TEXAS REGISTER

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

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

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IN THIS ISSUE

The Texas A&M University System

Texas A&M University System Board of Regents

Texas Water Development Board

Open Meetings

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

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

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

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

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

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

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

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

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

THE GOVERNOR

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

Appointments

Appointments for September 24, 2009

Appointed as Judge of the 436th Judicial District Court, Bexar County, pursuant to HB 4833, 81st Legislature, Regular Session, effective October 1, 2009, for a term until the next General Election and until his successor shall be duly elected and qualified, Lisa K. Jarrett of San Antonio.

Appointed as Judge of the 437th Judicial District Court, Bexar County, pursuant to HB 4833, 81st Legislature, Regular Session, effective December 15, 2009, for a term until the next General Election and until her successor shall be duly elected and qualified, Lori I. Valenzuela of San Antonio.

Appointed to the Public Utility Commission of Texas for a term to expire September 1, 2015, Donna L. Nelson of Austin (Ms. Nelson is being reappointed).

Appointed to the School Land Board for a term to expire August 29, 2011, Thomas Orr, Jr. of Houston (replacing Todd Barth of Houston whose term expired).

Appointed to the Rehabilitation Council of Texas for a term to expire October 29, 2011, Carolyn Todd of Georgetown (replacing Richard Poe of Austin who resigned).

Appointed to the Rehabilitation Council of Texas for a term to expire October 29, 2012, Amy B. Woolsey of Cypress (replacing Jeanette Brayboy-Alexander of Pearland who resigned).

Appointed to the Texas Juvenile Probation Commission for a term to expire August 31, 2015, William Conley of Wimberley (replacing Ed Culver of Canadian whose term expired).

Appointed to the Texas Juvenile Probation Commission for a term to expire August 31, 2015, Migdalia Lopez of Harlingen (replacing Cheryl Shannon of Cedar Hill whose term expired).

Appointed to the Texas Juvenile Probation Commission for a term to expire August 31, 2015, Scott O'Grady of Plano (Captain O'Grady is being reappointed).

Appointed to the Texas Military Preparedness Commission for a term to expire February 1, 2011, A.F. "Tom" Thomas, Jr. of El Paso (replacing James Maloney of El Paso who resigned).

Appointed to the North Texas Tollway Authority Board of Directors for a term to expire August 31, 2011, Robert Kelly Shepard of Weatherford (Mr. Shepard is being reappointed).

Appointed to the State Board of Veterinary Medical Examiners for a term to expire August 26, 2015, Bud E. Alldredge, Jr. of Sweetwater (reappointed).

Appointed to the State Board of Veterinary Medical Examiners for a term to expire August 26, 2015, Patrick M. Allen of Lubbock (reappointed).

Appointed to the State Board of Veterinary Medical Examiners for a term to expire August 26, 2015, Paul Martinez of Sonora (reappointed).

Rick Perry, Governor

TRD-200904424

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THE ATTORNEY GENERAL

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

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

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

Request for Opinions

RQ-0822-GA

Requestor:

The Honorable Patrick Rose

Chair, Committee on Human Services

Texas House of Representatives

P.O. Box 2910

Austin, Texas 78768-2910

Re: Whether a Type A General Law Municipality may impose and enforce a nonpoint source pollution ordinance in its extraterritorial jurisdiction pursuant to section 26.177, Water Code (RQ-0822-GA)

Briefs requested by October 23, 2009

RQ-0823-GA

Requestor:

The Honorable Yvonne Davis

Chair, Committee on Urban Affairs

Texas House of Representatives

P.O. Box 2910

Austin, Texas 78768-2910

Re: Whether a sheriff may accept an administrative fee from a third party that contracts for the operation of the county jail (RQ-0823-GA)

Briefs requested by October 26, 2009

RQ-0824-GA

Requestor:

The Honorable Jane Nelson

Chair, Committee on Health & Human Services

Texas State Senate

Post Office Box 12068

Austin, Texas 78711-2068

Re: Whether a municipality is required to receive a petition signed by 20 percent of its qualified voters before calling an election to withdraw from a regional transportation authority (RQ-0824-GA)

Briefs requested by October 26, 2009

RQ-0825-GA

Requestor:

The Honorable James A. Farren

Randall County Criminal District Attorney

2309 Russell Long Boulevard, Suite 120

Canyon, Texas 79015

Re: Whether a custodial parent may raise a defense to prosecution under section 43.24(c)(2), Penal Code, governing sale, distribution, or display of harmful material to a minor (RQ-0825-GA)

Briefs requested by October 28, 2009

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

TRD-200904414
Stacey Napier
Deputy Attorney General
Office of the Attorney General
Filed: September 30, 2009

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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).

TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 5. PROPERTY AND CASUALTY INSURANCE

SUBCHAPTER E. TEXAS WINDSTORM INSURANCE ASSOCIATION

DIVISION 10. IMPLEMENTATION OF HOUSE BILL 4409

28 TAC §5.4909, §5.4910

The Commissioner of Insurance adopts on an emergency basis, to take immediate effect, new §5.4909 and §5.4910 implementing the requirements of House Bill (HB) 4409, 81st Legislature, 2009, Regular Session, relating to the Texas Windstorm Insurance Association's (Association) plan of operation concerning the minimum retained premium requirement set forth in §5.4905 of this subchapter (relating to Minimum Retained Premium) by (i) adopting new insurance policies that incorporate the minimum retained premium requirement into the Association's dwelling, commercial and mobile home windstorm and hail insurance policy forms; and (ii) adopting rules that supersede the Association's existing manual rules relating to cancellations and refunds.

These new sections are necessary to implement the minimum retained premium requirement set forth in §5.4905, which provides applicants, policyholders, the Association, and other interested persons with requirements and procedures necessary for the Association to determine the minimum retained premium amount in the event of early cancellation and to conform the Association's current plan of operation set forth in §5.4001 of this subchapter with Chapter 2210 as amended by HB 4409. Section 5.4909 adopts new dwelling, commercial and mobile home windstorm and hail insurance policy forms that are necessary to contractually establish the minimum retained premium requirement and obligations. These new policy forms will supersede the Association's existing insurance policy forms for Association windstorm and hail insurance coverage (insurance coverage). Section 5.4910 adopts manual rules related to these new insurance policy forms and will supersede any conflicting current manual rule concerning policy cancellations or refunds. These sections apply to each Association policy that is issued or renewed on or after November 1, 2009.

The Association offers insurance coverage in the designated catastrophe area, which consists of the 14 Texas coastal counties and parts of Harris County. The catastrophe area is underserved for insurance coverage. Persons seeking insurance coverage from the Association are unable to obtain comparable insurance coverage in the voluntary insurance market. Thus, persons who obtain coverage from the Association have few, if any, other sources from which they may obtain insurance coverage. Therefore, the ability to obtain insurance coverage from the Association has a direct effect on the welfare of persons living and working in the designated catastrophe area, and the possible inability of such persons to obtain insurance coverage places them in imminent financial peril.

The Legislature has found that the provision of windstorm and hail insurance is necessary for the economic welfare of the state. The Legislature further determined that without that insurance, the orderly growth and development of the state would be severely impeded. Thus the adoption of these sections will affect the economic welfare of the state and the orderly development of the state.

The Association is created by the Legislature and may only engage in those activities the Legislature has authorized. The Association's primary activity is writing insurance coverage on eligible structures. Insurance coverage eligibility requirements were substantially amended by HB 4409. To effect these amended requirements, they must be included in the Association's plan of operation either by amendment of the existing plan of operation requirements or as an addition to the existing plan of operation. Compliance with these statutory requirements is essential to assure potential policyholders that they may obtain insurance coverage through the Association.

Thus it was necessary to adopt superseding provisions in §5.4905 that effectively amend the plan of operation to address the minimum retained premium requirement set forth in the Insurance Code §2210.204. Further, the minimum retained premium is a significant legislative requirement affecting the cost of insurance coverage for Association policyholders. Establishing this requirement in the plan of operation, including the methods of paying the required minimum retained premium and the exceptions thereto, may be a determining factor as to whether many persons may be able to obtain Association insurance coverage. Because §5.4905 affects the contractual relationship between the Association and its policyholders concerning premium refunds, §5.4909 and §5.4910 are also necessary to implement the minimum retained premium requirement set forth in the Insurance Code §2210.204 and §5.4905 of this subchapter. During the period in which §5.4909 and §5.4910 are effective, the new policy forms and related manual rules will be used in the place of those forms adopted by reference in §5.4101 and §5.4401 of this subchapter and manual rules adopted by reference in §5.4501 of this subchapter. Undue delay in adopting §5.4909 and §5.4910 may prevent persons living and working in the designated catastrophe area from obtaining Association insurance coverage, placing those persons in imminent financial peril and possibly affecting the orderly development and the economic welfare of the state.

