachate) sampling or analysis methods..1[1]
   c. To incorporate changes associated with underlying hazardous constituents in ignitable or corrosive wastes..1[1]
   d. Other changes..2

2. Changes to analytical quality assurance/control plan:

   a. To conform with agency guidance or regulations..1
   b. Other changes..2

3. Changes in procedures for maintaining the operating record..1

4. Changes in frequency or content of inspection schedules..2

5. Changes in the training plan:

   a. That affect the type or decrease the amount of training given to employees..2

   b. Other changes..1

6. Contingency plan:

   a. Changes in emergency procedures (i.e., spill or release response procedures)..2
   b. Replacement with functionally equivalent equipment, upgrade, or relocate emergency equipment listed..1
   c. Removal of equipment from emergency equipment list..2
   d. Changes in name, address, or phone number of coordinators or other persons or agencies identified in the plan..1

7. Construction quality assurance (CQA) plan:

   a. Changes that the CQA officer certifies in the operating record will provide equivalent or better certainty that the unity components meet the design specifications..1
   b. Other Changes..2

Note: When a permit modification (such as introduction of a new unit) requires a change in facility plans or other general facility standards, that change shall be reviewed under the same procedures as the permit modification.

C. Groundwater Protection

1. Changes to wells:

   a. Changes in the number, location, depth, or design of upgradient or downgradient wells of permitted groundwater monitoring system.......... 2
   b. Replacement of an existing well that has been damaged or rendered inoperable, without change to location, design, or depth of the well.......... 1

2. Changes in groundwater sampling or analysis procedures or monitoring schedule, with prior approval of the executive director.......... 1[1]

3. Changes in statistical procedure for determining whether a statistically significant change in groundwater quality between upgradient and downgradient wells has occurred, with prior approval of the executive director.......... 1[1]

4. Changes in point of compliance.......... 2

5. Changes in indicator parameters, hazardous constituents, or concentration limits (including alternate concentration limits (ACLs)):

   a. As specified in the groundwater protection standard.......... 3
   b. As specified in the detection monitoring program.......... 2

6. Changes to a detection monitoring program as required by §335.164(10) of this title (relating to Detection Monitoring Program), unless otherwise specified in this appendix.......... 2

7. Compliance monitoring program:

   a. Addition of compliance monitoring program pursuant to §335.164(7)(D) of this title, and §335.165 of this title (relating to Compliance Monitoring Program).......... 3
   b. Changes to a compliance monitoring program as required by §335.165(11) of this title, unless otherwise specified in this appendix.......... 2

8. Corrective action program:

   a. Addition of a corrective action program pursuant to §335.165(9)(B) of this title and §335.166 of this title (relating to Corrective Action Program).......... 3
   b. Changes to a corrective action program as required by §335.166(8) of this title, unless otherwise specified in this appendix.......... 2

D. Closure

1. Changes to the closure plan:

   a. Changes in estimate of maximum extent of operations or maximum inventory of waste on-site at any time during the active life of the facility, with prior approval of the executive director....................1[1]
   b. Changes in the closure schedule for any unit, changes in the final closure schedule for the facility, or extension of the closure period, with prior approval of the executive director....................1[1]
   c. Changes in the expected year of final closure, where other permit conditions are not changed, with prior approval of the executive director....................1[1]
   d. Changes in procedures for decontamination of facility equipment or structures, with prior approval of the executive director....................1[1]
   e. Changes in approved closure plan resulting from unexpected events occurring during partial or final closure, unless otherwise specified in this appendix....................2
   f. Extension of the closure period to allow a landfill, surface impoundment or land treatment unit to receive nonhazardous wastes after final receipt of hazardous wastes under 40 Code of Federal Regulations (CFR), §264.113(d) and (e)....................2

2. Creation of a new landfill unit as part of closure....................3

3. Addition of the following new units to be used temporarily for closure activities:

   a. Surface impoundments....................3
   b. Incinerators....................3
   c. Waste piles that do not comply with 40 CFR §264.250(c)....................3
   d. Waste piles that comply with 40 CFR §264.250(c)....................2
   e. Tanks or containers (other than specified below)....................2
   f. Tanks used for neutralization, dewatering, phase separation, or component separation, with prior approval of the executive director....................1[1]
   g. Staging Pile....................2

E. Post-Closure

1. Changes in name, address, or phone number of contact in post-closure plan....................1
2. Extension of post-closure care period....................2
3. Reduction in the post-closure care period....................3
4. Changes to the expected year of final closure, where other permit conditions are not changed....................1
5. Changes in post-closure plan necessitated by events occurring during the active life of the facility, including partial and final closure....................2

F. Containers

1. Modification or addition of container units:

a. Resulting in greater than 25% increase in the facility's container storage capacity, except as provided in F(1)(c) and F(4)(a) of this appendix....3

b. Resulting in up to 25% increase in the facility's container storage capacity, except as provided in F(1)(c) and F(4)(a) of this appendix....2

c. Or treatment processes necessary to treat wastes that are restricted from land disposal to meet some or all of the applicable treatment standards or to treat wastes to satisfy (in whole or in part) the standard of "use of practically available technology that yields the greatest environmental benefit" contained in 40 CFR §268.8(a)(2)(ii), with prior approval of the executive director. This modification may also involve addition of new waste codes or narrative descriptions of wastes. It is not applicable to dioxin-containing wastes (F020, 021, 022, 023, 026, 027, and 028)....1[1]

2. Modification of container units, as follows:

a. Modification of a container unit without increasing the capacity of the unit....2

b. Addition of a roof to a container unit without alteration of the containment system....1

3. Storage of different wastes in containers, except as provided in F(4) of this appendix:

a. That require additional or different management practices from those authorized in the permit....3

b. That do not require additional or different management practices from those authorized in the permit....2

Note: See §305.69(g) of this title (relating to Solid Waste Permit Modification at the Request of the Permittee) for modification procedures to be used for the management of newly listed or identified wastes.

4. Storage or treatment of different wastes in containers:

a. That require addition of units or change in treatment process or management standards, provided that the wastes are restricted from land disposal and are to be treated to meet some or all of the applicable treatment standards, or that are to be treated to satisfy (in whole or in part) the standard of "use of practically available technology that yields the greatest environmental benefit" contained in 40 CFR §268.8(a)(2)(ii), with prior approval of the executive director. This modification is not applicable to dioxin-containing wastes (F020, 021, 022, 023, 026, 027, and 028)....1[1]

b. That do not require the addition of units or a change in the treatment process or management standards, and provided that the units have previously received wastes of the same type (e.g., incinerator scrubber water). This modification is not applicable to dioxin-containing wastes (F020, 021, 022, 023, 026, 027, and 028)....1

5. Other changes in container management practices (e.g., aisle space, types of containers, segregation)..2

G. Tanks

1. Modification or addition of tank units or treatment processes, as follows:

   a. Modification or addition of tank units resulting in greater than 25% increase in the facility's tank capacity, except as provided in G(1)(c), G(1)(d), and G(1)(e) of this appendix..3
   b. Modification or addition of tank units resulting in up to 25% increase in the facility's tank capacity, except as provided in G(1)(d) and G(1)(e) of this appendix..2
   c. Addition of a new tank (no capacity limitation) that will operate for more than 90 days using any of the following physical or chemical treatment technologies: neutralization, dewatering, phase separation, or component separation...2
   d. After prior approval of the executive director, addition of a new tank (no capacity limitation) that will operate for up to 90 days using any of the following physical or chemical treatment technologies: neutralization, dewatering, phase separation, or component separation..1[1]
   e. Modification or addition of tank units or treatment processes necessary to treat wastes that are restricted from land disposal to meet some or all of the applicable treatment standards or to treat wastes to satisfy (in whole or in part) the standard of "use of practically available technology that yields the greatest environmental benefit" contained in 40 CFR §268.8(a)(2)(ii), with prior approval of the executive director. This modification may also involve addition of new waste codes. It is not applicable to dioxin-containing wastes (F020, 021, 022, 023, 026, 027, and 028)......................................1[1]

2. Modification of a tank unit or secondary containment system without

   increasing the capacity of the unit...2

3. Replacement of a tank with a tank that meets the same design standards

   and has a capacity within +/-10% of the replaced tank provided:.....................................1

   a. The capacity difference is no more than 1,500 gallons;
   b. The facility's permitted tank capacity is not increased; and
   c. The replacement tank meets the same conditions in the permit.

4. Modification of a tank management practice...2

5. Management of different wastes in tanks:

   a. That require additional or different management practices, tank

design, different fire protection specifications, or significantly different tank treatment process from that authorized in the permit, except as provided in G(5)(c) of this appendix....................3

b. That do not require additional or different management practices, tank design, different fire protection specifications, or significantly different tank treatment process from that authorized in the permit, except as provided in G(5)(d) of this appendix....................2

c. That require addition of units or change in treatment processes or management standards, provided that the wastes are restricted from land disposal and are to be treated to meet some or all of the applicable treatment standards or that are to be treated to satisfy (in whole or in part) the standard of "use of practically available technology that yields the greatest environmental benefit" contained in 40 CFR §268.8(a)(1)(ii), with prior approval of the executive director. The modification is not applicable to dioxin-containing wastes (F020, 021, 022, 023, 026, 027,and 028)....................1[1]

d. That do not require the addition of units or a change in the treatment process or management standards, and provided that the units have previously received wastes of the same type (e.g., incinerator scrubber water). This modification is not applicable to dioxin-containing wastes (F020, 021, 022, 023, 026, 027, and 028)....................1

Note: See §305.69(g) of this title for modification procedures to be used for the management of newly listed or identified wastes.

H. Surface Impoundments

1. Modification or addition of surface impoundment units that result in increasing the facility's surface impoundment storage or treatment capacity....................3

2. Replacement of a surface impoundment unit....................3

3. Modification of a surface impoundment unit without increasing the facility's surface impoundment storage or treatment capacity and without modifying the unit's liner, leak detection system, or leachate collection system....................2

4. Modification of a surface impoundment management practice....................2

5. Treatment, storage, or disposal of different wastes in surface impoundments:

a. That require additional or different management practices or different design of the liner or leak detection system than authorized in the permit....................3

b. That do not require additional or different management practices or different design of the liner or leak detection system than authorized in the permit....................2

c. That are wastes restricted from land disposal that meet the applicable treatment standards or that are treated to satisfy the standard of "use of practically available technology that yields the greatest environmental benefit" contained in 40 CFR §268.8(a)(2)(ii), and provided that the unit meets the minimum technological

requirements stated in 40 CFR §268.5(h)(2). This modification is not applicable to dioxin-containing wastes (F020, 021, 022, 023, 026, 027, and 028)..1

d. That are residues from wastewater treatment or incineration, provided that disposal occurs in a unit that meets the minimum technological requirements stated in 40 CFR §268.5(h)(2), and provided further that the surface impoundment has previously received wastes of the same type (for example, incinerator scrubber water). This modification is not applicable to dioxin-containing wastes (F020, 021, 022, 023, 026, 027, and 028)..1

6. Modifications of unconstructed units to comply with 40 CFR §§264.221(c), 264.222, 264.223, and 264.226(d) [~~of this title~~]..1[1]

7. Changes in response action plan:

   a. Increase in action leakage rate...3
   b. Change in a specific response reducing its frequency or effectiveness..3
   c. Other Changes..2

Note: See §305.69(g) of this title for modification procedures to be used for the management of newly listed or identified wastes.

I. Enclosed Waste Piles. For all waste piles except those complying with 40 CFR §264.250(c), modifications are treated the same as for a landfill.

The following modifications are applicable only to waste piles complying with 40 CFR

§264.250(c).

1. Modification or addition of waste pile units:

   a. Resulting in greater than 25% increase in the facility's waste pile storage or treatment capacity..3
   b. Resulting in up to 25% increase in the facility's waste pile storage or treatment capacity..2

2. Modification of waste pile unit without increasing the capacity of the unit.......................2

3. Replacement of a waste pile unit with another waste pile unit of the same design and capacity and meeting all waste pile conditions in the permit............................1

4. Modification of a waste pile management practice...2

5. Storage or treatment of different wastes in waste piles:

   a. That require additional or different management practices or different design of the unit..3
   b. That do not require additional or different management practices or different design of the unit..2

Note: See §305.69(g) of this title for modification procedures to be used for the management of newly listed or identified wastes.

6. Conversion of an enclosed waste pile to a containment building unit 2

J. Landfills and Unenclosed Waste Piles

1. Modification or addition of landfill units that result in increasing the facility's disposal capacity 3

2. Replacement of a landfill 3
3. Addition or modification or a liner, leachate collection system, leachate detection system, run-off control, or final cover system 3

4. Modification of a landfill unit without changing a liner, leachate collection system, leachate detection system, run-off control, or final cover system 2

5. Modification of a landfill management practice 2

6. Landfill different wastes:

   a. That require additional or different management practices, different design of the liner, leachate collection system, or leachate detection system 3
   b. That do not require additional or different management practices, different design of the liner, leachate collection system, or leachate detection system 2
   c. That are wastes restricted from land disposal that meet the applicable treatment standards or that are treated to satisfy the standard of "use of practically available technology that yields the greatest environmental benefit" contained in 40 CFR §268.8(a)(2)(ii), and provided that the landfill unit meets the minimum technological requirements stated in 40 CFR §268.5(h)(2). This modification is not applicable to dioxin-containing wastes (F020, 021, 022, 023, 026, 027, and 028) 1
   d. That are residues from wastewater treatment or incineration, provided that disposal occurs in a landfill unit that meets the minimum technological requirements stated in 40 CFR §268.5(h)(2), and provided further that the landfill has previously received wastes of the same type (for example, incinerator ash). This modification is not applicable to dioxin-containing wastes (F020, 021, 022, 023, 026, 027, and 028) 1

Note: See §305.69(g) of this title for modification procedures to be used for the management of newly listed or identified wastes.