Additionally, because §§5.4905, 5.4909, and 5.4910 are necessary to conform the Association's current plan of operation with the requirements in the Insurance Code Chapter 2210 as amended by HB 4409, these rules are essential for persons in the designated catastrophe area when making decisions concerning their insurance requirements and their ability to obtain insurance coverage on or after November 1, 2009, and in the future. Failure to conform the plan of operation to the requirements in the Insurance Code Chapter 2210, as amended, may cause persons to make decisions that they otherwise would not have made if they had been provided with additional information. The possibility that these decisions could limit the ability of such persons to obtain insurance coverage places them in imminent financial peril and may affect the orderly development and the economic welfare of the state.

Further, the Legislature has directed the Department to implement these rules on an emergency basis. Section 46 of HB 4409 indicates the legislative intent for adopting these rules prior to the appointment and seating of the Association's new board of directors by instructing the Department to adopt rules required by Chapter 2210 as soon as possible, but not later than 30 days after the effective date of HB 4409. The minimum retained premium requirement stated in HB 4409 became effective June 19, 2009. The Department does not consider the 30-day rule adoption requirement to create a prohibition on adopting rules after that period. Such a reading would be unreasonable because it would be inconsistent with the Insurance Code §2210.008(b) (Commissioner may adopt reasonable and necessary rules); §2210.151 (Commissioner shall adopt the plan of operation by rule); and §36.001 (the Commissioner may adopt necessary and appropriate rules). Nor does the Department interpret the 30-day requirement to be a prohibition against adopting emergency rules after that date. The imminent need for rules to implement HB 4409 to protect the welfare of coastal residents and businesses did not expire in July, 2009, but continues. The need to obtain coverage exists before a catastrophic hurricane or other windstorm event occurs. Given the imminent need for these rules and the lack of a penalty for failure to comply with the 30-day requirement, it is reasonable to consider that the 30-day requirement is a directive to adopt emergency rules under the Government Code §2001.034. The legislative requirement is to adopt those rules as soon as possible. Consistent with this requirement, the Department has determined that it was necessary to obtain input concerning the adopted sections from various stakeholders, including legislative offices, the Association, coastal policyholder representatives, and insurers. This process was intended to reduce the possibility of unintended consequences in the emergency rules. Additional emergency rules may follow this adoption as necessary.

Formal rule proposals subject to notice, public comment, and an opportunity for public hearing, will follow this emergency adoption. Future proposals may address the requirements stated herein and additional matters necessary to implement HB 4409. Further, HB 4409 directs the Association's board of directors to propose to the Commissioner amendments to the Association's plan of operation on or before March 1, 2010. The board's proposed amendments would then be proposed as a rule subject to notice, public comment, and an opportunity for public hearing.

Based on the foregoing facts, the Commissioner has determined that, to ensure that persons in the catastrophe area will be able to continue to obtain Association insurance coverage, the Association's existing plan of operation must be amended to conform with the Insurance Code Chapter 2210 as amended by HB 4409. The Commissioner has adopted §5.4905 relating to the minimum retained premium to conform the plan of operation with the Insurance Code Chapter 2210 as amended by HB 4409. Additionally, the Commissioner has determined that it is necessary to adopt by reference in §5.4909 new Association dwelling, commercial and mobile home windstorm and hail insurance policy forms that are consistent with §5.4905, and to adopt in §5.4910 a manual rule for such policies. Section 46, HB 4409 directs the Commissioner to adopt required rules as soon as possible, but not later than 30 days after the effective date of HB 4409, which is consistent with the requirement for an emergency rule under Government Code §2001.034. The inability to obtain insurance coverage from the Association, a market of last resort, places the welfare of persons in the designated catastrophe area in imminent financial peril and is also an impediment to the economic welfare and the orderly development of the state. Therefore, it is necessary to adopt these sections on an emergency basis.

Section 5.4909(a) and (b) adopt by reference a new *T.W.I.A. Dwelling Windstorm and Hail Insurance Policy and T.W.I.A. Commercial Windstorm and Hail Insurance Policy.* These policies differ form the Association's existing forms because they have been changed to conform with the minimum retained premium requirement set forth in the Insurance Code §2210.204 and §5.4905 of this subchapter. Both insurance policy forms shall supersede current Association dwelling and commercial insurance policy forms adopted by reference under §5.4101 of this subchapter. Both insurance policies are changed in paragraph 18a to read as follows:

"You may cancel this policy at any time by notifying us in writing of the date cancellation is to take effect. We will send you any refund due when the policy is returned to us. The refund will be pro rata, subject to a policy minimum retained premium in an amount equal to 180 days or $100, whichever is applicable. Payment of the minimum retained premium shall not create or extend coverage beyond the cancellation date that you requested. The minimum retained premium is fully earned on the effective date of the policy and you shall owe to us any unpaid balance of the minimum retained premium."

Section 5.4909(c) adopts by reference the Association's *Texas Special Mobile Home Windstorm and Hail Insurance Policy Deductible Coverage* that has been changed to conform with the minimum retained premium requirement set forth in the Insurance Code §2210.204 and §5.4905 of this subchapter. This insurance policy shall supersede the Association's current mobile home insurance policy form adopted by reference under §5.4401 of this subchapter. The mobile home insurance policy is changed in lines 31 - 46 of the Basic Conditions to provide the same cancellation provisions as the Association's Dwelling and Commercial Policies.

Section 5.4910 adopts a manual rule necessary for the Association to implement the insurance policies adopted under this section. This rule shall supersede the Association's existing manual rules adopted by reference under §5.4501 in the case of any conflict, including those existing manual rules in Section I, parts K and M of the *Texas Windstorm Insurance Association Manual.*

Specimen copies of the T.W.I.A. *Dwelling Windstorm and Hail Insurance Policy, T.W.I.A. Commercial Windstorm and Hail Insurance Policy, and Texas Special Mobile Home Windstorm and Hail Insurance Policy Deductible Coverage* are available from the Texas Windstorm Insurance Association, P.O. Box 99090, Austin, Texas 78709-9090. Copies may also be obtained by contacting the Personal Lines Division, Mail Code 104-1A, Texas

Department of Insurance, 333 Guadalupe Street, Austin, Texas 78701.

STATUTORY AUTHORITY. New §5.4909 and §5.4910 are adopted on an emergency basis under the Government Code §2001.034 and the Insurance Code §§2210.008, 2210.151, 2210.204, and 36.001; and Section 46, HB 4409, 81st Legislature, 2009, Regular Session. The Insurance Code §2210.008(a) the commissioner may issue any orders that the commissioner considers necessary to implement this chapter. The Insurance Code §2210.008(b) authorizes the Commissioner to adopt reasonable and necessary rules in the manner prescribed in Subchapter A, Chapter 36, Insurance Code. The Insurance Code §2210.151 authorizes the Commissioner to adopt the Association's plan of operation by rule. The Insurance Code §2210.204(d) and (e) require that the minimum retained premium be set forth in the plan of operation and that the plan of operation specify events that reflect a significant change in the exposure or the policyholder concerning the insured property that would be exemptions from the minimum retained premium requirement. The Insurance Code §36.001 provides that the Commissioner of Insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state. Section 46 of HB 4409, directs the Commissioner to adopt rules required by Chapter 2210 as soon as possible but not later than the 30th day after the effective date of HB 4409. The Government Code §2001.034 authorizes a state agency to adopt administrative rules on an emergency basis without prior notice and hearing under certain statutorily specified circumstances, including a finding that there is imminent peril to the public health, safety, or welfare.

§5.4909. Policy Forms and Manual Rules.

(a) The Texas Department of Insurance adopts by reference the Texas Windstorm Insurance Association Dwelling Policy effective November 1, 2009. Specimen copies of this policy form are available from the Texas Windstorm Insurance Association, P.O. Box 99090, Austin, Texas 78709-9090. They may also be obtained by contacting the Personal Lines Division, Mail Code 104-1A, Texas Department of Insurance, 333 Guadalupe Street, Austin, Texas 78701.