7. Modifications of unconstructed units to comply with 40 CFR §§264.251(c), 264.252, 264.253, 264.254(c), 264.301(c), 264.302, 264.303(c), and 264.304 of this title .... 1[1]

8. Changes in response action plan:

a. Increase in action leakage rate..3
b. Change in a specific response reducing its frequency or effectiveness..3
c. Other changes..2

K. Land Treatment

1. Lateral expansion of or other modification of a land treatment unit to increase areal extent..3

2. Modification of run-on control system..2

3. Modify run-off control system..3

4. Other modifications of land treatment unit component specifications or standards required in the permit..2

5. Management of different wastes in land treatment units:

a. That require a change in permit operating conditions or unit design specifications..3
b. That do not require a change in permit operating conditions or unit design specifications..2

Note: See §305.69(g) of this title for modification procedures to be used for the management of newly listed or identified wastes.

6. Modification of a land treatment management practice to:

a. Increase rate or change method of waste application..3
b. Decrease rate of waste application..1

7. Modification of a land treatment unit management practice to change measures of pH or moisture content, or to enhance microbial or chemical reactions..2

8. Modification of a land treatment unit management practice to grow food chain crops, or add to or replace existing permitted crops with different food chain crops, or to modify operating plans for distribution of animal feeds resulting from such crops..3

9. Modification of operating practice due to detection of releases from the land treatment unit pursuant to 40 CFR §264.278(g)(2)..3

10. Changes in the unsaturated zone monitoring system, resulting in a change to the location, depth, or number of sampling points, or that replace unsaturated zone monitoring devices or components thereof with devices or components that have specifications different from permit requirements..3

11. Changes in the unsaturated zone monitoring system that do not result in a change to the location, depth, or number of sampling points, or that replace

unsaturated zone monitoring devices or components thereof with devices or components having specifications not different from permit requirements....................2

12. Changes in background values for hazardous constituents in soil and soil-pore liquid....................2

13. Changes in sampling, analysis, or statistical procedure....................2

14. Changes in land treatment demonstration program prior to or during the demonstration....................2

15. Changes in any condition specified in the permit for a land treatment unit to reflect results of the land treatment demonstration, provided performance standards are met, and the executive director's prior approval has been received....................1[1]

16. Changes to allow a second land treatment demonstration to be conducted when the results of the first demonstration have not shown the conditions under which the wastes can be treated completely, provided the conditions for the second demonstration are substantially the same as the conditions for the first demonstration and have received the prior approval of the executive director....................1[1]

17. Changes to allow a second land treatment demonstration to be conducted when the results of the first demonstration have not shown the conditions under which the waste can be treated completely, where the conditions for the second demonstration are not substantially the same as the conditions for the first demonstration....................3

18. Changes in vegetative cover requirements for closure....................2

L. Incinerators, Boilers and Industrial Furnaces

1. Changes to increase by more than 25% any of the following limits authorized in the permit: A thermal feed rate limit; a feedstream feed rate limit; a chlorine feed rate limit, a metal feed rate limit, or an ash feed rate limit. The executive director will require a new trial burn to substantiate compliance with the regulatory performance standards unless this demonstration can be made through other means....................3

2. Changes to increase by up to 25% any of the following limits authorized in the permit: A thermal feed rate limit; a feedstream feedrate limit; chlorine/chloride feed rate limit, a metal feed rate limit, or an ash feed rate limit. The executive director will require a new trial burn to substantiate compliance with the regulatory performance standards unless this demonstration can be made through other means....................2

3. Modification of an incinerator, boiler, or industrial furnace unit by changing the internal size of geometry of the primary or secondary combustion units, by adding a primary or secondary combustion unit, by substantially changing the design of any component used to remove HCl/Cl2, metals or particulate

from the combustion gases, or by changing other features of the incinerator,

boiler, or industrial furnace that could affect its capability to meet the regulatory performance standards. The executive director will require a new trial burn to substantiate compliance with the regulatory performance standards unless this demonstration can be made through other means............................3

4. Modification of an incinerator, boiler, or industrial furnace unit in a manner that would not likely affect the capability of the unit to meet the regulatory performance standards but which would change the operating conditions or monitoring requirements specified in the permit. The executive director may require a new trial burn to demonstrate compliance with the regulatory performance standards..2

5. Operating requirements:

   a. Modification of the limits specified in the permit for minimum or maximum combustion gas temperature, minimum combustion gas residence time, oxygen concentration in the secondary combustion chamber, flue gas carbon monoxide and hydrocarbon concentration, maximum temperature at the inlet to the particulate matter emission control system, or operating parameters for the air pollution control system. The executive director will require a new trial burn to substantiate compliance with the regulatory performance standards unless this demonstration can be made through other means..3
   b. Modification of any stack gas emission limits specified in the permit, or modification of any conditions in the permit concerning emergency shutdown or automatic waste feed cutoff procedures or controls..3
   c. Modification of any other operating condition or any inspection or recordkeeping requirement specified in the permit..2

6. Burning different wastes:

   a. If the waste contains a principal organic hazardous constituent (POHC) that is more difficult to burn than authorized by the permit or if burning of the waste requires compliance with different regulatory performance standards than specified in the permit. The executive director will require a new trial burn to substantiate compliance with the regulatory performance standards unless this demonstration can be made through other means..3
   b. If the waste does not contain a POHC that is more difficult to burn than authorized by the permit and if burning of the waste does not require compliance with different regulatory performance standards than specified in the permit..2

Note: See §305.69(g) of this title for modification procedures to be used for the management of newly regulated wastes and units.

7. Shakedown and trial burn:

a. Modification of the trial burn plan or any of the permit conditions applicable during the shakedown period for determining operational readiness after construction, the trial burn period, or the period immediately following the trial burn....2

b. Authorization of up to an additional 720 hours of waste burning during the shakedown period for determining operational readiness after construction, with the prior approval of the executive director....1[1]

c. Changes in the operating requirements set in the permit for conducting a trial burn, provided the change is minor and has received the prior approval of the executive director....1[1]

d. Changes in the ranges of the operating requirements set in the permit to reflect the results of the trial burn, provided the change is minor and has received the prior approval of the executive director....1[1]

8. Substitution of an alternate type of nonhazardous waste fuel that is not specified in the permit....1

9. Technology changes needed to meet standards under Title 40 CFR Part 63 (Subpart EEE - National Emission Standards for Hazardous Air Pollutants from Hazardous Waste Combustors), provided the procedures of §305.69(i) of this title are followed....1[1]

<u>10. Changes to Resource Conservation and Recovery Act permit provisions needed to support transition to §113. 620 of this title and 40 CFR Part 63, Subpart EEE (National Emission Standards for Hazardous Air Pollutants from Hazardous Waste Combustors) provided the procedures of 40 CFR §270.42(k) are followed....1[1]</u>

M. Corrective Action

1. Approval of a corrective action management unit pursuant to 40 <u>CFR</u> [~~Code of Federal Regulations~~] §264.552....3

2. Approval of a temporary unit or time extension for a temporary unit pursuant to 40 <u>CFR</u> [~~Code of Federal Regulations~~] §264.553....2

3. Approval of a staging pile or staging pile operating term extension pursuant to 40 <u>CFR</u> [~~Code of Federal Regulations~~] §264.554....2

N. Containment Buildings

1. Modification or addition of containment building units:

a. Resulting in greater than 25% increase in the facility's containment building storage or treatment capacity....3

b. Resulting in up to 25% increase in the facility's containment building storage or treatment capacity....2

2. Modification of a containment building unit or secondary containment system without increasing the capacity of the unit....2

3. Replacement of a containment building with a containment building that meets the same design standards provided:

   a. The unit capacity is not increased..1
   b. The replacement containment building meets the same conditions in the permit..1

4. Modification of a containment building management practice.....................................2

5. Storage or treatment of different wastes in containment buildings:

   a. That require additional or different management practices..3
   b. That do not require additional or different management practices..2

O. Burden Reduction

1. Development of one contingency plan based on Integrated Contingency Plan Guidance pursuant to 40 CFR §264.52(b)..................................1

2. Changes to recordkeeping and reporting requirements pursuant to: 40 CFR §§264.56(i), 264.343(a)(2), 264.1061(b)(1) and (d), 264.1062(a)(2), 264.196(f), 264.100(g), and 264.113(e)(5)....................................1

3. Changes to inspection frequency for tank systems pursuant to 40 CFR §264.195(b) 1

4. Changes to detection and compliance monitoring program pursuant to 40 CFR §§264.98(d), (g)(2), and (g)(3), 264.99(f), and (g)..................1

Figure: 30 TAC §335.1(138)(D)(iv)

TABLE 1

	Use Constituting Disposal S.W. Def. (D)(i)(1)	**Energy Recovery/Fuel S.W. Def. (D)(ii)(2)**	**Reclamation S.W. Def. (D)(iii)(3)[2]**	**Speculative Accumulation S.W. Def. (D)(iv)(4)**
Spent materials (listed hazardous & not listed characteristically hazardous)	*	*	*	*
Spent materials (nonhazardous)[1]	*	*	*	*
Sludges (listed hazardous in 40 CFR §261.31 or §261.32)	*	*	*	*
Sludges (not listed characteristically hazardous)	*	*		*
Sludges (nonhazardous)[1]	*	*		*
By-products (listed hazardous in 40 CFR §261.31 or §261.32)	*	*	*	*
By-products (not listed characteristically hazardous)	*	*		*
By-products (nonhazardous)[1]	*	*		*
Commercial chemical products (listed, not listed characteristically hazardous, and nonhazardous)	*	*		
Scrap metal other than excluded scrap metal (see §335.17(9)) (hazardous)	*	*	*	*
Scrap metal other than excluded scrap metal (see §335.17(9)) (nonhazardous)1	*	*	*	*

NOTE: The terms "spent materials," "sludges," "by-products," "scrap metal," and "excluded scrap metal" are defined in §335.17 of this title (relating to Special Definitions for Recyclable Materials and Nonhazardous Recyclable Materials).

[1] These materials are governed by the provisions of §335.24(h) only.
[2] Except as provided in 40 CFR §261.4(a)(17) for mineral processing secondary materials.

Figure: 30 TAC §335.590(24)(F)(vi)

"I (Texas Licensed Professional Engineer) [~~qualified professional engineer~~], Texas P.E. Registration Number _____, certify under penalty of law that I have personally examined and am familiar with the design and construction of the dikes that are a portion of (unit name) .

I further certify that I have evaluated the dike design and materials of construction using accepted engineering procedures, and have determined that the dike has structural integrity, and:

(I) Will withstand the stress of the pressure exerted by the types and amounts of wastes to be placed in the unit; and

(II) Will not fail due to scouring or piping, without dependence on any liner system included in the unit construction.

(Signature) ______________________________ Date: _____________

(SEAL)"

IN ADDITION

The *Texas Register* is required by statute to publish certain documents, including applications to purchase control of state banks, notices of rate ceilings issued by the Office of Consumer Credit Commissioner, and consultant proposal requests and awards. State agencies also may publish other notices of general interest as space permits.

Department of Aging and Disability Services

Public Notice Announcing the Pre-Application Orientation for Enrollment of Home and Community-Based Services and Texas Home Living Medicaid Waiver Program Providers

The Department of Aging and Disability Services (DADS) is making the Pre-Application Orientation (PAO) available online for persons seeking to participate as a contractor in the Home and Community-based Services (HCS) or the Texas Home Living (TxHmL) Medicaid Waiver Programs or both. Applicants will be able to complete the PAO via computer-based training and submit application packets for the HCS and TxHmL Programs year round. **The computer-based PAO and instructions on how to complete an application packet will be available year round starting in June 2009.** Please visit the DADS HCS and TxHmL websites, listed below, for more information about each program.

http://www.dads.state.tx.us/providers/HCS/howto.html

http://www.dads.state.tx.us/providers/TxHmL/howto.html

For any additional information concerning the PAO, you may contact DADS Community Services Contracts at (512) 438-3550 or via e-mail at hcsmailbox@dads.state.tx.us.

TRD-200901879
Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
Filed: May 12, 2009

♦ ♦ ♦

Office of the Attorney General

Agreed Final Judgment and Permanent Injunction

Notice is hereby given by the State of Texas of the following proposed resolution of an environmental enforcement lawsuit under the Texas Water and Health & Safety Codes. Before the State may settle a judicial enforcement action, pursuant to §7.110 of the Texas Water Code, the State shall permit the public to comment in writing on the proposed judgment. The Attorney General will consider any written comments and may withdraw or withhold consent to the proposed agreed judgment if the comments disclose facts or considerations that indicate that the consent is inappropriate, improper, inadequate, or inconsistent with the requirements of Chapter 7 of the Texas Water Code.

Case Title and Court: *State of Texas v. City of Edcouch, Texas,* Cause No. D-1-GV-03-0000213 in the 201st District, Travis County, Texas.

Background: This is a suit for enforcement of rules of the Texas Commission on Environmental Quality concerning a drinking water facility and wastewater treatment plant owned and operated by the City of Edcouch.

Nature of Settlement: Proposed Agreed Judgment: The proposed Agreed Final Judgment and Permanent Injunction settles all of the State's claims in the suit. The Agreed Final Judgment and Permanent Injunction contains provisions for injunctive relief, civil penalties, and attorney's fees. The proposed judgment will enjoin the City of Edcouch, to correct violations and maintain compliance levels at its public drinking water facility and wastewater treatment plant. The judgment awards the State attorney's fees of $50,000; and civil penalties of $105,000.

The Office of the Attorney General will accept written comments relating to this proposed judgment for thirty (30) days from the date of the publication of this notice. Copies of the proposed judgment may be examined at the Office of the Attorney General, 300 W. 15th Street, 10th Floor, Austin, Texas. A copy of the proposed judgment may also be obtained in person or by mail at the above address for the cost of copying. Requests for copies of the judgment and written comments on the proposed judgment should be directed to Sarah Jane Utley, Assistant Attorney General, Office of the Texas Attorney General, P.O. Box 12548, Austin, Texas 78711-2548, (512) 463-2012, facsimile (512) 320-0911.

For more information regarding this publication, contact Cindy Hodges, Agency Liaison, at (512) 936-1841.

TRD-200901903
Stacey Napier
Deputy Attorney General
Office of the Attorney General
Filed: May 13, 2009

♦ ♦ ♦

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 May 1, 2009, through May 7, 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 13, 2009. The public comment period for this project will close at 5:00 p.m. on June 12, 2009.

FEDERAL AGENCY ACTIONS:

Applicant: Penn-Virginia Oil and Gas, LP; Location: The project is located adjacent to the South Fork of Taylor Bayou, south of Craigen Road, near Hamshire, Jefferson County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled: Hamshire, Texas. Approximate UTM Coordinates in NAD 83 (meters): Zone 15; Easting: 378832; Northing: 3303977. Project Description: The applicant proposes to construct a 300- by 325-foot gravel well pad with a ring levee

for the installation of the Junker Spencer Well No. 69 natural gas well. A temporary tank farm will be installed on top of the gravel pad. The well pad will be reduced in size if the well is productive. Approximately 1,500 cubic yards of gravel will be used, filling 0.72 acres of forested wetlands. The site will be accessed using an existing access road. If the well produces, approximately 0.65 mile of pipeline (two 2- to 3-inch lines) will be laid across two existing gravel access road rights-of-ways (ROW), and subsurface bored along a utility ROW. No wetlands will be impacted from the pipeline installation. The applicant is also proposing a 7:1 mitigation ratio (5.04 acres) by paying an in-lieu mitigation fee to the National Fish and Wildlife Foundation for ultimate work in the Trinity River National Wildlife Refuge. CCC Project No.: 09-0154-F1. Type of Application: U.S.A.C.E. permit application #SWG-2008-00052 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). Note: The consistency review for this project may be conducted by the Railroad Commission of Texas under §401 of the Clean Water Act (33 U.S.C.A. §1344).

Applicant: Harris County Public Infrastructure Department; Location: The project is located in Wildwood Bayou and an adjacent ditch, within Harris County Flood Control District (HCFCD) Unit No. A102-01-00, in Seabrook, Harris County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled: League City, Texas. Approximate UTM Coordinates in NAD 83 (meters): Start - Zone 15; Easting: 302420.4; Northing: 3272630.5. End - Zone 15; Easting: 303042. Project Description: The applicant proposes to widen and expand Repsdorph Road and construct the associated stormwater management facilities needed for the road expansion. The applicant proposes to install 2,310 linear feet of double 10-foot wide by 5-foot tall box culverts with standard earthen material fill within HCFCD Unit No. A102-01-00. The installation of the double box culverts and the fill of standard earthen material will impact 1.061 acres of HCFCD Unit No. A102-01-00 and 0.30 acres of adjacent wetlands. Two sets of double 60-inch-diameter corrugated metal pipes will be removed under Lakeside Lane and near the intersection of HCFCD Unit No. A102-01-00 and Wildwood Bayou for installation of the box culverts. The box culverts will connect to a 380-square-foot outfall structure that will impact 0.0087 acre of Wildwood Bayou. To construct the outfall structure, a 200-square-foot cofferdam will be constructed that will temporarily impact 0.004 acre of Wildwood Bayou. CCC Project No.: 09-0161-F1. Type of Application: U.S.A.C.E. permit application #SWG-2006-02030 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). Note: The consistency review for this project may be conducted by the Texas Commission on Environmental Quality under §401 of the Clean Water Act (33 U.S.C.A. §1344).

Applicant: Golden Pass LNG Terminal, LLC; Location: The project is located in the Port Arthur Ship Channel, at 3752 South Gulf Freeway Drive, in Sabine Pass, Jefferson County, Texas. The site can be located on the U.S.G.S. quadrangle map entitled: Port Arthur South, Texas. Approximate UTM Coordinates in NAD 83 (meters): Zone 15; Easting: 410673; Northing: 3294334. Project Description: The applicant requests permission to modify Department of the Army Permit 23260 to increase the dredge depth in the Golden Pass LNG (GP LNG) Turning Basin from -40 feet below mean low water (MLW), with 2 feet of advanced maintenance and a 2-foot over dredge, to -45 feet below MLW, with 2 feet of advanced maintenance and a 2-foot over dredge. In addition, the applicant wishes to extend the time to perform maintenance dredging to 10 years. Approximately 900,000 cubic yards of material would be excavated by mechanical or hydraulic means. CCC Project No.: 09-0162-F1. Type of Application: U.S.A.C.E. permit application #SWG-2004-02118 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-200901900
Larry L. Laine
Chief Clerk/Deputy Land Commissioner, General Land Office
Coastal Coordination Council
Filed: May 13, 2009

♦ ♦ ♦

Comptroller of Public Accounts

Notice of Contract Award

The Texas Treasury Safekeeping Trust Company (Trust Company), by and through the Texas Comptroller of Public Accounts, announces this notice of contract awards for investment consulting services.

The notice of request for proposals (RFP #191a) was published in the October 24, 2008, issue of the *Texas Register* (33 TexReg 8815).

The Trust Company announces that two (2) contracts were awarded to the following:

1. Asset Consulting Group, Inc., 231 S. Bemiston, 14th Floor, St. Louis, MO 63105, was selected as the General Investment Consultant. The total contract amount shall not exceed $700,000. The term of the contract is February 1, 2009 through December 31 2009. The Trust Company shall have the right to renew the contract for up to two (2) additional 1-year terms, one year at a time, beginning January 1, 2010.

2. Aksia LLC, 599 Lexington Avenue, 46th Floor, New York, NY 10022, was selected as the Selected Consultant. The total contract amount shall be $750,000 per annum. The term of the contract is April 1, 2009 through August 31, 2010. The Trust Company shall have the right to renew the contract for up to two (2) additional one year periods, one year at a time.

TRD-200901872
William Clay Harris
Assistant General Counsel, Contracts
Comptroller of Public Accounts
Filed: May 11, 2009

♦ ♦ ♦

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 05/18/09 - 05/24/09 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 05/18/09 - 05/24/09 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.

TRD-200901877
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: May 12, 2009

♦ ♦ ♦

Deep East Texas Local Workforce Development Board

Strategic Plan Modification

The Deep East Texas Local Workforce Development Board, Inc. dba WorkForce Solutions Deep East Texas issues this public notice that the strategic and operational plan modification summary for Board Contract Years 2009-2010 is available for public review and comment. The plan modification summary is available on the WorkForce Solutions Deep East Texas Internet site http://www.detwork.org; or may be requested by telephone (936) 639-8898 or in person at 539 South Chestnut, Suite 300, Lufkin, Texas 75901.

WorkForce Solutions Deep East Texas is responsible for the implementation of workforce development programs in the following 12 counties: Angelina, Houston, Jasper, Nacogdoches, Newton, Polk, Sabine, San Augustine, San Jacinto, Shelby, Trinity, and Tyler.

The entire plan includes the Board's mission, goals and objectives; a labor market analysis; plans for employer involvement; elements of system operation including service delivery, partners, structure, and performance; information regarding the alignment to the state workforce plan; public comments; and priority of service. The plan modification summary describes the intended changes to the plan and appendices.

The public comment period begins on May 26, 2009 and the deadline for receipt of comments is 5:00 p.m. on June 26, 2009. Comments must be submitted in writing to the following postal address: 539 South Chestnut, Suite 300, Lufkin, Texas 75901, faxed to the following number: (936) 633-7491, or e-mailed to the following individual: Marilyn Hartsook at marilyn.hartsook@twc.state.tx.us. Comments will be incorporated as part of the Board's plan modification. For more information, call Marilyn Hartsook at (936) 639-8898.

The Deep East Texas Local Workforce Development Board is an equal opportunity organization. Auxiliary aids or services are available upon request to those individuals with disabilities. For extra assistance, please contact us at (936) 639-8898.

TRD-200901690
Marilyn Hartsook
Planning and Operations Director
Deep East Texas Local Workforce Development Board
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 22, 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 22, 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: ABC Custom Homes, Inc.; DOCKET NUMBER: 2009-0641-WQ-E; IDENTIFIER: RN105698963; LOCATION: Ector County; TYPE OF FACILITY: general contractor; RULE VIOLATED: 30 Texas Administrative Code (TAC) §281.25(a)(4), by failing to obtain a construction general permit; PENALTY: $700; ENFORCEMENT COORDINATOR: Harvey Wilson, (512) 239-0321; REGIONAL OFFICE: 3300 North A Street, Building 4-107, Midland, Texas 79705-5406, (432) 570-1359.

(2) COMPANY: Big Diamond, Inc. dba Diamond Shamrock 1260; DOCKET NUMBER: 2009-0178-PST-E; IDENTIFIER: RN102438413; LOCATION: El Paso, El Paso County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §115.245(2) and Texas Health and Safety Code (THSC), §382.085(b), by failing to verify proper operation of the Stage II equipment; PENALTY: $4,401; Supplemental Environmental Project (SEP) offset amount of $1,760 applied to Audubon Society-Rio Bosque Wetland Park; ENFORCEMENT COORDINATOR: Brianna Carlson, (956) 425-6010; REGIONAL OFFICE: 401 East Franklin Avenue, Suite 560, El Paso, Texas 79901-1212, (915) 834-4949.

(3) COMPANY: Chemical Lime, Limited; DOCKET NUMBER: 2008-1122-AIR-E; IDENTIFIER: RN100552454; LOCATION: New Braunfels, Comal County; TYPE OF FACILITY: lime manufacturing plant; RULE VIOLATED: 30 TAC §122.143(4) and §122.145(2)(C), Federal Operating Permit (FOP) Number O-01122, General Terms and Conditions (GTC), and THSC, §382.085(b), by failing to submit the Title V deviation report; PENALTY: $2,875; ENFORCEMENT COORDINATOR: Trina Grieco, (210) 490-3096; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(4) COMPANY: City of China; DOCKET NUMBER: 2009-0254-MWD-E; IDENTIFIER: RN101721686; LOCATION: Jefferson County; TYPE OF FACILITY: wastewater treatment plant; RULE VIOLATED: 30 TAC §305.125(1), Texas Pollutant Discharge Elimination System (TPDES) Permit Number 12104001, Effluent Limitations and Monitoring Requirements Numbers 1, 2, and 6, and the Code, §26.121(a), by failing to comply with the permitted

effluent limitations for dissolved oxygen, five-day biochemical oxygen demand, total chlorine residual, and total suspended solids (TSS); and 30 TAC §305.125(17) and TPDES Permit Number 12104001, Sludge Provisions, by failing to timely submit the annual sludge report; PENALTY: $10,322; ENFORCEMENT COORDINATOR: Jennifer Graves, (956) 425-6010; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(5) COMPANY: Eagle Rock Field Services, L.P.; DOCKET NUMBER: 2009-0147-AIR-E; IDENTIFIER: RN100222660; LOCATION: Miami, Roberts County; TYPE OF FACILITY: natural gas compressor station; RULE VIOLATED: 30 TAC §122.143(4) and §122.146(2), FOP Number O-00821, GTC, and THSC, §382.085(b), by failing to submit the annual permit compliance certification; and 30 TAC §101.27(c)(1) and the Code, §5.702, by failing to pay outstanding air emissions late fees; PENALTY: $2,575; ENFORCEMENT COORDINATOR: Steven Lopez, (512) 239-1896; REGIONAL OFFICE: 3918 Canyon Drive, Amarillo, Texas 79109-4933, (806) 353-9251.