(b) The Texas Department of Insurance adopts by reference the Texas Windstorm Insurance Association Commercial Policy effective November 1, 2009. Specimen copies of this policy form are available from the Texas Windstorm Insurance Association, P.O. Box 99090, Austin, Texas 78709-9090. They may also be obtained by contacting the Personal Lines Division, Mail Code 104-1A, Texas Department of Insurance, 333 Guadalupe Street, Austin, Texas 78701.

(c) The Texas Department of Insurance adopts by reference the Texas Special Mobile Home Windstorm and Hail Insurance Policy--Deductible Coverage effective November 1, 2009. Specimen copies of this policy form are available from the Texas Windstorm Insurance Association, P.O. Box 99090, Austin, Texas 78709-9090. Copies may also be obtained by contacting the Personal Lines Division, Mail Code 104-1A, Texas Department of Insurance, 333 Guadalupe Street, Austin, Texas 78701.

(d) Insurance policy forms adopted by reference under this subchapter shall supersede the Texas Windstorm Insurance Association's existing insurance policy forms adopted by reference under §5.4201 and §5.4501 of this subchapter (relating to TWIA Dwelling and Commercial Policy Forms and Texas Special Mobile Home Windstorm and Hail Insurance Policy--Deductible Coverage, respectively). This section applies to each Association policy that is issued or renewed on or after November 1, 2009.

§5.4910. Cancellations and Minimum Retained Premium.

(a) Cancellations.

(1) A policy may be canceled at any time at the request of the insured or a premium financier by notifying the Texas Windstorm Insurance Association (Association) in writing of the date cancellation is to take effect. The Association will refund premium in accordance with §5.4905 of this subchapter (relating to Minimum Retained Premium) when the policy is returned to the Association. The refund will be pro rata of the amount in excess of the minimum retained premium under subsection (b) of this section in which case the Association shall upon demand and surrender of the policy refund the unearned premium on a pro-rata basis.

(2) Non-payment of premium shall be deemed a request for cancellation by the insured.

(3) The Association may not initiate flat cancellation for any reason.

(4) The minimum retained premium shall not create or extend coverage beyond the date cancellation takes effect.

(5) The minimum retained premium is fully earned on the effective date of the policy and the insured shall owe to the Association the unpaid balance of the minimum retained premium.

(b) Minimum Retained Premium.

(1) The minimum retained premium per policy shall be the premium amount equal to 180 days of the annual policy term or $100, as determined in accordance with §5.4905 of this subchapter.

(2) The minimum retained premium shall not create or extend coverage beyond the date cancellation takes effect.

(3) The minimum retained premium is fully earned on the effective date of the policy and the insured shall owe to the Association the unpaid balance of the minimum retained premium.

(4) In the event of cancellation of the policy by the Association, paragraphs (1) - (3) of this subsection shall not apply and the actual unearned premium must be refunded.

(c) This section shall control over any conflicting provision in the rules manual adopted by reference in §5.4501 of this subchapter (relating to Rules for the Texas Windstorm Insurance Association). This section applies to each Association policy that is issued or renewed on or after November 1, 2009.

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

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

TRD-200904366
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Effective Date: September 28, 2009
Expiration Date: January 25, 2010
For further information, please call: (512) 463-6327

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PROPOSED RULES

Proposed rules include new rules, amendments to existing rules, and repeals of existing rules. A state agency shall give at least 30 days' notice of its intention to adopt a rule before it adopts the rule. A state agency shall give all interested persons a reasonable opportunity to submit data, views, or arguments, orally or in writing (Government Code, Chapter 2001).

Symbols in proposed rule text. Proposed new language is indicated by underlined text. [~~Square brackets and strikethrough~~] indicate existing rule text that is proposed for deletion. "(No change)" indicates that existing rule text at this level will not be amended.

TITLE 1. ADMINISTRATION

PART 4. OFFICE OF THE SECRETARY OF STATE

CHAPTER 81. ELECTIONS

The Office of the Secretary of State proposes to repeal §§81.101 - 81.103, 81.107, 81.109, 81.111 - 81.113, 81.115 - 81.117, 81.119 - 81.121, 81.123 - 81.132, and 81.135 in Subchapter F, relating to Primary Elections, and §§81.145, 81.148, 81.149, 81.151 - 81.153, 81.155, and 81.157 in Subchapter G, relating to Joint Primary Elections. The Secretary of State simultaneously proposes new §§81.101 - 81.103, 81.107, 81.109, 81.111 - 81.113, 81.115 - 81.117, 81.119 - 81.121, and 81.123 - 81.132 in Subchapter F, as well as §§81.145, 81.148, 81.149, 81.151 - 81.153, 81.155, and 81.157 in Subchapter G. The revisions to Subchapters F and G concern the financing of the 2010 primary elections with state funds, including the determination of necessary and proper expenses relating to the proper conduct of primary elections by party officials and the procedures for requesting reimbursement by the parties for such expenses.

The proposed repeals and new rules are necessary for the proper and efficient conduct of the 2010 primary elections. It is in the public interest to establish adequate procedures to insure the best use of state funding.

Ann McGeehan, Director of Elections, has determined that, for the first five-year period the new sections are in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the proposed new rules.

Ms. McGeehan also has determined that, for each year of the first five years the proposed new sections are in effect, the public benefit anticipated as a result of enforcing the sections will be the proper conduct of the 2010 primary elections by party officials with the aid of state money appropriated for that purpose. There will be no effect on small or micro-business. There will be no anticipated economic cost to the state and county chairs of the Democratic and Republican parties.

Written comments of the proposal may be submitted to the Office of the Secretary of State, Ann McGeehan, Director of Elections, P.O. Box 12060, Austin, Texas 78711. Comments must be received no later than 5:00 p.m. October 30, 2009.

SUBCHAPTER F. PRIMARY ELECTIONS

1 TAC §§81.101 - 81.103, 81.107, 81.109, 81.111 - 81.113, 81.115 - 81.117, 81.119 - 81.121, 81.123 - 81.132, 81.135

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

The repeals are proposed under the Election Code, §31.003 and §173.006, which provide the Office of the Secretary of State with the authority to obtain and maintain uniformity in the application, interpretation, and operation of provisions under the Code and other election laws. It also allows the Secretary of State in performing such duties to prepare detailed and comprehensive written directives and instructions based on such laws. These sections additionally authorize the Secretary of State to adopt rules consistent with the Code that reduce the cost of the primary elections or facilitate the holding of the elections within the amount appropriated by the legislature for that purpose.

No other sections are affected by the proposed repeals.

§81.101. Application of Rules.

§81.102. Primary Funds Defined.

§81.103. Bank Account for Primary-Fund Deposits and Expenditures.

§81.107. Primary-Fund Records.

§81.109. Political-Party Costs not Payable with Primary Funds.

§81.111. Interest on Start Up Loan to Open Primary Fund is not Reimbursable.

§81.112. List of Candidates and Filing Fees.

§81.113. Misuse of State Funds.

§81.115. Requirement for Competitive Bids for Services or Products.

§81.116. Estimating Voter Turnout.

§81.117. Number of Election Workers per Polling Place.

§81.119. County Chair's Compensation.

§81.120. Compensation for Election-Day Workers.

§81.121. No Compensation for Attending Election Schools for Judges or Clerks.

§81.123. Administrative Personnel Limited.

§81.124. Number of Paper or Electronic-Voting-System Ballots per Voting Precinct.

§81.125. Number of Direct Record Electronic (DRE) Units or Precinct Ballot Counters per Voting Precinct.

§81.126. Training Reimbursement to Attend County Chairs Election Law Seminar.

§81.127. Office Equipment and Supplies.

§81.128. Telephone and Postage Charges.

§81.129. Office Rental.

§81.130. Payment for Use of County-Owned Equipment.

§81.131. Contracting with the County-Elections Officer (County Clerk, County Elections Administrator, or County Tax Assessor-Collector).

§81.132. Cost of Early Voting to Be Paid by the County.

§81.135. Primary Canvass Rules for 2008 Elections.

This 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 September 28, 2009.