(6) COMPANY: Exxon Mobil Corporation; DOCKET NUMBER: 2009-0132-AIR-E; IDENTIFIER: RN102579307; LOCATION: Baytown, Harris County; TYPE OF FACILITY: refining and supply company; RULE VIOLATED: 30 TAC §116.715(a), Flexible Permit Number 18287, Special Condition (SC) Number 1, and THSC, §382.085(b), by failing to prevent unauthorized emissions; PENALTY: $10,000; SEP offset amount of $4,000 applied to Houston-Galveston AERCO's Clean Cities/Clean Vehicles Program; ENFORCEMENT COORDINATOR: John Muennink, (361) 825-3100; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(7) COMPANY: Harris County Municipal Utility District Number 249; DOCKET NUMBER: 2009-0318-MWD-E; IDENTIFIER: RN102955549; LOCATION: Spring, Harris County; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number WQ0013765001, Effluent Limitations and Monitoring Requirements Number 1, and the Code, §26.121(a), by failing to comply with permitted effluent limits for ammonia nitrogen and carbonaceous biochemical oxygen demand; PENALTY: $1,100; ENFORCEMENT COORDINATOR: Craig Fleming, (512) 239-5806; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(8) COMPANY: City of Plano; DOCKET NUMBER: 2009-0034-AIR-E; IDENTIFIER: RN102892007; LOCATION: Melissa, Collin County; TYPE OF FACILITY: composting site; RULE VIOLATED: 30 TAC §111.201 and THSC, §382.085(b), by failing to comply with the general prohibition of outdoor burning; PENALTY: $1,050; SEP offset amount of $840 applied to North Central Texas Council of Governments - North Central Texas Clean School Bus Program; ENFORCEMENT COORDINATOR: Kirk Schoppe, (512) 239-0489; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(9) COMPANY: Producers Cooperative Association; DOCKET NUMBER: 2009-0618-PST-E; IDENTIFIER: RN102493111; LOCATION: Bryan, Brazos County; TYPE OF FACILITY: underground storage tank; RULE VIOLATED: 30 TAC §334.8(c)(5)(A)(i), by failing to possess a valid TCEQ delivery certificate prior to receiving fuel; PENALTY: $875; ENFORCEMENT COORDINATOR: Keith Frank, (512) 239-1203; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(10) COMPANY: Judy Rinker and Phyllis Bigby; DOCKET NUMBER: 2008-1958-PWS-E; IDENTIFIER: RN101232031; LOCATION: Canyon Lake, Comal County; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.109(c)(2)(A)(i) and §290.122(c)(2)(B) and THSC, §341.033(d), by failing to collect routine distribution coliform samples and by failing to provide public notification of the failure to sample; PENALTY: $2,052; ENFORCEMENT COORDINATOR: Amanda Henry, (713) 767-3500; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(11) COMPANY: Texas Barge & Boat, Inc.; DOCKET NUMBER: 2009-0433-IWD-E; IDENTIFIER: RN102037959; LOCATION: Brazoria County; TYPE OF FACILITY: barge cleaning and marine vessel repair; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number WQ0004696000, Effluent Limitations and Monitoring Requirements Number 1 at Outfall 004, and the Code, §26.121(a)(1), by failing to comply with permitted effluent limits for TSS, oil and grease, and total organic carbon; PENALTY: $5,970; ENFORCEMENT COORDINATOR: Heather Brister, (254) 751-0335; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77024-1452, (713) 767-3500.

(12) COMPANY: Larry West dba West Dairy Farm; DOCKET NUMBER: 2009-0150-AGR-E; IDENTIFIER: RN104348537; LOCATION: Grayson County; TYPE OF FACILITY: dairy; RULE VIOLATED: 30 TAC §321.47(j), by failing to have a Natural Resources Conservation Service engineer, licensed Texas professional engineer, or licensed Texas professional geoscientist review liner maintenance documentation and perform a site evaluation of structural controls every five years; PENALTY: $2,369; ENFORCEMENT COORDINATOR: Tom Jecha, (512) 239-2576; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

TRD-200901878
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: May 12, 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 22, 2009.** Section 7.075 also requires that the commission promptly consider any written comments received and that the commission may withdraw or withhold approval of an AO if a comment discloses facts or considerations that indicate that consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed AO is not required to be published if those changes are made in response to written comments.

Copies of each proposed AO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 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 22, 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: Aztec Waste, Inc.; DOCKET NUMBER: 2007-0902-MLM-E; TCEQ ID NUMBER: RN103991634; LOCATION: 13242 Lookout Road, San Antonio, Bexar County; TYPE OF FACILITY: municipal solid waste recycling facility; RULES VIOLATED: 30 TAC §328.5(d), by failing to establish and maintain financial assurance for closure of a municipal solid waste recycling facility; 30 TAC §328.4(a) and §328.5(a) and (b), by failing to obtain authorization to operate a recycling facility; and 30 TAC §330.15(a)(1) and TWC, §26.121(a), by failing to prevent the discharge of municipal solid waste into or adjacent to water in the State; PENALTY: $3,210; STAFF ATTORNEY: Gary Shiu, Litigation Division, MC R-12, (713) 422-8916; REGIONAL OFFICE: San Antonio Regional Office, 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(2) COMPANY: Bryan D. Carlson; DOCKET NUMBER: 2008-1138-LII-E; TCEQ ID NUMBER: RN104706726; LOCATION: 4955 Jaymar Drive, Sugar Land, Harris County; TYPE OF FACILITY: licensed landscape irrigator; RULES VIOLATED: 30 TAC §344.58(c), recodified in 30 TAC §344.34(d), effective January 1, 2009 (33 TexReg 6843), by failing to refrain from authorizing or allowing anyone else to use his license to act as a licensed irrigator; PENALTY: $250; STAFF ATTORNEY: Phillip Goodwin, Litigation Division, MC 175, (512) 239-0675; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023, (713) 767-3500.

(3) COMPANY: D. L. Finney Investments, Inc.; DOCKET NUMBER: 2008-0586-WQ-E; TCEQ ID NUMBER: RN104968474; LOCATION: intersection of Samac Street and 1st Street, Lampasas, Lampasas 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 stormwater associated with construction activities; PENALTY: $2,100; STAFF ATTORNEY: Xavier Guerra, Litigation Division, MC R-13, (210) 403-4016; REGIONAL OFFICE: Waco Regional Office, 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(4) COMPANY: Fikremariam Deresse and Gizaw Getachew dba John's Corner Store; DOCKET NUMBER: 2007-1786-PST-E; TCEQ ID NUMBER: RN101560985; LOCATION: 4925 South Second Avenue, Dallas, Dallas County; TYPE OF FACILITY: inactive underground storage tanks (USTs); RULES VIOLATED: 30 TAC §334.47(a)(2), by failing to permanently remove from service, no later than 60 days after the prescribed upgrade implementation date, three USTs for which any applicable component of the system is not brought into timely compliance with the upgrade requirements; and 30 TAC §334.22(a) and TWC, §5.702, by failing to pay outstanding UST fees and associated late fees for TCEQ Financial Account Number 0031759U for Fiscal Years 1997 - 2007; PENALTY: $2,625; STAFF ATTORNEY: Benjamin 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.

(5) COMPANY: Fouad Matar dba Bingle Chevron; DOCKET NUMBER: 2008-1909-PST-E; TCEQ ID NUMBER: RN101778884; LOCATION: 2901 Bingle Road, Houston, Harris County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §115.245(2) and Texas Health and Safety Code (THSC), §382.085(b), by failing to verify proper operation of the Stage II equipment at least once every 12 months; PENALTY: $3,218; STAFF ATTORNEY: Phillip Goodwin, Litigation Division, MC 175, (512) 239-0675; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023, (713) 767-3500.

(6) COMPANY: Gator Stop, Inc. dba Gator Stop Raywood; DOCKET NUMBER: 2008-0326-PST-E; TCEQ ID NUMBER: RN101729127; LOCATION: 13652 Highway 90 East, Raywood, Liberty 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 release at a frequency of at least once every month (not to exceed 35 days between each monitoring); 30 TAC §334.50(d)(1)(B) and TWC, §26.3475(c)(1), by failing to conduct proper inventory control procedures for all USTs at the facility; 30 TAC §334.8(c)(4)(A)(vii) and (5)(B)(ii), by failing to timely renew a previously issued UST delivery certificate by submitting a properly completed UST registration and self-certification form at least 30 days before the expiration date; and 30 TAC §334.8(c)(5)(A)(i) and TWC, §26.3467(a), by failing to make available to a common carrier a valid, current TCEQ delivery certificate before accepting delivery of a regulated substance into the USTs; PENALTY: $5,160; 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.

(7) COMPANY: J.C. Evans Construction Company, Inc.; DOCKET NUMBER: 2005-0897-AIR-E; TCEQ ID NUMBER: RN103045340; LOCATION: County Road 239, near Georgetown, Williamson County; TYPE OF FACILITY: rock crusher; RULES VIOLATED: 30 TAC §116.110(a)(1) and THSC, §382.0518(a) and §382.085(b), by failing to obtain authorization or satisfy the conditions of a permit by rule to operate an existing facility; PENALTY: $210,000, Supplemental Environmental Project offset amount of $168,000 for the performance of the SEP and any remaining funds to Texas Association of Resource Conservation & Development Areas, Inc. - Cleanup of Unauthorized Dumpsites; STAFF ATTORNEY: James Sallans, Litigation Division, MC 175, (512) 239-2053; REGIONAL OFFICE: Austin Regional Office, 2800 South Interstate Highway 35, Suite 100, Austin, Texas 78704-5712, (512) 339-2929.

(8) COMPANY: Larry Cathey dba Waco Wood Recycling and Materials; DOCKET NUMBER: 2008-0727-MSW-E; TCEQ ID NUMBER: RN105211361; LOCATION: 268 Antler Road, Waco, McLennan County; TYPE OF FACILITY: recycling facility; RULES VIOLATED: 30 TAC §332.8(b)(1), by failing to maintain the minimum setback distance of 50 feet from all property lines to the edge of the area for storing processed material; 30 TAC §328.5(h), by failing to have a fire prevention and suppression plan; 30 TAC §37.921(a) and §328.5(d), by failing to establish and maintain financial assurance for the closure of a recycling facility that stores combustible material outdoors; 30 TAC §328.5(f)(1), by failing to provide documentation showing the recycling of or transfer to a different site for recycling at least 50% by weight or volume of material accumulated at the beginning of the period during each subsequent six-month period; and 30 TAC §328.5(b) and §330.11(e), by failing to submit a Notice of Intent to operate a Recycling Facility to the executive director at least 90 days prior to engaging in recycling activities and to submit a form or forms describing the types of materials being accepted for recycling, any storage of materials prior to recycling, how the materials will be recycled and updates or changes to information contained in the facility report within 90 days of the effective date of the change; PENALTY: $38,216; STAFF ATTORNEY: Tracy Chandler, Litigation Division, MC 175, (512) 239-0629; REGIONAL OFFICE: Waco Regional Office, 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(9) COMPANY: Larry Cathey dba Waco Wood Recycling and Materials; DOCKET NUMBER: 2008-1368-MLM-E; TCEQ ID NUMBER: RN105211361; LOCATION: 268 Antler Road, Waco, McLennan County; TYPE OF FACILITY: composting facility; RULES VIOLATED: TWC, §26.121(a) and 30 TAC §332.4(1), by failing to obtain a permit for wastewater generated from a livestock manure composting operation; and 30 TAC §330.15(a), by failing to prevent the unauthorized disposal of municipal solid waste; PENALTY: $4,400; STAFF ATTORNEY: Tracy Chandler, Litigation Division, MC 175, (512) 239-0629; REGIONAL OFFICE: Waco Regional Office, 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(10) COMPANY: Leo Bird dba Walnut Ridge Estates Water System; DOCKET NUMBER: 2008-1824-PWS-E; TCEQ ID NUMBER: RN101195857; LOCATION: Highway 147, three miles northeast of Zavalla, Angelina County; TYPE OF FACILITY: public water supply; RULES VIOLATED: 30 TAC §290.113(f)(4) and THSC, §341.0315(c), by failing to comply with the maximum contaminant level of 0.080 milligram per liter (mg/L) for trihalomethanes, based on a running annual average; PENALTY: $354; STAFF ATTORNEY: Jennifer Cook, Litigation Division, MC 175, (512) 239-1873; REGIONAL OFFICE: Beaumont Regional Office, 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(11) COMPANY: Ludivinia Granados dba Venicias Bar; DOCKET NUMBER: 2007-1778-PST-E; TCEQ ID NUMBER: RN103002887; LOCATION: 6918 West Expressway 83, Mission, Hidalgo County; TYPE OF FACILITY: nightclub; RULES VIOLATED: 30 TAC §334.47(a)(2), by failing to permanently remove from service, no later than 60 days after the prescribed upgrade implementation date, two USTs for which any applicable component of the system is not brought into timely compliance with the upgrade requirements; and 30 TAC §334.7(d)(3), by failing to provide amended registration regarding USTs within 30 days from the date of occurrence of the change or addition; PENALTY: $3,675; STAFF ATTORNEY: Rudy Calderon, Litigation Division, MC 175, (512) 239-0205; REGIONAL OFFICE: Harlingen Regional Office, 1804 West Jefferson Avenue, Harlingen, Texas 78550-5247, (956) 425-6010.

(12) COMPANY: Ned H. Ward; DOCKET NUMBER: 2007-0235-PST-E; TCEQ ID NUMBER: RN102435484 and RN102270162; LOCATION: right of the D&D Feed Store and right behind the Gulf Station near 11th Street and North Highway 83 (Facility 1), Aspermont, Stonewall County and Broadway and 3rd Street (Facility 2), Aspermont, Stonewall County; TYPE OF FACILITY: two inactive convenience stores with USTs; RULES VIOLATED: 30 TAC §334.47(a)(2), by failing to permanently remove from service, no later than 60 days after the prescribed upgrade implementation date, the facilities' ten USTs for which any applicable component of the system is not brought into timely compliance; PENALTY: $5,250; STAFF ATTORNEY: Tracy Chandler, Litigation Division, MC 175, (512) 239-0629; REGIONAL OFFICE: Abilene Regional Office, 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (325) 698-9674.