TRD-200904393
Ann McGeehan
Director of Elections
Office of the Secretary of State
Earliest possible date of adoption: November 8, 2009
For further information, please call: (512) 463-5650

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1 TAC §§81.101 - 81.103, 81.107, 81.109, 81.111 - 81.113, 81.115 - 81.117, 81.119 - 81.121, 81.123 - 81.132

The new rules are proposed under the Election Code, §31.003 and §173.006, which provide the Office of the Secretary of State with the authority to obtain and maintain uniformity in the application, interpretation, and operation of provisions under the Code and other election laws. It also allows the Secretary of State in performing such duties to prepare detailed and comprehensive written directives and instructions based on such laws. These sections additionally authorize the Secretary of State to adopt rules consistent with the Code that reduce the cost of the primary elections or facilitate the holding of the elections within the amount appropriated by the legislature for that purpose.

No other sections are affected by the proposed rules.

§81.101. Primary and Runoff Election Cost Estimate; Receipt of State Funds.

(a) This subchapter applies to the use and management of all primary funds.

(b) Approval by the Secretary of State of a Primary Election Cost Estimate does not relieve the chair, any employee paid from the primary fund, or the county election official, of their responsibility to comply with administrative rules issued by the Secretary of State, or with any statute governing the use of primary funds.

(c) The Secretary of State shall provide a 2010 Primary Election Cost Estimate and a Pre-Populated 2010 Primary Sworn Advancement Agreement to each county chair. The pre-populated amount will be based on 75 percent of the amount of each primary line item reported and approved on the 2008 Final Primary Election Cost Report less any filing fees received as reported on the 2006 Final Primary Election Cost Report. In order to receive funding for the 2010 Primary, the chair must submit to the Secretary of State a notarized copy of the Sworn Advancement Agreement form accepting the amounts indicated on the form. If a county did not hold a Primary or a Final Primary Election Cost Report was never received by the Secretary of State, the county chair will submit for processing a 2010 Primary Election Cost Estimate Report. The chair must complete this form and submit it to the Secretary of State for review and approval prior to receiving their 75 percent of estimated cost.

(d) If a statewide Runoff is conducted, the Secretary of State shall provide a 2010 Primary Runoff Pre-Populated Sworn Advancement Agreement and a 2010 Primary Runoff Cost Estimate Report to each county chair. The pre-populated amount will be based on 75 percent of the amount of each runoff line item reported and approved on the 2008 Final Primary Election Cost Report less any filing fees received as reported on the 2006 Final Primary Election Cost Report. In order to receive funding for the 2010 Runoff, the chair must submit to the Secretary of State a notarized copy of the Sworn Advancement Agreement form accepting the amounts indicated on the form. If a county did not hold a Runoff or a Final Cost Report was never received by the Secretary of State, the county chair will submit for processing a 2010 Primary Runoff Election Cost Estimate Report. The chair must complete this form and submit it to our office for review and approval prior to receiving their 75 percent of estimated cost.

(e) Pursuant to the General Appropriations Act, 81st Legislature, 2009, counties may not be reimbursed for amounts that exceed the costs to conduct a joint primary election. Accordingly, any additional costs incurred due to the fact that county parties do not use joint polling places or do not use joint voting system equipment will not be reimbursed.

§81.102. Primary Funds Defined.

(a) Pursuant to §173.031 of the Texas Election Code, a county primary fund is created for each county executive committee of a political party holding a primary election. The primary fund consists of:

(1) all filing fees accompanying an application for a place on the ballot filed with the county chair;

(2) state funds paid to the county chair;

(3) contributions made to the county executive committee for the purpose of defraying primary election expenses; and

(4) the income earned by the fund.

(b) Any refund of money expended from a primary fund is considered part of the primary fund.

§81.103. Bank Account for Primary-Fund Deposits and Expenditures.

(a) The county chair shall establish and maintain a bank account for the sole purpose of depositing and expending primary funds; any interest earned in such an account becomes part of the primary fund.

(b) The county chair, or any employee paid from the primary fund, shall not commingle primary funds with any other fund or account.

(c) Each check issued from a primary-funds account must include the following statement on its face: "VOID AFTER 180 DAYS."

(d) The county chair shall complete bank reconciliations on a monthly basis. Bank reconciliations are considered part of the primary-

fund records and must be submitted to the Secretary of State with the final cost report.

(e) After all 2010 primary expenditures have been paid, the primary bank account must be retained with maximum balance of $50.00 assuming sufficient funds are available in the local primary accounts. All bank account information must be transferred to the incoming county chair in accordance with §81.108 of this title (relating to Transfer of Records to New County Chair).

§81.107. Primary-Fund Records.

(a) The county chair shall preserve all records relating to primary-election expenses until the later of:

(1) 22 months following the primary elections; or

(2) the conclusion of any relevant litigation or official investigation.

(b) In order to receive approval of a final cost report, the county chair shall transmit copies of receipts, bills, invoices, contracts, competitive bids, petty-cash receipts for items and services over $2,000 and copies of all monthly bank statements, electronic bookkeeping records (i.e., Quicken or Quickbooks) or check register, and any other related materials documenting primary-fund expenditures. Purchase requisitions are not considered receipts and may not be remitted as such.

(c) If the chair does not file a final cost report, their files will be reported to the Attorney General's Office and/or County District Attorney's Office for prosecution of misappropriation of funds in accordance with §81.113 of this title (relating to Misuse of State Funds).

§81.109. Political-Party Costs not Payable with Primary Funds.

(a) Pursuant to §173.001 of the Texas Election Code, only expenses necessary for and directly related to the conduct of primary elections are payable from primary funds.

(b) Political expenses and expenses for any activity forbidden by statute or rule are not primary costs subject to primary fund reimbursement. Examples of non-payable expenses include, but are not limited to, the following:

(1) expenses incurred in connection with a convention of a political party;

(2) any food or drink items;

(3) stationery not related to the conduct of the primary election;

(4) costs associated with voter-registration drives or get-out-the-vote campaigns; or

(5) election notices, except for public testing announcements.

§81.111. Interest on Start Up Loan to Open Primary Fund is Not Reimbursable.

A county chair may acquire a start up loan to defray the cost of the Primary Election, prior to receiving reimbursement from the state. A county chair may not use primary funds, which are subsequently approved by the Secretary of State, to pay interest on loans used to defray operating expenses incurred prior to the receipt of such funds.

§81.112. List of Candidates and Filing Fees.

Not later than January 14, 2010 the county chair shall file with the Secretary of State a complete list of candidates, including the name of the candidate, the office sought, and the amount of the filing fee paid (or a notation that the candidate filed a petition in lieu of a filing fee). (Note: The amount of filing fees paid must equal the amount reported on the Final Cost Report. If any additions or deletions are made to the list of candidates, after being filed with the Secretary of State, a supplemental list of candidates must be filed with the Secretary of State, the county clerk and the state chair.) If the List of Candidates and Filing Fees are not timely filed with the Secretary of State, it may cause a delay and/or errors in the processing of your 2010 Primary Election Final Cost Report and/or the receipt of your 75% 2010 Primary Election Cost Estimate.

§81.113. Misuse of State Funds.

The Secretary of State shall refer any misuse or misappropriation of primary funds to the appropriate prosecuting authority for the enforcement of all civil and/or criminal penalties. Prosecuting authority includes but is not limited to Office of the Attorney General and the appropriate County Attorney and/or County District Attorney's Office.

§81.115. Requirement for Competitive Bids for Services or Products.

(a) This section does not apply to expenditures of $2,000 or less. (Note: A large purchase may not be divided into small lot purchases to circumvent the dollar limits established by this section. For example, expenditures for computer equipment to a single vendor that total more than $2,000 are subject to the competitive bid requirement and may not be split between printers/scanner/computers.)

(b) Unless prior approval from the Secretary of State is obtained, the county chair must purchase all services and products using competitive bids from no less than three sources. If purchase is through the Texas Procurement and Support Services (TPASS), cooperative purchasing programs for state contract purchasing for the State of Texas bids are not required. Proper documentation must be submitted to indicate the type of procurement service used and the source for those services.

(c) The county chair must document or otherwise provide an explanation regarding the lack of available bids from vendors (sole source). This documentation or explanation must be submitted with the 2010 Final Primary Election Cost Report.

(d) If the county chair contracts with the county election official who has a term contract for election supplies or services, then competitive bids are not required for term-contract supplies or services if the county entered the term contract pursuant to regular county purchasing rules. If a term contract is utilized, a letter explaining the use of the term contract must be provided. The letter must be signed by the county official and the county purchasing agent stating that supplies were purchased for the primary election from a vendor with which they have a term contract. The letter must be submitted with the 2010 Final Primary Election Cost Report.

§81.116. Estimating Voter Turnout.

(a) The county chair shall use the formula set out in the following figure, with necessary modifications as determined by the chair, to determine the estimated voter turnout for each precinct for the 2010 primary elections. If a county chair receives allocated funds based on the Primary Sworn Advancement Agreement forms, it is not required or necessary to submit an estimation of voter turnout. This general formula is a guideline and must be adjusted if the local political situation indicates a higher voter turnout than that derived by the formula.
Figure: 1 TAC §81.116(a)

(b) After estimating the voter turnout for each precinct, the county chair shall use the guidelines set forth in §§81.117, 81.124, and 81.125 of this title (relating to the Number of Election Workers per Polling Place, Number of Ballots per Voting Precinct, and Number of Direct Record Electronic (DRE) Units or Precinct Ballot Counters per Voting Precinct) to determine the necessary personnel, supplies, and equipment for each precinct (i.e., ballots, election judges and clerks, voting devices, or machines).

(c) After estimating the need for personnel, supplies, and equipment for each precinct, the county chair shall combine all precinct data to determine the total countywide estimate.

(d) The county chair may use the estimate calculated under subsection (c) of this section to determine the cost of the election.

§81.117. Number of Election Workers per Polling Place.

The county chair shall use the formula set out in the following figure to determine the number of election workers allowable for each polling place.
Figure: 1 TAC §81.117

§81.119. County Chair's Compensation.

(a) Pursuant to §173.004 of the Texas Election Code, a county chair may receive compensation for administering primary elections. (Note: In calculating the county chair's compensation, ballot reprints, legal fees, programming errors, reprogramming costs or similar corrective measures will not be included in the formula for determining the county chair's compensation. Additionally, costs for contracted services, including, but not limited to, voting system usage fees, will be deducted from the total primary election costs when calculating the county chair's compensation.)

(b) The Secretary of State shall not authorize payment under this section until the county party's 2010 Final Primary Election Cost Report has been received as a completed unit and approved. The Secretary of State shall notify the county chair of this approval by letter and a copy of the approved report.

(c) After all other expenses have been paid, the county chair shall be paid with a check drawn on the county's primary-fund account.

(d) The Secretary of State may deny compensation to county chairs who file delinquent final-cost reports.

§81.120. Compensation for Election-Day Workers.

(a) Except as provided by subsection (b) of this section, the compensation paid to polling-place judges, clerks, early-voting-ballot board members, or persons working at the central counting station for the 2010 general-primary and primary-runoff elections shall be $8.50 per hour, and all workers must attend a training class certified by the Secretary of State, online pollworker training classes are available on the Secretary of State website.

(b) The county chair may pay technical support personnel at the central counting station (appointed under Texas Election Code §§127.002, 127.003, or 127.004) compensation which is more than $8.50 per hour, but costs may not exceed those paid to county staff for comparable work.

(c) Except as provided by this section, a judge or clerk may be paid only for the actual time spent on election duties performed in the polling place or central counting station. If an election worker elects to donate his or her compensation to the county party, signed documentation referencing that fact, by the election worker and chair, must be placed in the primary records.

(d) The county chair may allow one election worker from each polling place up to one hour before election day to annotate the precinct list of registered voters.

(e) The county chair is authorized to pay members of the early-voting-ballot board.

(1) Members of the early voting ballot board may only be compensated for the actual number of hours worked.

(2) Additionally, members may reconvene to process provisional or late ballots. The provisional ballot/late counting process must be completed not later than the 7th day after the primary or primary runoff elections.

(f) Compensation for the election judge or clerk who delivers and picks up the election records, equipment, and unused supplies may not exceed $15 per polling place location.

(g) Except as provided by subsection (f) of this section the county chair may not pay an election-day worker for travel time, delivery of supplies, or attendance at the precinct convention.

§81.121. No Compensation for Attending Election Schools for Judges or Clerks.

(a) Training materials may be ordered free of charge from the Secretary of State.

(b) The county chair may not be reimbursed for materials published and provided by the Secretary of State.

(c) Costs associated with attending an election school are not an allowable cost subject to primary reimbursement.

§81.123. Administrative Personnel Limited.

(a) "Administrative Personnel" means a non-election-day worker.

(b) The employment of administrative personnel is not required for the conduct of the primary elections.

(c) Pursuant to §81.114 of this title (relating to Conflicts of Interest), no member of the county chair's family may be paid an administrative salary from primary funds.

(d) If administrative personnel are required for the conduct of the primary election, salaries or wages for such personnel are payable from the primary fund for a period beginning no earlier than December 1, 2009, and ending no later than the last day of the month in which the last primary election is held.

(e) The county chair shall submit to the Secretary of State a list of all necessary personnel to be paid from the primary fund with the 2010 Primary Election Final Cost Report. This list must indicate the name and title of the employee, job duties, hours to be worked, period of employment, monthly or hourly rate of pay, and the estimated or actual gross pay for the period.

(f) The county chair shall use the formula set out in the following figure to calculate the maximum total gross salaries that may be paid to administrative personnel. Salaries must be reasonable for the hours worked and services rendered and must reflect the salaries paid for similar work or services in the same area. In no circumstance may an employee who is paid from the primary fund be compensated more than $2,500 for any one-month's work. If an individual is paid from the primary fund and that individual is also leasing space, furniture, or equipment to the party for the primary-election, then the lease amounts must be added to that person's salary to determine whether the allowable administrative-salary limit has been reached.
Figure: 1 TAC §81.123(f)

(g) If the county chair contracts with third parties or the county elections officer for election services, the overall administrative personnel costs to be submitted to the Secretary of State for reimbursement cannot include administrative expenses provided by third parties or a county election officer. (Administrative personnel costs include, but are not limited to, polling location services, ballot ordering, and secretarial services.)

(h) The Secretary of State may disallow full payment for administrative personnel if it is determined that the contracting county-elections officer substantially performed the conduct of the election.

§81.124. Number of Ballots per Voting Precinct.

(a) The county chair shall determine the minimum number of ballots to be furnished to each polling place based on the estimated voter turnout formula established pursuant to §81.116 of this title (relating to Estimating Voter Turnout). The county chair shall not distribute to a polling place fewer ballots than the amount indicated by the formula provided by §81.116 of this title.

(b) If the chair determines that more ballots than the minimum are necessary, he or she may order a maximum number of ballots up to an amount that is equal to the number of registered voters in the precinct.

(c) In no event should a polling place ballot supply be limited so as to impede the voting process or jeopardize voting rights.

§81.125. Number of Direct Record Electronic (DRE) Units or Precinct Ballot Counters per Voting Precinct.

(a) The county chair shall use the table set out in the following figure to determine the number of precinct ballot counters and DRE units allowable for each precinct.
Figure: 1 TAC §81.125(a)

(b) If a county chair determines that the number of precinct ballot counters and/or DRE units authorized under the formula is inadequate, he or she must obtain permission from the Secretary of State to obtain additional machines, counters, or devices.

(c) Pursuant to federal and state law, there must be at least one accessible voting unit in each precinct. If the county has only one accessible unit per precinct, the parties are encouraged to share that unit in a joint polling place. Sharing a polling place and sharing an accessible voting unit only is not considered a formal joint election pursuant to §172.126 of the Texas Election Code. Due to limited state funds, if the county does not have a sufficient number of accessible voting units for each party to lease independently, then the costs to lease additional accessible voting units may not be fully reimbursed by the state primary fund. In addition, county chairs must adhere to the requirements of the General Appropriations Act, 81st Legislature, 2009 and §81.101(e) of this title (relating to Primary and Runoff Election Cost Estimate; Receipt of State Funds), which preclude reimbursement for expenses in excess of those that would have been incurred had the parties held a joint primary.

(d) In precincts that are conducting a limited joint election for purposes of sharing a polling place and a Direct Record Electronic unit, the presiding election judge from the party whose candidate for governor received the highest number of votes in the precinct or consolidated precinct in the most recent gubernatorial general election shall deliver the DRE device containing the vote totals to the general custodian. The presiding judge of the party whose candidate for governor received the highest number of votes in the precinct or consolidated precinct in the most recent gubernatorial general election may designate the presiding judge or clerk of the other party to deliver the ballot box and/or DRE device.

§81.126. Training Reimbursement to Attend County Chairs Election Law Seminar.