(13) COMPANY: Sam Cicalo; DOCKET NUMBER: 2008-1450-AIR-E; TCEQ ID NUMBER: RN105566525; LOCATION: 488 County Road 3737, Wise County; TYPE OF FACILITY: dry abrasive cleaning sandblasting operation; RULES VIOLATED: 30 TAC §106.452(2)(D) and THSC, §382.085(b), by failing to obtain authorization prior to conducting a dry abrasive cleaning sandblasting operation; PENALTY: $1,000; STAFF ATTORNEY: Laurencia Fasoyiro, Litigation Division, MC R-12, (713) 422-8914; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(14) COMPANY: The City of McGregor; DOCKET NUMBER: 2007-1641-PWS-E; TCEQ ID NUMBER: RN101387199; LOCATION: 302 South Madison Street, McGregor, McLennan County; TYPE OF FACILITY: public water system; RULES VIOLATED: 30 TAC §290.46(f)(2) and TCEQ Order Docket Number 2006-0137-PWS-E Ordering Provision 2.a., by failing to keep on file and make available for commission review the water system's operating and maintenance records; 30 TAC §290.43(c)(4) and TCEQ Order Docket Number 2006-0137-PWS-E Ordering Provision 2.c.ii., by failing to provide a liquid level indicator for the below ground storage tank at plant number 1; 30 TAC §290.41(c)(3)(K), by failing to provide a casing vent for well number 3; 30 TAC §290.43(e), by failing to provide an intruder resistant fence around the elevated storage tank; 30 TAC §290.41(c)(3)(M), by failing to provide a suitable sampling cock on the discharge pipe of well pump number 4; 30 TAC §290.46(t), by failing to post a legible sign that contains the name of the water supply and emergency telephone numbers where a responsible official can be contacted; 30 TAC §290.43(c)(3), by failing to provide a proper overflow pipe and pipe flap cover; 30 TAC §290.46(m)(4), by failing to maintain the plant and distribution system in a watertight condition; 30 TAC §290.44(h)(1)(A), by failing to install backflow prevention assemblies or an air gap at all residences or establishments where an actual or potential contamination hazard exists; 30 TAC §290.42(l), by failing to provide a complete plant operations manual; and 30 TAC §290.46(j), by failing to provide an appropriate customer service inspection certificate form; PENALTY: $10,812; STAFF ATTORNEY: Benjamin Thompson, Litigation Division, MC 175, (512) 239-1297; REGIONAL OFFICE: Waco Regional Office, 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(15) COMPANY: Veolia Es Technical Solutions, L.L.C. fka Onyx Environmental Services, L.L.C.; DOCKET NUMBER: 2006-0455-IHW-E; TCEQ ID NUMBER: RN102599719; LOCATION: 7665 State Highway 73, Port Arthur, Jefferson County; TYPE OF FACILITY: commercial hazardous waste treatment, storage and disposal facility; RULES VIOLATED: 30 TAC §335.152(a)(1), 40 CFR §264.13(b), and Industrial Hazardous Waste (IHW) Permit Number 50212, Provision IV.A, by failing to develop an adequate Waste Analysis Plan; and 30 TAC §335.2(a) and (b), 40 CFR §264.344(a), and IHW Permit Number 50212, Provision IV.B.3.b., by failing to ship industrial mixed waste (incinerator ash and radioactive waste) to an authorized facility for disposal and by failing to prevent the acceptance of unauthorized waste that resulted in onsite waste management activities including storage and treatment; PENALTY: $15,554, Supplemental Environmental Project offset amount of $7,777 applied to Southeast Texas Regional Planning Commission - West Port Arthur Home Energy Efficiency Project; STAFF ATTORNEY: Jennifer Cook, Litigation Division, MC 175, (512) 239-1873; REGIONAL OFFICE: Beaumont Regional Office, 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(16) COMPANY: Vicky Barnett dba Vicky's Playcare; DOCKET NUMBER: 2007-0803-PWS-E; TCEQ ID NUMBER: RN105027924; LOCATION: 205 County Road 4111, Cass County; TYPE OF FACILITY: public water supply; RULES VIOLATED: 30 TAC §290.41(c)(3)(N), by failing to provide a flow measuring device to measure production yields and provide for the accumulation of water production data; 30 TAC §290.42(b)(1), by failing to provide disinfection facilities for microbiological control and distribution protection; 30 TAC §290.42(1), by failing to compile and maintain a facility operations manual for operator review and reference; 30 TAC §290.43(d)(2), by failing to provide the pressure tank with a pressure release device and an easily readable gauge; 30 TAC §290.46(f)(2), by failing to provide water system records to commission personnel at the time of the investigation; 30 TAC §290.46(m)(1), by failing to conduct an annual inspection of the water system's pressure tank; 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(a) and THSC, §341.035(a), by failing to submit plans to the executive director for review and approval prior to the construction of a public water system; 30 TAC §290.46(e) and THSC, §341.033(a), by failing to ensure that the production, treatment, and distribution facilities at the public water supply system are under the direct supervision of a water works operator who holds an applicable and valid license; 30 TAC §290.45(d)(2)(A)(ii) and THSC, §341.0315(c), by failing to provide a minimum pressure tank capacity of 220 gallons; 30 TAC §290.46(r), by failing to operate the system to maintain a minimum pressure of 35 pounds per square inch throughout the distribution system under normal operating conditions; and 30 TAC §290.109(c)(2)(A)(i) and §290.122(c)(2)(B) and THSC, §341.033(d), by failing to perform routine monthly bacteriological sampling of the public water supply during the months of August, October, and December 2006, and January 2007 - August 2007, and by failing to provide public notification of the failure to conduct monthly bacteriological sampling during the months of August and October 2006 and January 2007 - August 2007; PENALTY: $9,067; STAFF ATTORNEY: Benjamin Thompson, Litigation Division, MC 175, (512) 239-1297; REGIONAL OFFICE: Tyler Regional Office, 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

TRD-200901881
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: May 12, 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 22, 2009.** The commission will consider any written comments received and the commission may withdraw or withhold approval of a DO if a comment discloses facts or considerations that indicate that consent to the proposed DO is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction, or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed DO is not required to be published if those changes are made in response to written comments.

Copies of each proposed DO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Written comments about the DO should be sent to the attorney designated for the DO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on June 22, 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: Allan Watts; DOCKET NUMBER: 2007-1509-WOC-E; TCEQ ID NUMBER: RN105325534; LOCATION: 1918 South State Highway 80, Luling, Guadalupe County; TYPE OF FACILITY: public water supply; RULES VIOLATED: 30 TAC §30.381(b), TWC, §37.003, and Texas Health and Safety Code (THSC), §341.034(b), by failing to have a valid, effective public water system operator license issued by the commission prior to performing process control duties for the production and distribution of drinking water; and 30 TAC §21.4 and TWC, §5.702, by failing to pay all outstanding Water Quality Violation fees, including any interest and penalties, for TCEQ Financial Administration Account Number 23600236; PENALTY: $1,550; 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.

(2) COMPANY: Andrea Bennett, Trustee of the Randy Bennett GST Trust; DOCKET NUMBER: 2007-1777-PST-E; TCEQ ID NUMBER: RN101564649; LOCATION: Interstate Highway (IH) 20 and State Highway 108 North, Thurber, Erath County; TYPE OF FACILITY: former smoke stack station; RULES VIOLATED: 30 TAC §334.47(a)(2), by failing to permanently remove from service, no later than 60 days after the prescribed upgrade implementation date, three underground storage tanks (USTs) for which any applicable component of the system is not brought into timely compliance with the upgrade requirements; PENALTY: $7,875; STAFF ATTORNEY: Barham A. Richard, Litigation Division, MC 175, (512) 239-0107; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(3) COMPANY: Earlene McDaniel; DOCKET NUMBER: 2007-1902-PST-E; TCEQ ID NUMBER: RN101912145; LOCATION: 1026 Shelbyville Street, Center, Shelby County; TYPE OF FACILITY: out of service USTs; RULES VIOLATED: 30 TAC §334.47(a)(2), by failing to permanently remove from service, no later than 60 days after the prescribed upgrade implementation date, two USTs for which any applicable component of the system is not brought into timely compliance with the upgrade requirements; PENALTY: $5,250; STAFF ATTORNEY: Benjamin Thompson, Litigation Division, MC 175, (512) 239-1297; REGIONAL OFFICE: Beaumont Regional Office, 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(4) COMPANY: Edward Wiesen; DOCKET NUMBER: 2008-1845-PST-E; TCEQ ID NUMBER: RN104315155; LOCATION: 201 North Avenue C, Olney, Young County; TYPE OF FACILITY: inactive USTs; RULES VIOLATED: 30 TAC §334.47(a)(2), by failing to permanently remove from service, no later than 60 days after the prescribed upgrade implementation date, one UST for which any applicable component of the system is not brought into timely compliance with the upgrade requirements; PENALTY: $3,675; STAFF ATTORNEY: Jacquelyn Boutwell, Litigation Division, MC 175, (512) 239-5846; REGIONAL OFFICE: Abilene Regional Office, 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (325) 698-9674.

(5) COMPANY: Gregory W. Boyd; DOCKET NUMBER: 2008-0135-LII-E; TCEQ ID NUMBER: RN104946199; LOCATION: 6717 Harry Road, San Antonio, Bexar County; TYPE OF FACILITY: landscape irrigation business; RULES VIOLATED: 30 TAC §344.94(b), by failing to include the required statement: "Irrigation in Texas is regulated

by the Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087", on all written contracts and bills to install irrigation systems; and 30 TAC §344.95(a), by failing to design an irrigation system, or portion thereof, so as to require the use of any component part in a way which does not exceed the manufacturer's performance limitations for the part, unless the use is necessary to accommodate special site conditions; PENALTY: $207; STAFF ATTORNEY: Barham A. Richard, Litigation Division, MC 175, (512) 239-0107; REGIONAL OFFICE: San Angelo Regional Office, 622 South Oakes, Suite K, San Angelo, Texas 76903-7013, (915) 655-9479.

(6) COMPANY: James W. Hackney; DOCKET NUMBER: 2007-1273-LII-E; TCEQ ID NUMBER: RN105239826; LOCATION: 19719 Mesquite Branch Court, Spring, Harris County; TYPE OF FACILITY: landscape irrigation business; RULES VIOLATED: 30 TAC §30.5(a) and (b) and §344.4(a), TWC §37.003, and Texas Occupations Code, §1903.251, by failing to hold an irrigator license prior to selling, designing, consulting, installing, maintaining, altering, repairing, advertising, or servicing an irrigation system and representing to the public that he could perform a service for which a license is required; PENALTY: $736; STAFF ATTORNEY: Rudy Calderon, Litigation Division, MC 175, (512) 239-0205; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023, (713) 767-3500.

(7) COMPANY: Leroy Leonard Limas dba Lee Limas Mobile Home Park; DOCKET NUMBER: 2008-1118-PWS-E; TCEQ ID NUMBER: RN101223741; LOCATION: Farm-to-Market Road 259 and Schuman Road, Canutillo, El Paso County; TYPE OF FACILITY: mobile home park with a public water supply system; RULES VIOLATED: 30 TAC §290.271(b), §290.274(a) and (c), by failing to mail or directly deliver one copy of the Consumer Confidence Report (CCR) to each bill paying customer by July 1st of each year and by failing to submit a copy of the annual CCR and certification that the CCR has been distributed to the customers of the water system and that the information in the CCR is correct and consistent with compliance monitoring data to the TCEQ by July 1st of each year; and 30 TAC §290.51(a)(6), by failing to pay all annual and late Public Health Service fees for TCEQ Financial Administration Account Number 90710158 for Fiscal Years 1998 - 2008 to the TCEQ in a timely manner; PENALTY: $598; STAFF ATTORNEY: Rudy Calderon, Litigation Division, MC 175, (512) 239-0205; REGIONAL OFFICE: El Paso Regional Office, 401 East Franklin Avenue, Suite 560, El Paso, Texas 79901-1212, (915) 834-4949.

(8) COMPANY: PSW Real Estate, L.L.C.; DOCKET NUMBER: 2008-1884-EAQ-E; TCEQ ID NUMBER: RN105619837; LOCATION: 150 feet southwest of the intersection of Rabb Road and Melridge Place, Travis County; TYPE OF FACILITY: single family residential development; RULES VIOLATED: 30 TAC §213.4(a)(1), by failing to obtain approval of a Water Pollution Abatement Plan prior to beginning a regulated activity over the Edwards Aquifer Recharge Zone; PENALTY: $5,000; STAFF ATTORNEY: Barham A. Richard, Litigation Division, MC 175, (512) 239-0107; REGIONAL OFFICE: Austin Regional Office, 2800 South IH 35, Suite 100, Austin, Texas 78704-5712, (512) 339-2929.

(9) COMPANY: Russell Giles dba Waco Wrecking; DOCKET NUMBER: 2008-1370-MLM-E; TCEQ ID NUMBER: RN104947387; LOCATION: 14597 North Interstate 35, Elm Mott, McLennan County; TYPE OF FACILITY: automotive wrecking and storage yard; RULES VIOLATED: 30 TAC §111.201 and §330.15(c) and THSC, §382.085(b), by failing to prevent the unauthorized burning of municipal solid waste; PENALTY: $1,757; STAFF ATTORNEY: Benjamin Thompson, Litigation Division, MC 175, (512) 239-1297; REGIONAL OFFICE: Waco Regional Office, 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(10) COMPANY: SINDLO, INC. dba Rubys Food Store; DOCKET NUMBER: 2008-1825-PST-E; TCEQ ID NUMBER: RN101872265; LOCATION: 7500 Almeda Road, Houston, Harris 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: $2,884; STAFF ATTORNEY: Stephanie J. Frazee, Litigation Division, MC 175, (512) 239-3693; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023, (713) 767-3500.

TRD-200901880
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: May 12, 2009

Notice of Public Hearing on Proposed Revisions to 30 TAC Chapters 305 and 335

The Texas Commission on Environmental Quality (commission) will conduct a public hearing to receive testimony concerning proposed revisions to 30 TAC Chapter 305, Consolidated Permits and Chapter 335, Industrial Solid Waste and Municipal Hazardous Waste.