(a) Except as provided by this section, the Secretary of State shall reimburse from the state primary fund, the actual travel expenses for the county chair or the county chair's designee to attend the Secretary of State Election Law Seminar for County Chairs. (The Secretary of State shall provide travel reimbursement forms at the seminar.)

(b) The Secretary of State shall reimburse the county chair or the county chair's designee for:

(1) mileage (if driving personal vehicle);

(2) airfare (coach only);

(3) airport transfers;

(4) airport parking;

(5) lodging; and

(6) any other reasonable expenses related to an individual's attendance at the Election Law Seminar for County Chairs.

(c) The Secretary of State shall use the Official State Mileage Guide to determine distances traveled to attend the Election Law Seminar for County Chairs. The Secretary of State shall reimburse mileage claims from the county seat to and from Austin using the mileage rate approved on the State Comptroller's Texas Mileage Guide at the time of the seminar.

(d) The Secretary of State shall reimburse actual lodging expenses in an amount not to exceed the rates approved by the state, plus applicable taxes.

(e) As provided by the Texas General Appropriations Act, the Secretary of State shall not make reimbursements for gratuities or tips.

(f) The county chair or the chair's designee must submit actual receipts to the Secretary of State in order to be reimbursed for airfare, lodging, parking, or airport transfers.

(g) The county chair shall submit request for reimbursement no later than 60 days after the seminar. If a request for reimbursement is submitted after this date, the Secretary of State may deny the request.

§81.127. Office Equipment and Supplies.

(a) Rental of office equipment is not required in order to conduct primary elections.

(b) The county chair may lease office equipment necessary for the administration of the primary elections for a period beginning December 1, 2009, and ending not later than the last day of the month in which the last primary election is held.

(c) The county party may not rent or lease equipment in which the party, the county chair, or a member of the county chair's family has a financial interest. (See definition of "family" at §81.114(b) of this title (relating to Conflicts of Interest).)

(d) The county chair or party shall rent equipment from an entity that has been in business for at least 18 months and has at least three other bona fide clients and on file with the corporation department of the Secretary of State or locally.

(e) The purchase of office supplies must be reasonable and/or necessary for the administration of the primary election to be payable from the primary fund. (This includes, but is not limited to, the purchase of two paperback copies of the Texas Election Code.)

(f) The county chair or party may be reimbursed for the cost of incidental supplies used in connection with the primary election. (Examples of reasonable incidental supplies include paper, toner, and staples.)

(g) The county chair may not use primary funds to purchase any single office-supply item or equipment valued at over $1,500. These items become a part of the Party Primary Office and are to be transferred to the next county chair.

(h) The county chair may not pay notary public expenses from the primary fund.

§81.128. Telephone and Postage Charges.

(a) The Secretary of State shall reimburse necessary telephone and postage costs incurred with respect to the administration of the primary elections beginning no earlier than December 1, 2009 and ending no later than the last day of the month in which the last primary election is held.

(b) In counties with fewer than 150 primary election day polling places, the county party may be reimbursed for the lease of no more than two telephone lines.

(c) In counties with 150 or more primary election day polling places, the county party may be reimbursed for the lease of no more than four telephone lines.

§81.129. Office Rental.

(a) The rental of office space is not required for the conduct of the primary elections.

(b) The Secretary of State shall reimburse necessary office space rental expenses incurred with respect to the administration of the primary elections for a period beginning no earlier than December 1, 2009, and ending not later than the last day of the month in which the last primary election is held.

(c) If the rental of office space is necessary, the county party shall rent office space in a regularly rented commercial building. Office rent shall not exceed the fair market rate for office space currently-rented in the same area.

(d) Unless such services are required in accordance with the lease agreement, no payment may be made with primary funds for janitorial services, parking, or signage.

(e) The county party may not rent or lease office space in which the party, the county chair, the county chair's spouse, or the county chair's family has a financial interest. (See definition of "family" at §81.114(b) of this title (relating to Conflicts of Interest).)

(f) If the party leases space for the purpose of the primary only, the county chair shall transmit a copy of the three competitive bids obtained as well as the lease agreement to the Secretary of State, along with a copy of the 2010 Final Primary Election Cost Report. (Note: If the party maintains a lease, unrelated to the conduct of the primary, the cost of that lease will not be reimbursed in excess of 30% of the rental cost by the state as a primary expense.)

§81.130. Payment for Use of County-Owned Equipment.

(a) Section 123.033 of the Texas Election Code provides for the rental rate that a county may charge for the use of its equipment. (The rental rates $5 for each unit of tabulating equipment and $5 for each complete unit which makes up a DRE.)

(b) In addition to subsection (a) of this section, the county primary fund may be used to pay the actual expenses incurred by the county in transporting, preparing, programming, and testing the necessary equipment, as well as for staffing the central counting station.

(c) The county chair shall submit all calculations for amounts charged for the use of county-owned and non-county-owned equipment to the Secretary of State for review with the 2010 Final Cost Report.

(d) The county chair shall not use primary funds to pay expenses related to the use of non county-owned equipment, including, but not limited to, ballot boxes and voting booths, without written permission from the Secretary of State. The county chair must immediately notify the Secretary of State if a line item amount will exceed the cost provided on the initial primary cost estimate. This notice must include a new estimate with respect to the increased cost. The notice required by this subsection must be in writing.

§81.131. Contracting with the County-Elections Officer (County Clerk, County Elections Administrator, or County Tax Assessor-Collector).

(a) The Secretary of State has prepared a Primary Election Services Contract (the "Model Contract"). Copies of the Model Contract may be obtained from the Secretary of State.

(b) The county chair should use the Model Contract when executing an agreement for election services between the county executive committee and the county elections officer. (Contractible election services are listed in Subchapter B of Chapter 31 of the Texas Election Code.)

(c) The county chair shall submit to the Secretary of State for approval any change to the Model Contract or any alternate contract that the chair desires to use. A contract submitted under this subsection must be signed by both parties to the contract, the county chair and county election official. Secretary of State approval of the contract is required only if the county chair requests not to accept the pre-populated agreement and submits a request for approval to process a primary cost estimated report.

(d) Prior to the time that the chair submits final payment, the county election official must submit an accounting of the actual costs incurred in the performance of the election-services contract. This must be included with the Final Primary Election Cost Report.

(e) The Secretary of State may only pay actual costs incurred by the county and payable under provisions of the Texas Election Code, an election-services contract, or these administrative rules.

(f) A contract may not allow for reimbursement for training of election workers or providing materials published by the Secretary of State.

(g) Salaries of personnel regularly employed by the county may not be paid from or reimbursed to the county from the primary fund even if the employee used their vacation time to perform the duties.

(h) A county-elections officer may not contract for the performance of any duty or service that he or she is statutorily obligated to perform.

(i) Costs associated with an election services contract are not counted toward the administrative salary limits established under §81.123 of this title (relating to Administrative Personnel Limited).

(j) County election officials who contract or conduct joint primaries must pay all bills for items they order on behalf of the parties, and seek reimbursements from the parties.

§81.132. Cost of Early Voting to Be Paid by the County.

(a) Pursuant to §173.003 of the Texas Election Code, the only expense to be paid from primary funds for early voting is ballot costs.

(b) The county shall pay for voting-by-mail kits including, but not limited to, postage, early-voting workers, and all other costs incurred that are related to early voting.

(c) The county chair shall not include expenses related to early voting in a primary-election-services joint resolution, county election services contract or a primary cost report. (Note: Expenses related to the early-voting-ballot board are payable from the primary fund.)

This 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 September 28, 2009.

TRD-200904394
Ann McGeehan
Director of Elections
Office of the Secretary of State
Earliest possible date of adoption: November 8, 2009
For further information, please call: (512) 463-5650

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SUBCHAPTER G. JOINT PRIMARY ELECTIONS

1 TAC §§81.145, 81.148, 81.149, 81.151 - 81.153, 81.155, 81.157

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

The repeals are proposed under the Election Code, §31.003 and §173.006, which provide the Office of the Secretary of State with the authority to obtain and maintain uniformity in the application, interpretation, and operation of provisions under the Code and other election laws. It also allows the Secretary of State in performing such duties to prepare detailed and comprehensive written directives and instructions based on such laws. These sections additionally authorize the Secretary of State to adopt rules consistent with the Code that reduce the cost of the primary elections or facilitate the holding of the elections within the amount appropriated by the legislature for that purpose.

No other sections are affected by the proposed repeals.

§81.145. Recommended Deadlines to Comply with Statutory Requirements for the Conduct of Joint Primaries.

§81.148. Appointment of Various Election Officials.

§81.149. Number of Election Workers per Joint Polling Place.

§81.151. Authority of Co-Judge for Joint-Primary-Polling Places, Joint-Primary Central Counting Station, and Joint-Primary-Early-Voting-Ballot Board.

§81.152. Estimating Voter Turnout for Joint Primaries.

§81.153. Delivery of Election Records and Supplies.

§81.155. Returning Surplus Funds.

§81.157. Joint-Primary Contract with the County-Elections Officer (County Clerk, County Elections Administrator, or County Tax Assessor Collector).

This 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 September 28, 2009.

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Ann McGeehan
Director of Elections
Office of the Secretary of State
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1 TAC §§81.145, 81.148, 81.149, 81.151 - 81.153, 81.155, 81.157

The rules are proposed under the Election Code, §31.003 and §173.006, which provide the Office of the Secretary of State with the authority to obtain and maintain uniformity in the application, interpretation, and operation of provisions under the Code and other election laws. It also allows the Secretary of State in performing such duties to prepare detailed and comprehensive written directives and instructions based on such laws. These sections additionally authorize the Secretary of State to adopt rules consistent with the Code that reduce the cost of the primary elections or facilitate the holding of the elections within the amount appropriated by the legislature for that purpose.

No other sections are affected by the proposed rules.

§81.145. Recommended Deadlines to Comply with Statutory Requirements for the Conduct of Joint Primaries.

(a) November 12, 2009: Recommended date by which county chairs who wish to conduct a joint primary should meet with the county clerk/elections administrator to determine whether to enter into a joint resolution to conduct the primary, and to determine the estimated number of election judges and clerks, members of the early voting ballot board, and central counting station personnel to be appointed from the parties. Additionally, the parties and the county clerk/elections administrator should determine which voting system(s), ballot formats, and precinct consolidation or combination plans (if applicable) will be used. (It is permissible to create separate consolidation or combination plans for each party, provided that every consolidated or combined precinct has a co-judge representing each party.)

(b) December 1, 2009: Recommended date by which the commissioners court should vote on approval of joint resolution. The joint resolution must include the required number of joint-precinct-polling places and the number of co-judges and clerks for each joint-precinct location. The commissioners court resolution approving the joint primary must also be signed by the county clerk or elections administrator, and the county chair of both parties entering into the agreement.

(c) December 14, 2009 (2nd Monday in December): Statutory date for each party chair to deliver lists of names of election judges and clerks, early-voting-ballot-board members, and central counting station personnel (if applicable) to the county clerk/elections administrator.

(d) January 19, 2010: Deadline to file final cost estimate and joint resolution. Recommended date to make modifications to the joint resolution regarding the number of joint polling places and the number of polling-place personnel. Any modifications must be signed by the county clerk/elections administrator and both party chairs.

§81.148. Appointment of Various Election Officials.

(a) Upon receipt of the lists of names of election judges and clerk from each county chair (list must be submitted by December 14, 2009), the county clerk/elections administrator shall select co-judges, co-alternate judges, and appoint clerks (if applicable) for each precinct. (These selections are made in accordance with §32.002(c) of the Texas Election Code and §81.152 of this title (relating to Estimating Voter Turnout for Joint Primaries).)

(b) The county clerk/elections administrator shall determine the total number of election workers required and select from the party chairs' lists the individuals to be appointed as co-judges, members of the early voting ballot board, and central counting station personnel. The county clerk/elections administrator shall ensure party balance in these selections.

(c) If the total number of individuals serving on the early voting ballot board or at the central counting station is an odd number, the county clerk/elections administrator shall appoint an additional member from the party whose candidate for governor received the highest number of votes in the county in the most recent gubernatorial general election.

§81.149. Number of Election Workers per Joint Polling Place.

(a) The county clerk/elections administrator shall use the table set out in the following figure, to determine the number of election workers allowable for each joint polling place.

(b) Each polling place shall have no less than one co-judge from each party and one clerk from each party.

(c) If the total number of workers is an odd number, the county clerk/elections administrator shall appoint an additional worker from the list of the party whose candidate for governor received the highest number of votes in the precinct in the most recent gubernatorial general election. (If precincts have been consolidated or combined for the joint primary, then the highest number of votes is determined by adding together the votes from the consolidated or combined precincts.)
Figure: 1 TAC §81.149(c)

§81.151. Authority of Co-Judge for Joint Primary Polling Places, Joint Primary Central Counting Station, and Joint Primary Early Voting Ballot Board.

(a) A co-judge may only process provisional voters from the judge's own party. (This applies to the provisional process at the polling place.)

(b) A co-judge may only determine a voter's intent on an irregularly marked ballot cast by a voter from the co-judge's own party. (This limitation applies to individuals serving in a co-judge capacity at the polling place, early-voting-ballot board, or central counting station.)

§81.152. Estimating Voter Turnout for Joint Primaries.

(a) Each county chair shall estimate voter turnout for each precinct using the formula set out in the following figure.
Figure: 1 TAC §81.152(a)

(b) The county clerk/elections administrator shall combine the turnout estimates provided by each party chair for each joint-primary precinct.

(c) The county clerk/elections administrator shall enter this information in Section B of the Joint Primary Resolution.

§81.153. Delivery of Election Records and Supplies.

(a) In joint precincts using an electronic voting system in which only one ballot box or only one Direct Record Electronic (DRE) unit is used, the co-judge from the party whose candidate for governor received the highest number of votes in the precinct or consolidated precinct in the most recent gubernatorial general election shall deliver the election supplies, including the DRE device containing the vote totals. (Note: A county clerk/elections administrator may use separate ballot boxes for each party when using electronic voting systems, if applicable.)

(b) The co-judge of the party whose candidate for governor received the highest number of votes in the precinct or consolidated precinct in the most recent gubernatorial general election may designate the other co-judge or a clerk to deliver the ballot box and/or DRE device.

(c) In a jurisdiction using paper ballots, each co-judge shall deliver their party's ballot box and election returns.

§81.155. Returning Surplus Funds.

Immediately following final payment of necessary expenses for conducting the joint primary elections (but no later than July 1), the county chair shall remit any surplus in the primary fund account to the Secretary of State. (The county chair shall remit the surplus regardless of whether state funds were requested by the chair. If the chair does not file a final cost report, their files will be reported to the Attorney General's Office and/or County District Attorney's Office in accordance with §81.113 of this title (relating to Misuse of State Funds).)

§81.157. Joint-Primary Contract with the County Elections Officer (County Clerk, County Elections Administrator, or County Tax Assessor Collector).

(a) Before the county chair may make final payment, the county elections officer must submit to the Secretary of State an accounting of actual costs incurred in conducting the joint-primary election.

(b) Before the Secretary of State may reimburse the final 25% of primary funds requested, the county elections officer must submit to the Secretary of State a detailed billing of all actual costs with the Final Cost Report.

(c) The Secretary of State may only reimburse actual costs incurred by the county and payable pursuant to provisions of the Texas Election Code, a joint primary contract, or an administrative rule.

(d) If the joint elections agreement requires the county elections officer to directly pay the costs associated with the joint election, then the county chair shall remit the total amount of state funds forwarded to the county chair pursuant to Section B of the Final Cost Estimate to the county clerk no later than the fifth day after receipt of the funds.

(e) The cost estimate may not provide for reimbursement for training of election workers or for materials provided by the Secretary of State.

(f) The county may not reimburse from primary-election funds, regular pay for personnel normally employed by the county.

(g) The joint resolution for the 2010 primary elections may not provide for any salary or compensation for the county elections officer for the performance of any statutory duty or service. (Note: Joint Primary Election Agreements do not count against the administrative salary limits set out under §81.123 of this title (relating to Administrative Personnel Limited).)

This 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 September 28, 2009.

TRD-200904396
Ann McGeehan
Director of Elections
Office of the Secretary of State
Earliest possible date of adoption: November 8, 2009
For further information, please call: (512) 463-5650

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TITLE 4. AGRICULTURE

PART 1. TEXAS DEPARTMENT OF AGRICULTURE

CHAPTER 1. GENERAL PROCEDURES
SUBCHAPTER E. ADVISORY COMMITTEES

4 TAC §1.212

The Texas Department of Agriculture (the department) proposes new §1.212, regarding the Texas Bioenergy Policy Council (Council) and Texas Bioenergy Research Committee (Committee) authorized with the enactment of Senate Bill 1016 (SB), 81st Legislature, 2009. New §1.212 adds the Council and Committee to the list of the department's advisory committees, states the Council and Committee's purpose and duties and specifies how they will report to the department.