The proposed rulemaking would update Chapter 305 and Chapter 335 to include federal rule changes in Federal Rule Clusters XIV, XV, XVI, XVII and XVIII; make corrections to the K-181 hazardous waste listing and to the United States Environmental Protection Agency (EPA) manifest form amendments previously adopted; remove the requirement to use EPA SW-846 methods when conducting Resource Conservation and Recovery Act (RCRA) monitoring programs; add mercury-containing equipment to the list of Universal Wastes; allow for a standardized permit for treatment, storage and disposal facilities that treat or store hazardous waste in tanks, containers and containment buildings; exempt wastewater mixtures with benzene and 2-ethoxyethanol from the definition of hazardous waste; amend hazardous air pollutant standards for combustors; amend reporting requirements for the RCRA program that will reduce the paperwork burden that these requirements impose; correct administrative errors in the hazardous waste program; exclude cathode ray tubes from the definition of solid waste; amend an existing exclusion to the definition of solid waste that applies to oil-bearing hazardous secondary materials; amend the October 2005 NESHAP final rule to clarify several compliance and monitoring provisions; amend the F019 listing to exempt wastewater treatment sludges from the zinc phosphating process when used in the motor vehicle manufacturing industry; and update Chapter 330 references cited in Chapter 335, Subchapter T.

The commission will hold a public hearing on this proposal in Austin June 16, 2009 at 10:00 a.m. at the Texas Commission on Environmental Quality Complex located at 12100 Park 35 Circle in Building B, Room 201A. The hearing will be structured for the receipt of oral or written comments by interested persons. Registration will begin 30 minutes prior to the hearing. Individuals may present oral statements when called upon in order of registration. There will be no open discussion during the hearing; however, commission staff members will be available to informally discuss the proposal 30 minutes before the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Devon Ryan, Office of Legal Services, at (512) 239-6090.

Comments may be submitted to Devon Ryan, MC 205, Office of Legal Services, Texas Commission on Environmental

Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at *http://www5.tceq.state.tx.us/rules/ecomments*. File size restrictions may apply to comments submitted through the eComments system. All comments should reference Rule Project Number 2008-024-335-PR. The comment period closes June 22, 2009. Copies of the proposed rules can be obtained from the commission's web site at *http://www.tceq.state.tx.us/nav/rules/propose_adopt.html*. For further information, please contact Cynthia Palomares, Waste Permits Division, (512) 239-6079.

TRD-200901753
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: May 8, 2009

Notice of Water Quality Applications

The following notices were issued during the period of April 14, 2009 through May 8, 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 SINTON has applied for a renewal of TPDES Permit No. WQ0010055001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 800,000 gallons per day. The facility is located approximately 3/4 mile north of Sinton, Texas from the intersection of U.S. Highway 181 and State Highway 181 just east of U.S. Business Highway 77 North and along the southern edge of Chiltipin Creek, extending until the right of way of the Missouri Pacific Railroad in San Patricio County, Texas.

HARRIS COUNTY WATER CONTROL AND IMPROVEMENT DISTRICT NO. 50 has applied for a renewal of TPDES Permit No. WQ0010243001 which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 540,000 gallons per day. The facility is located at 1122 Cedar Lane, northeast of the intersection of Cedar Lane and Hickory Ridge Drive, one mile northwest of the intersection of State Highway 146 (Bayport Boulevard) and State Highway-NASA 1 (NASA Boulevard) in Harris County, Texas.

THE CITY OF GRANBURY has applied for a renewal of TPDES Permit No. WQ0010178002, which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 2,000,000 gallons per day. The facility is located on the east bank of Lake Granbury, approximately 0.9 miles south of the intersection of U.S. Highway 377 and Old Cleburne Road in Hood County, Texas.

THE CITY OF LAREDO has applied for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0010681007, to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 72,000 gallons per day. The facility will be located approximately 9,865 feet west of the intersection of Farm-to-Market Road 3338 (Las Tiendas) and Rancho Penitas Road in Webb County, Texas.

UNITED STATES DEPARTMENT OF THE ARMY AND AMERICAN WATER OPERATIONS AND MAINTENANCE INC which operates vehicle cleaning and sewage treatment facilities at Ft. Hood, has applied for a renewal of TPDES Permit No. WQ0002233000, which authorizes the discharge of wash rack treated wastewaters on an intermittent and flow variable basis via Outfall 001 and 002; wash rack treated wastewaters commingled with storm water on an intermittent and flow variable basis via Outfalls 004, 005, and 006; and treated domestic wastewater via Outfall 010 at a daily average flow not to exceed 30,000 gallons per day. The draft permit authorizes the discharge of wash rack treated wastewaters commingled with storm water via Outfalls 004, 005, and 006 on an intermittent and flow variable basis; and treated domestic wastewater via Outfall 010 at a daily average flow not to exceed 30,000 gallons per day. The facility is located in the main cantonment area and near Belton Lake at Fort Hood, Bell and Coryell County, Texas.

BNSF RAILWAY COMPANY which operates BNSF Railway Company - Temple Railyard, a fueling and repair station for locomotives and railroad rolling stock, has applied for a renewal of TPDES Permit No. WQ0002545000, which authorizes the discharge of storm water runoff, groundwater from a trench recovery system, and pad wash water on an intermittent and flow variable basis via Outfalls 001 and 002. The facility is located approximately 800 feet north of the Hawkins Road Crossing and 3400 feet north of Farm-to-Market Road 3117 Crossing, south of the City of Temple, Bell County, Texas.

CHEMICAL LIME LTD which operates Clifton Lime Plant, a lime manufacturing facility consisting of three lime kilns, a hydration plant, and related support operations, has applied for a renewal of TCEQ Permit No. WQ0003041000, which authorizes the disposal of process wastewater and contaminated storm water on a flow variable basis via evaporation. This permit will not authorize a discharge of pollutants into water in the State. The facility and evaporation ponds are located on Farm-to-Market Road 2602, two miles west of the intersection of Farm-to-Market Road 2602 and State Highway 6, approximately four miles south of the City of Clifton, Bosque County, Texas.

TANGLEWOOD WINE GROUP which proposes to operate a vineyard and winery, has applied for a renewal of TCEQ Permit No. WQ0004768000, which authorizes disposal of wastewaters generated from washing, crushing, and fermenting grapes for the production of wine at a daily average flow not exceed 1,600 gallons per day via irrigation of 18 acres of grapes with cover crop, at a hydraulic application rate not to exceed 2.4 acre-feet/acre/year. This permit will not authorize a discharge of pollutants into water in the State. The facility and land application site are located approximately 10,500 feet east of the intersection of State Highway 36 and Sempronius Road, near the City of Brenham, Austin County, Texas.

CITY OF CAMERON has applied for a renewal of TPDES Permit No. WQ0010004001 which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 960,000 gallons per day. The facility is located approximately 1,300 feet south-southeast of the intersection of U.S. Highways 190 and 77, State Highway 36 and Adams Street; and approximately one-half mile east of the intersection of Oak Street and Gillis Street in Milam County, Texas.

CITY OF JASPER has applied for a major amendment to TPDES Permit No. WQ0010197001 to authorize the processing of "Class A" sludge and marketing and distribution of "Class A" sludge. The current permit authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 3,250,000 gallons per day. The facility is located approximately 0.8 mile east of the intersection of Farm-to-Market Roads 2799 and 777, and approximately 1.0 mile northeast of the intersection of U.S. Highway 190 and State Highway 63 in Jasper County, Texas.

CITY OF SEALY has applied for a renewal of TPDES Permit No. WQ0010276001, which authorizes the discharge of treated domestic

wastewater at a daily average flow not to exceed 975,000 gallons per day. The facility is located approximately 0.5 mile southeast of the intersection of Interstate Highway 10 and State Highway 36 and adjacent to and on the east side of the Santa Fe Railroad tracks in Austin County, Texas.

CITY OF WOLFFORTH has applied to the Texas Commission on Environmental Quality (TCEQ) for a renewal of Permit No. WQ0010321002, which authorizes the disposal of treated domestic wastewater at a daily average flow not to exceed 410,000 gallons per day via surface irrigation of 600 acres of non-public access land including 60 acres of Pecan trees and 540 acres of perennial pasture that surround the plant site. This permit will not authorize the discharge of pollutants into waters in the State. The wastewater treatment facility and disposal site are located approximately 2,600 feet southwest of the intersection of Farm-to-Market Roads 179 and 1585, approximately three miles east of the intersection of U.S. Highway 82 and Farm-to-Market Road 1585 in Lubbock County, Texas.

CITY OF BRYAN has applied for a renewal of TPDES Permit No. WQ0010426001, which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 8,000,000 gallons per day. The facility is located approximately 3,800 feet northeast of the intersection of East 29th Street and Farm-to-Market Road 60 (University Drive) and approximately 3,400 feet southwest of the intersection of State Highway 6 and Farm-to-Market Road 60 in Brazos County, Texas.

CITY OF MINERAL WELLS has applied to the Texas Commission on Environmental Quality (TCEQ) for a renewal of TPDES Permit No. WQ0010585001, which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 2,350,000 gallons per day. The facility is located southwest of the City of Mineral Wells at the crossing of Pollard Creek by 22nd Street in Palo Pinto County, Texas.

CITY OF WESLACO has applied for a major amendment to TPDES Permit No. WQ0010619003 to authorize an increase in the discharge of treated domestic wastewater from an annual average flow not to exceed 3,000,000 gallons per day to an annual average flow not to exceed 5,500,000 gallons per day. The facility is located northeast of the City of Weslaco approximately 4,000 feet east of State Highway 88 and approximately 4,000 feet north of Pike Boulevard in Hidalgo County, Texas.

CITY OF SUGAR LAND has applied for a renewal of TPDES Permit No. WQ0011317001, which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 6,000,000 gallons per day. The facility is located approximately 2 miles south of Sugar Land at the intersection of Highway 6 and U.S. Highway 59 in Fort Bend County, Texas.

NEEDVILLE INDEPENDENT SCHOOL DISTRICT has applied for a major amendment to TPDES Permit No. WQ0012010001 to authorize an increase in the discharge of treated domestic wastewater from a daily average flow not to exceed 36,000 gallons per day to a daily average flow not to exceed 82,000 gallons per day and construct a new treatment facility. The current permit authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 36,000 gallons per day. The Interim phase facility is located between the intersections of Roesler Road and Danhouse Road with State Highway 36, approximately 2.25 miles southeast of the City of Needville on State Highway 36. The Final phase facility will be located approximately 1,900 feet northeast of the existing facility; approximately 3,100 feet northeast of the intersection of Fritzella Street and State Highway 36 on the east side of Fritzella Street in Fort Bend County, Texas.

U S ARMY CORPS OF ENGINEERS has applied for a renewal of Permit No. WQ0012088001, which authorizes the disposal of treated domestic wastewater at a daily average flow not to exceed 2,000 gallons per day via evaporation and when needed by irrigation on 0.5 acres of non-public access 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 on the south side of Somerville Lake in Rocky Creek Park at a point approximately 400 feet southwest of the intersection of Road A and Road B within Rocky Creek Park in Washington County, Texas.

BEMARD TIMBERS WATER SUPPLY CORPORATION has applied for a renewal of TPDES Permit No. WQ0012097001 which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 21,000 gallons per day. The facility is located at north of U.S. Highway 90A, approximately 1.4 miles northeast of the intersection of U.S. Highway 90A and State Highway 60 in Wharton County, Texas.

CITY OF BURTON has applied for a renewal of TPDES Permit No. WQ0012193001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 44,000 gallons per day. The facility is located approximately 500 feet north of the U.S. Highway 290 Bridge across Indian Creek in Washington County, Texas.

AQUA DEVELOPMENT INC has applied for a renewal of TPDES Permit No. WQ0014194001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 225,000 gallons per day. The facility is located in Water House Court approximately three miles southwest of the intersection of Farm-to-Market Road 359 and Farm-to-Market Road 1093 in Fort Bend County, Texas.

ZAVALA COUNTY WATER CONTROL AND IMPROVEMENT DISTRICT NO 1 has applied for a new permit, Proposed Permit No. WQ0014367002, to authorize the disposal of treated domestic wastewater at a daily average flow not to exceed 330,000 gallons per day via surface irrigation of 100 acres of public access grassland. This permit will not authorize a discharge of pollutants into waters in the State. The wastewater treatment facility and disposal site will be located approximately 6,000 feet northwest of the intersection of Highway 83 and Highway 57 in Zavala County, Texas.

CITY OF RISING STAR has applied to the Texas Commission on Environmental Quality (TCEQ) for a renewal of TPDES Permit No. WQ0014515001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 140,000 gallons per day. The facility is located approximately 500 feet north of State Highway 36, one mile east of the intersection of State Highway 36 and U.S. Highway 183 - East Pioneer Street in Eastland County, Texas.

STONE HEDGE UTILITY CO INC has applied for a renewal of TPDES Permit No. WQ0014709001 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 approximately 6,100 feet northeast of the intersection of State Highway 105 and State Highway 336 in Montgomery County, Texas.

FORT BEND COUNTY MUNICIPAL UTILITY DISTRICT 134 has applied for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0014917001, to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 950,000 gallons per day in the final phase. The facility will be located approximately 1.75 miles northwest of the intersection of Highway 99 and Highway 90A in Fort Bend County, Texas.

If you need more information about these permit applications or the permitting process, please call the TCEQ Office of Public Assistance, Toll Free, at 1-800-687-4040. General information about the TCEQ

can be found at our web site at www.TCEQ.state.tx.us. Si desea información en Español, puede llamar al 1-800-687-4040.

TRD-200901904
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: May 13, 2009

Notice of Water Rights Application

Notices issued May 8, 2009.

APPLICATION NO. 5528A; Kevin and Martha Petermann, 207 FM 473, Comfort, Texas, 78013, Applicants, have applied to amend their portion of Water Use Permit No. 5528 to add a downstream diversion point on the Guadalupe River, Guadalupe River Basin and to add a place of use in Kendall County. More information on the application and how to participate in the permitting process is given below. The application and fees were received on July 3, 2007. Additional information was received on September 7, September 19, and November 10, 2007. The application was declared administratively complete and filed with the Office of the Chief Clerk on November 16, 2007. 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, by May 28, 2009.

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-200901905
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: May 13, 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 8, 2009, in the matter of the Executive Director of the Texas Commission on Environmental Quality, Petitioner v. Dolores A. Luke dba Little Big Horn Services; SOAH Docket No. 582-09-2143; TCEQ Docket No. 2008-1303-PWS-E. The commission will consider the Administrative Law Judge's Proposal for Decision and Order regarding the enforcement action against Dolores A. Luke dba Little Big Horn Services 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-200901906
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: May 13, 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 11, 2009, in the matter of the Executive Director of the Texas Commission on Environmental Quality, Petitioner v. EBAA Iron, Inc.; SOAH Docket No. 582-08-3322; TCEQ Docket No. 2004-0505-WQ-E. The commission will consider the Administrative Law Judge's Proposal for Decision and Order regarding the enforcement action against EBAA Iron, Inc. 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-200901907
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: May 13, 2009

Request for Nominations

The Texas Commission on Environmental Quality (TCEQ) is requesting nominations for eight individuals to serve on the Municipal Solid Waste Management and Resource Recovery Advisory Council (Advisory Council) for the following positions:

1. A representative from a private environmental conservation organization (term expires August 31, 2015).

2. A representative from a planning region (term expires August 31, 2015).

3. A registered waste tire processor (term expires August 31, 2015).

4. A professional engineer from a private engineering firm with experience in the design and management of solid waste facilities (term expires August 31, 2015).

5. A solid waste professional with experience managing or operating a commercial solid waste landfill (term expires August 31, 2015).

6. An elected official from a municipality with a population of 25,000 or more but less than 100,000 (term expires August 31, 2015).

7. An elected official from a county with a population of less than 150,000 (term expires August 31, 2015).

8. An elected official from a county with any population size (term expires August 31, 2011).

The Advisory Council was created by the 69th Legislature in 1983. Members represent various interests, which include city and county solid waste agencies, public solid waste districts or authorities, commercial solid waste landfills, planning regions, environmental perspectives, city and county governments, financial advisors, registered waste tire processors, professional engineers, solid waste professionals, composting/recycling companies and general public representatives.

Upon request from the TCEQ Commissioners, the Advisory Council reviews and evaluates the effect of state policies and programs on municipal solid waste management; makes recommendations on matters relating to municipal solid waste management; recommends legislation to encourage the efficient management of municipal solid waste; recommends policies for the use, allocation, or distribution of the planning fund; and recommends special studies and projects to further the effectiveness of municipal solid waste management and recovery for the state of Texas.

The Advisory Council members are required by law to hold at least one meeting every three months. The meetings usually last one day and are held in Austin, Texas. Some travel reimbursement may be available.

To apply or to nominate an individual for one of eight Advisory Council positions, please complete and submit an Advisory Council application and related materials. The application and additional information is available at: http://www.tceq.state.tx.us/goto/msw/council/.

Evaluations will be made based upon the application, materials submitted and solid waste experience. Materials may include a résumé, biography, summary of experience, list of publications, recognitions/awards, letters of reference, etc., that help demonstrate knowledge, experience and interest on municipal solid waste matters. Appointments will be made by the TCEQ's Commissioners in Austin, Texas, in the Fall of 2009.

The Advisory Council application and materials must be postmarked by 5:00 p.m., Friday, June 26, 2009, and delivered to Mr. Steve Hutchinson of the Waste Permits Division. If sending by regular mail, please send to: Texas Commission on Environmental Quality, Waste Permits Division, Mr. Steve Hutchinson, P.O. Box 13087, MC-126, Austin, Texas 78711-3087. If sending by overnight mail, please send to Texas Commission on Environmental Quality, Waste Permits Division, Mr. Steve Hutchinson, 12100 Park 35 Circle, Building A, MC-126, Austin, Texas 78753. Questions regarding the Advisory Council can be directed to Mr. Hutchinson at (512) 239-6716, or e-mail address shutchin@tceq.state.tx.us.

TRD-200901882
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: May 12, 2009

♦ ♦ ♦

Texas Facilities Commission

Request for Proposals #303-9-11760

The Texas Facilities Commission (TFC), on behalf of the Department of Family and Protective Services and the Texas Health and Human Services Commission, announces the issuance of Request for Proposals (RFP) #303-9-11760. TFC seeks a ten year lease of approximately 4,119 square feet of office space in Dimmitt, Castro County, Texas.

The deadline for questions is May 29, 2009 and the deadline for proposals is June 8, 2009 at 3:00 p.m. The anticipated award date is June 26, 2009. TFC reserves the right to accept or reject any or all proposals submitted. TFC is under no legal or other obligation to execute a lease on the basis of this notice or the distribution of a RFP. Neither this notice nor the RFP commits TFC to pay for any costs incurred prior to the award of a grant.

Parties interested in submitting a proposal may obtain information by contacting TFC Purchaser Sandy Williams at (512) 475-0453. A copy of the RFP may be downloaded from the Electronic State Business Daily at *http://esbd.cpa.state.tx.us/bid_show.cfm?bidid=82358*.

TRD-200901873
Kay Molina
General Counsel
Texas Facilities Commission
Filed: May 11, 2009

♦ ♦ ♦

Request for Proposals #303-9-11765

The Texas Facilities Commission (TFC), on behalf of the Texas Department of Criminal Justice announces the issuance of Request for Proposals (RFP) #303-9-11765. TFC seeks a five or ten year lease of approximately 2,411 square feet of office space in Palestine, Anderson County, Texas.

The deadline for questions is May 29, 2009 and the deadline for proposals is June 12, 2009 at 3:00 p.m. The award date is July 15, 2009. TFC reserves the right to accept or reject any or all proposals submitted. TFC is under no legal or other obligation to execute a lease on the basis of this notice or the distribution of a RFP. Neither this notice nor the RFP commits TFC to pay for any costs incurred prior to the award of a grant.

Parties interested in submitting a proposal may obtain information by contacting TFC Purchaser Sandy Williams at (512) 475-0453. A copy of the RFP may be downloaded from the Electronic State Business Daily at *http://esbd.cpa.state.tx.us/bid_show.cfm?bidid=82414*.

TRD-200901884
Kay Molina
General Counsel
Texas Facilities Commission
Filed: May 12, 2009

♦ ♦ ♦

Texas Health and Human Services Commission

Public Notice

The Texas Health and Human Services Commission (HHSC) intends to submit to the Centers for Medicare and Medicaid Services an amendment to the program for people with Deaf Blindness and Multiple Disabilities (DBMD), which is a Medicaid Home and Community-Based Services waiver program under the authority of 1915(c) of the Social Security Act. The DBMD program is currently approved for the five-year period beginning March 1, 2008, and ending February 29, 2013. The proposed effective date for the amendment is March 1, 2009.

The DBMD program serves individuals 18 years and older who are legally blind, have a chronic, severe hearing impairment, and have a third disability that limits independent functioning. The program serves individuals in the community who would otherwise require care in an Intermediate Care Facility for the Mentally Retarded and Related Conditions (ICF/MR).

This amendment will change the frequency in which provider contracts are monitored. This will impact the quality assurance measures throughout the waiver. The required documentation of an individual's Freedom of Choice between the waiver and institutional care will change from an annual requirement to initial enrollment only. Support Consultation will be added as a new service, which will allow individuals participating in the Consumer Directed Services the option to access a Support Advisor to assist in directing their services. Form number references will be replaced with form names throughout the waiver application. This amendment will update the contact information for the Department of Aging and Disability policy specialist.

HHSC is requesting that the waiver amendment be approved for the period beginning March 1, 2009, through February 28, 2013. This amendment maintains cost neutrality for waiver years 2009 through 2013.

To obtain copies of the proposed waiver amendment, interested parties may contact Christine Longoria by mail at Texas Health and Human Services Commission, P.O. Box 85200, mail code H-620, Austin, Texas 78708-5200, phone (512) 491-1152, fax (512) 491-1953, or by e-mail at Christine.Longoria@hhsc.state.tx.us.

TRD-200901733
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Filed: May 7, 2009

♦ ♦ ♦

Texas Department of Insurance

Company Licensing and Registration

Application for incorporation in the State of Texas by TEXAS PLATINUM PROPERTY & CASUALTY INSURANCE COMPANY, a domestic fire and casualty company. The home office is in Austin, Texas.

Any objections must be filed with the Texas Department of Insurance, within twenty (20) calendar days from the date of the *Texas Register* publication, addressed to the attention of Godwin Ohaechesi, 333 Guadalupe Street, M/C 305-2C, Austin, Texas 78701.

TRD-200901901
Brenda Caldwell
Assistant General Counsel
Texas Department of Insurance
Filed: May 13, 2009

♦ ♦ ♦

Notice of Public Hearing

Notice is hereby given that a public hearing will be held under Docket No. 2705 beginning at 9:30 a.m. on June 17, 2009. The purpose of the hearing is to receive comments regarding proposed amendments to Chapter 21, Subchapter AA, Consumer Choice Health Benefit Plans, 28 TAC §§21.3502, 21.3510 - 21.3513, 21.3515 - 21.3518, 21.3540, and 21.3543; new Subchapter JJ, Autism Spectrum Disorder Coverage, 28 TAC §§21.4401 - 21.4404; and amendments to Chapter 26, Subchapter D, Health Group Cooperatives, 28 TAC §26.409. The proposed amendments and new sections were published in the April 3, 2009, issue of the *Texas Register* (34 TexReg 2218).

The initial comment period for these rules, scheduled to end on May 4, 2009 is hereby extended to June 17, 2009.

The hearing will be held in Room 100 of the William P. Hobby, Jr. State Office Building, 333 Guadalupe Street in Austin, Texas 78701.

For information regarding the proposed amendments and new sections you may contact Debra Diaz-Lara, Deputy Commissioner, HWCN Division, Mail Code 103-6A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104.

TRD-200901801
Brenda Caldwell
Assistant General Counsel
Texas Department of Insurance
Filed: May 11, 2009

♦ ♦ ♦

Third Party Administrator Applications

The following third party administrator (TPA) application has been filed with the Texas Department of Insurance and is under consideration.

Application of FIRST SERVICE ADMINISTRATORS, INC., a foreign third party administrator. The home office is WINTER HAVEN, FLORIDA.

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-200901902
Brenda Caldwell
Assistant General Counsel
Texas Department of Insurance
Filed: May 13, 2009

♦ ♦ ♦

Texas Lottery Commission

Instant Game Number 1194 "Cadillac® Escalade™ Cash"

1.0 Name and Style of Game.

A. The name of Instant Game No. 1194 is "CADILLAC® ESCALADE™ CASH". The play style is "beat score with doubler".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 1194 shall be $5.00 per ticket.

1.2 Definitions in Instant Game No. 1194.

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: 2, 3, 4, 5, 6, 7, 8, 9, 10, 14, 15, 16, 17, 18, 19, 20, J SYMBOL, Q SYMBOL, K SYMBOL, A SYMBOL, $5.00, $10.00, $15.00, $25.00, $50.00, $100, $500, $50,000 and CADILLAC® ESCALADE™HYBRID 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. 1194 - 1.2D

PLAY SYMBOL	CAPTION
2	TWO
3	THR
4	FOR
5	FIV
6	SIX
7	SVN
8	EGT
9	NIN
10	TEN
14	FRTN
15	FFTN
16	SXTN
17	SVTN
18	EGTN
19	NNTN
20	TWY
J SYMBOL	JCK
Q SYMBOL	QUN
K SYMBOL	KNG
A SYMBOL	ACE
$5.00	FIVE$
$10.00	TEN$
$15.00	FIFTEEN
$25.00	TWY FIV
$50.00	FIFTY
$100	ONE HUN
$500	FIV HUN
$50,000	50 THOU
CADILLAC® ESCALADE™ HYBRID	HYBRID

E. Serial Number - A unique 14 (fourteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There will be a four (4)-digit "security number" which will be individually boxed and randomly placed within the number. The remaining ten (10) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 00000000000000.

F. Low-Tier Prize - A prize of $5.00, $10.00 and $15.00.

G. Mid-Tier Prize - A prize of $25.00, $50.00, $100 or $500.

H. High-Tier Prize - A prize of $5,000, $50,000 or CADILLAC® ESCALADE™ HYBRID.

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 (1194), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 001 and end with 075 within each pack. The format will be: 1194-0000001-001.

K. Pack - A pack of "CADILLAC® ESCALADE™ CASH" Instant Game tickets contains 075 tickets, packed in plastic shrink-wrapping and fanfolded by 75 fanfolded, perforated tickets per pack in one (1) ticket per strip. Ticket 001 will be shown on the front of the pack; the back of ticket 075 will be revealed on the back of the pack. All packs will be tightly shrink-wrapped. There will be no breaks between the tickets in a pack. Every other book will reverse i.e., reverse order will be: the back of ticket 001 will be shown on the front of the pack and the front of ticket 075 will be shown on the back of the pack.

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 "CADILLAC® ESCALADE™ CASH" Instant Game No. 1194 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 "CADILLAC® ESCALADE™ CASH" Instant Game is determined once the latex on the ticket is scratched off to expose 40 (forty) Play Symbols. If the total of YOUR CARDS beats the DEALER'S TOTAL in the same HAND, the player wins prize shown for that HAND. If YOUR CARDS add up to "21" in any one HAND, the player wins DOUBLE the prize shown for that HAND instantly. J, Q, K=10, A=11. 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 40 (forty) 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 40 (forty) 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 40 (forty) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;

17. Each of the 40 (forty) 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 within a pack will not have identical patterns.

B. A ticket will win as indicated by the prize structure.

C. A ticket can win up to ten (10) times.

D. Non-winning configurations to vary ticket to ticket and from pack to pack.

E. The ACE is considered high and has a value of 11.

F. The Jack, Queen and King have a value of 10.

G. The YOUR CARDS symbols will be used randomly and evenly across all twenty (20) YOUR CARDS positions, with respect to other restrictions.

H. No YOUR CARDS symbol will appear more than three (3) times on a ticket unless required for multiple wins.

I. The DEALER'S TOTAL symbols will be used randomly and evenly across all ten (10) DEALER'S TOTAL positions, with respect to other restrictions.

J. No DEALER'S TOTAL symbol will appear more than three (3) times on a ticket unless required for multiple wins.

K. The PRIZE symbols will be used randomly and evenly across all ten (10) PRIZE positions, with respect to other restrictions.

L. There will be no ties between the DEALER'S TOTAL and the total value of the YOUR CARDS within a HAND.

M. A range of values from fourteen (14) to twenty (20) will be used for the DEALER'S TOTAL.

N. A range of total values from twelve (12) to twenty-one (21) will be used for the YOUR CARDS.

O. A total value of "21" in the YOUR CARDS wins double the PRIZE shown, and will win as per the prize structure.

P. A total value of "21" will never appear within any HAND on a non-winning ticket.

Q. On all tickets, a prize amount will not appear more than twice, except when required by multiple wins.

R. On non-winning tickets, the total value of each YOUR CARDS will never be greater than or equal to the DEALER'S TOTAL within a hand.

S. On winning and non-winning tickets, the top cash prize of $50,000 and Escalade™ will each appear at least once, except on the nine (9) and ten (10) times wins.

2.3 Procedure for Claiming Prizes.

A. To claim a "CADILLAC® ESCALADE™ CASH" Instant Game prize of $5.00, $10.00, $15.00, $25.00, $50.00, $100, or $500, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, if appropriate, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not required, to pay a $25.00, $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 "CADILLAC® ESCALADE™ CASH" Instant Game prize of $5,000, $50,000 or Cadillac® Escalade™ Hybrid, 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 "CADILLAC® ESCALADE™ CASH" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General;

3. delinquent in reimbursing the Texas Health and Human Services Commission for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resources Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "CADILLAC® ESCALADE™ CASH" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "CADILLAC® ESCALADE™ CASH" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code 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 6,000,000 tickets in the Instant Game No. 1194. The approximate number and value of prizes in the game are as follows:

Figure 2: GAME NO. 1194 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in**
$5	760,000	7.89
$10	700,000	8.57
$15	160,000	37.50
$25	65,000	92.31
$50	38,900	154.24
$100	18,750	320.00
$500	1,500	4,000.00
$5,000	10	600,000.00
$50,000	4	1,500,000.00
Cadillac® Escalade™ Hybrid	3	2,000,000.00

***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 3.44. 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. 1194 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. 1194, 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-200901732
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: May 7, 2009

♦ ♦ ♦

Public Utility Commission of Texas

Notice of Application for Approval of Code of Conduct and Organizational Structure

Notice is given to the public of the filing on April 15, 2009, with the Public Utility Commission of Texas of an application for approval of code of conduct and organizational structure as required by PURA §39.157. The filing is required prior to securing a Certificate of Convenience and Necessity for specific facilities.

Docket Title and Number: Application of Cross Texas, LLC for Approval of its Code of Conduct and Organizational Structure, Docket Number 36865 before the Public Utility Commission of Texas.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than June 1, 2009. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 36865.

TRD-200901874
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: May 11, 2009

♦ ♦ ♦

Notice of Application for Designation as an Eligible Telecommunications Carrier

Notice is given to the public of a petition filed with the Public Utility Commission of Texas on May 6, 2009, for designation as an eligible telecommunications carrier, pursuant to Substantive Rule §26.418.

Docket Title and Number: Application of Everycall Communications, Inc. for Designation as an Eligible Telecommunications Carrier. Docket Number 36975.

The Application: Everycall Communications, Inc. seeks designation as an eligible telecommunications carrier in the service areas of Southwestern Bell Telephone Company d/b/a AT&T Texas, and GTE Southwest, Inc. d/b/a Verizon in Texas.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by June 11, 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 36975.

TRD-200901896
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: May 13, 2009

♦ ♦ ♦

Notice of Application for Service Provider Certificate of Operating Authority

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on May 5, 2009, for a service provider certificate of operating authority (SPCOA), pursuant to §§54.151 - 54.156 of the Public Utility Regulatory Act (PURA).

Docket Title and Number: Application of WTI Communications, Inc. for a Service Provider Certificate of Operating Authority, Docket Number 36970 before the Public Utility Commission of Texas.

Applicant intends to provide plain old telephone service, ADSL, SDSL, T1-Private Line, Frame Relay, long distance, wireless and MPLS services.

Applicant's requested SPCOA geographic area includes area of Texas currently served by Southwestern Bell Telephone Company d/b/a AT&T Texas, Embarq, and Verizon Southwest.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than May 28, 2009. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 36970.

TRD-200901875
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: May 11, 2009

♦ ♦ ♦

Notice of Application for Waiver of Denial of Request for NXX Code

Notice is given to the public of the filing with the Public Utility Commission of Texas an application on May 4, 2009, for waiver of denial by the Pooling Administrator (PA) of 1stel, Inc.'s (1stel) request for a 1,000 number block for Waxahachie, Texas.

Docket Title and Number: Petition of 1stel, Inc. for Waiver of Denial of Numbering Resources, Docket Number 36962.

The Application: 1stel, Inc. submitted an application to the PA for a 1,000 number block for Waxahachie, Texas in accordance with the current guidelines. The PA denied the request because 1stel did not meet the months-to-exhaust and utilization criteria established by the Federal Communications Commission.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than May 28, 2009. Hearing and speech impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 36962.

TRD-200901897
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: May 13, 2009

♦ ♦ ♦

Notice of Application for Waiver of Denial of Request for NXX Code

Notice is given to the public of the filing with the Public Utility Commission of Texas an application on May 8, 2009, for waiver of denial by the Pooling Administrator (PA) of Verizon Southwest, Inc.'s (Verizon) request for an NPA/NXX to meet the business needs of the University of Texas Medical Branch at their Victory Lakes site in League City, Texas, Dickinson rate center.

Docket Title and Number: Petition of Verizon Southwest, Inc. for Waiver of Denial of Numbering Resources, Docket Number 36977.

The Application: Verizon submitted an application to the PA for the requested NPA/NXX in accordance with the current guidelines. The PA denied the request because Verizon did not meet the months-to-exhaust and utilization criteria established by the Federal Communications Commission.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than May 28, 2009. Hearing and speech impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 36977.

TRD-200901898
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: May 13, 2009

♦ ♦ ♦

Notice of Application to Amend Certificated Service Area Boundaries

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application filed on May 6, 2009, for an amendment to certificated service area boundaries within Williamson County, Texas.

Docket Style and Number: Application of the Georgetown Utility Systems (Georgetown) to Amend a Certificate of Convenience and Necessity for Service Area Boundaries within Williamson County. Docket Number 36974.

The Application: The application encompasses an area of land which is singly certificated to Pedernales Electric Cooperative (PEC) and is within the corporate limits of the City of Georgetown. Georgetown received a letter request from Erin Welch, authorized agent of the current landowner, Campbell-Georgetown #1 Limited Partnership, requesting Georgetown to provide electric utility service to a proposed 33.765 acre tract for construction of a residential development. The estimated cost to Georgetown to provide service to this proposed area is $80,000.

Persons wishing to comment on the action sought should contact the Public Utility Commission of Texas no later than May 29, 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) at 1-800-735-2989. All comments should reference Docket Number 36974.

TRD-200901876
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: May 11, 2009

Request for Comments

The Public Utility Commission of Texas (commission) has initiated a new project to determine whether changes in technology, facilities, or competitive or market conditions justify a modification of the commission-established categories of access lines or the adoption of a revised definition of "access line" as defined for Municipal Right of Way purposes. Rules pertaining to this subject are found in 16 Texas Administrative Code Chapter 26, Subchapter R, Provisions Relating to Municipal Regulation and Rights-of-Way Management.

This review is required by Texas Local Government Code §283.003 (relating to Commission Review). In order to determine whether there is a need to revise commission rules applicable to Municipal Franchise Fees, the commission requests that interested persons file comments in response to the following questions:

1. Over the past three years, do any changes in telecommunications technology justify changes to the rules relating to the definition of an access line and/or the categories of access lines as defined for municipal right-of-way purposes? Please identify the technology and the commission rule(s) that the change in technology affects. In addition, please reference and discuss all applicable provisions of the Public Utility Regulatory Act (PURA), Texas Utilities Code Title II.

2. Over the past three years, do any changes in telecommunications facilities for the provisioning of telecommunications service justify changes to the rules relating to the definition of an access line and/or the categories of access lines as defined for municipal right-of-way purposes? Please identify the technology and the commission rule(s) that the change in technology affects. In addition, please reference and discuss all applicable PURA provisions.

3. Over the past three years, do any changes in competitive or market conditions justify changes to the rules relating to the definition of an access line or the categories of access lines as defined for municipal right-of-way purposes? Please identify the conditions and the commission rule(s) that the change in conditions affects. In addition, please reference and discuss all applicable PURA provisions.

4. Do changes in telecommunications technology, facilities, or market or competitive conditions require a review of the methodology for counting access lines for the assessment of municipal right-of-way fees? If so, please describe the necessary changes to the counting methodology, the commission rules affected, the rationale for making such changes, and how the changes may be accomplished in a competitively neutral manner.

Responses to this notice may be filed by submitting 16 copies to the commission's Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326 within 21 days of the date of publication of this notice. All responses should reference Project Number 36830. This notice is not a formal notice of a proposed rulemaking, but the parties' responses to the questions will assist the commission in determining the necessity for a related rulemaking. Questions concerning this notice should be referred to John Costello, Rate Regulation Division, at (512) 936-7377 or Jeff Stuart, Legal Division, at (512) 936-7442. Hearing and speech impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136.

TRD-200901883
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: May 12, 2009

Texas Water Development Board

Public Hearing Notice for Clean Water State Revolving Fund Intended Use Plan for American Recovery and Reinvestment Act of 2009

The Texas Water Development Board (Board) will conduct a public hearing on the draft American Recovery and Reinvestment Act of 2009 (ARRA) Clean Water State Revolving Fund (CWSRF) Intended Use Plan (IUP) to implement funding under the ARRA special CWSRF capitalization grant. The hearing will begin at 1:30 p.m. on Friday, June 12, 2009, in Room 170 of the Stephen F. Austin Building at 1700 N. Congress Ave., Austin, Texas 78701. Public access to the Stephen F. Austin Building is located at the Congress Avenue (east) entrance of the building.

The ARRA CWSRF IUP contains a list of wastewater projects in prioritized order which will be considered for funding through the CWSRF loan program. The draft ARRA CWSRF IUP has been prepared pursuant to rules adopted by the Board in 31 Texas Administrative Code Chapter 375. Please note that these rules have been waived or modified by the TWDB in certain respects in order to comply with special requirements for the ARRA CWSRF capitalization grant. The ARRA CWSRF funds must be used to fund projects that are either under construction or fully committed to construction contracts no later than February 17, 2010. Accordingly, the projects are prioritized on the basis of readiness to proceed to construction before that date. ARRA also requires that 20% of the available funds are set aside for "green" projects and 50% for deep subsidization of projects which the Board has re-

served for disadvantaged communities. See the TWDB WebSite at www.twdb.state.tx.us/stimulus for descriptions of green projects.

Interested persons are encouraged to attend the hearing and to present relevant and material comments concerning the draft ARRA CWSRF IUP. The Board also will receive information from applicants in addition to that previously provided in order to supplement or clarify a project's readiness to proceed, disadvantaged community status, or qualifications as a "green" project. **However, the Board will not consider any changes or modifications to the scope of work for any project.** In addition, persons may submit written comments to General Counsel, Texas Water Development Board, P.O. Box 13231, Austin, Texas 78711, or may file comments at *rulescomments@twdb.state.tx.us*. **Comments and supplemental information provided outside of electronic submission at the address stated, written comments to the Board's General Counsel, or at the public hearing on June 12, 2009, will not be considered. Any comments and supplemental information received after 5:00 p.m. June 15, 2009, will not be considered.** Interested persons also may review the draft ARRA of 2009 CWSRF IUP at the Board's website at: *www.twdb.state.tx.us/stimulus/index.htm.* Copies of the draft ARRA CWSRF IUP also may be obtained in Room 560 on the 5th floor of the Stephen F. Austin Building or may be obtained from the Texas Water Development Board, Project Finance, P.O. Box 13231, Austin, Texas 78711.

The hearing will be conducted in a manner that allows all members of the public to speak. Please note that time limits on public comments may be imposed.

Persons with disabilities who plan to attend this meeting and who may need auxiliary aids or services such as interpreters for persons who are deaf or hearing impaired, readers, large print or Braille, are requested to contact Leslie Anderson at (512) 463-7855 two (2) working days prior to the meeting so that appropriate arrangements can be made.

TRD-200901909
Kenneth L. Petersen
General Counsel
Texas Water Development Board
Filed: May 13, 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).