Kelley Stripling, director of policy, has determined that for the first five years the new section is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the new section.

Ms. Stripling also has determined that for each year of the first five years the new section is in effect the public benefit anticipated as a result of enforcing the new section will be to provide interested members of the public with accurate information regarding the establishment of the Council and Committee. For the first five-year period the new section is in effect, there will be no economic cost for micro-businesses, small businesses or individuals who are required to comply with the section, as proposed.

Written comments on the proposal may be submitted to Kelley Stripling, Director of Policy, Texas Department of Agriculture, P.O. Box 12847, Austin, Texas 78711. Written comments must be received no later than 30 days from the date of publication of the proposed new section in the *Texas Register.*

New §1.212 is proposed under the Texas Government Code, Chapter 2110, which requires that an agency that establishes an advisory committee adopt rules to state the purpose and tasks of the committee and manner in which the committee shall report to the agency, Texas Agriculture Code, §12.016 which provides the department with the authority to adopt rules to administer its duties under the Code, and Texas Agriculture Code.

The code affected by the proposal is the Texas Government Code, Chapter 2110 and the Texas Agriculture Code, Chapter 50D, as established by SB 1016, which provides that the department shall provide administrative support for the Council and Committee.

§1.212. Texas Bioenergy Policy Council and Committee.

(a) Purpose. The Texas Bioenergy Policy Council (Council) and Texas Bioenergy Research Committee (Committee) are created pursuant to Texas Agricultural Code, Chapter 50D. The purpose of the Council and Committee is to promote the goal of making biofuels and bioenergy a significant part of the energy industry in Texas.

(b) Policy Council's Duties. The Council shall:

(1) provide a vision for unifying this state's agricultural, energy, and research strengths in a successful launch of a cellulosic biofuel and bioenergy industry;

(2) foster development of cellulosic-based and bio-based fuels and build on the Texas emerging technology fund's investments in leading-edge energy research and efforts to commercialize the production of bioenergy;

(3) pursue the creation of a next-generation biofuels energy research program at a university in this state; work to procure federal and other funding to aid this state in becoming a bioenergy leader;

(4) study the feasibility and economic development effect of a blending requirement for biodiesel or cellulosic fuels;

(5) pursue the development and use of thermochemical process technologies to produce alternative chemical feedstocks;

(6) study the feasibility and economic development of the requirements for pipeline-quality, renewable natural gas; and

(7) perform any other advisory duties as requested by the commissioner regarding the responsible development of bioenergy resources in this state.

(c) Research Committee's Duties. The Committee shall:

(1) identify and research appropriate and desirable biomass feedstock for each geographic region of this state;

(2) investigate logistical challenges to the planting, harvesting, and transporting of large volumes of biomass and provide recommendations to the Council that will aid in overcoming barriers to transportation, distribution, and marketing of bioenergy;

(3) identify strategies for and obstacles to the potential transition of the agriculture industry in western regions of this state to dryland bioenergy crops that are not dependent on groundwater resources; explore regions of this state, including coastal areas, that may contain available marginal land for use in growing bioenergy feedstocks;

(4) study the potential for producing oil from algae; study the potential for the advancement of thermochemical process technologies to produce alternative chemical feedstocks;

(5) study the potential for producing pipeline-quality natural gas from renewable sources; and

(6) perform other research duties as requested by the commissioner relating to the responsible development of bioenergy resources in this state.

(d) Reporting. Reporting takes place through meetings held by the Council and Committee. Through these meetings, the Commissioner and/or department staff discusses matters related to the Council and Committee's business and the Council and Committee provides oral feedback and direction. The department provides administrative support to the Council and Committee. Department staff prepares and maintains the minutes of each meeting. Staff maintains a record of actions taken and distributes copies of approved minutes and other documents to Council and Committee members.

(e) Of those Council and Committee members that are appointed by the governor, four positions will expire January 1 of each odd-numbered year and four positions will expire January 1 of each even-numbered year.

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

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Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
Earliest possible date of adoption: November 8, 2009
For further information, please call: (512) 463-4075

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CHAPTER 17. MARKETING AND PROMOTION

SUBCHAPTER I. TEXAS EQUINE INCENTIVE PROGRAM

4 TAC §§17.500 - 17.509

The Texas Department of Agriculture (the department) proposes new Chapter 17, Subchapter I, §17.500 - 17.509, concerning the Texas Equine Incentive Program. These rules are proposed to fulfill the mandate of the 81st Legislature of the state of Texas in accordance with House Bill 1881, 81st Legislature, 2009 (HB 1881), which creates the Texas Equine Incentive Program and requires the department to adopt rules to establish and administer the program.

Gene Richards, Assistant Commissioner for Marketing and Promotion, has determined that for the first five years the proposed rules are in effect, there will be fiscal implications for state government as a result of enforcing or administering the proposed rules. There will be an increase in state revenue due to the collection of incentive fees from owners of stallions used for breeding. It is not possible to determine the amount of fees that will be collected, but that amount will be based upon the number of breeders of Appaloosa, Paint and Quarter horses whose stallions have bred more than five mares during the 12-month period preceding the filing of a breeders report with the appropriate breed association. The owner of these stallions, as well as the owners of other eligible stallions who elect to opt in, will initially be paying a $30 fee to the program per mare bred. Breeders may opt out of the program by providing notice to the department in accordance with program rules. In addition, it is intended that fees collected will be awarded to eligible horse owners in the form of incentive grants, with the exception of up to 5% of fees collected, which may be used for administrative costs. There will be no fiscal implications for local government as a result of enforcing or administering the proposed rules.

Mr. Richards also has determined that for each year of the first five years the proposed rules are in effect the public benefit anticipated as a result of enforcing the proposed rules will be to provide an incentive for the owners of certain Texas-bred horses to enter foals in Texas horse events, in order to encourage the further development of the Texas horse industry and to enhance the quality of certain breeds of Texas-bred horses. For the first five-year period the proposed rules are in effect, there will be an economic cost for micro-businesses, small businesses or individuals who are required to comply with the sections, as proposed. An incentive fee in the amount of $30 per mare bred will be paid by the owner of an eligible stallion who had bred more than five mares, or by the owner of a stallion who has elected to opt in to the program. The total amount paid by the owner of the stallion owner will be dependent on the number of Texas mares bred during the applicable period. In addition, the owner of a stallion who has bred less than six mares may elect to participate in the program and pay a fee for each mare bred by the stallion. The payment of the incentive fee is required by law, and therefore, no regulatory flexibility analysis is required.

Comments on the proposed rules may be submitted to Gene Richards, Assistant Commissioner for Marketing and Promotion, 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 new sections are proposed under the Texas Agriculture Code §12.044, as established by HB 1881, which requires the department to establish rules to establish and administer an equine incentive program, and authorizes the department to set and collect a program fee in an amount of not less than $30 per mare bred.

The code affected by the proposal is the Texas Agriculture Code, Chapter 12.

§17.500. Authority.

Pursuant to §12.044 of the Texas Agriculture Code, the department has established an Texas Equine Incentive Program.

§17.501. Purpose.

The purpose of the Texas Equine Incentive Program is to provide an incentive for the owners of Texas-bred horses to enter foals in Texas horse events, to encourage the further development of the Texas horse industry, and to enhance the quality of certain breeds of Texas-bred horses.

§17.502. Definitions.

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

(1) Appaloosa Horse--A breed of horse registered with the Appaloosa Horse Club established in the United States in 1938, which is the international breed registry for Appaloosa horses.

(2) Breed Associations--The American Paint Horse Association, the American Quarter Horse Association, and the Appaloosa Horse Club.

(3) Department--Texas Department of Agriculture.

(4) Foal--The offspring of a stallion (as defined in this section) and mare registered with their respective breed associations.

(5) Horse Events--Officially sanctioned racing or show events in Texas authorized by the American Paint Horse Association, American Quarter Horse Association, or the Appaloosa Horse Club.

(6) Mare--A female horse.

(7) Paint Horse--A breed of horse registered with the American Paint Horse Association.

(8) Program--The Texas Equine Incentive Program authorized by §12.044 of the Texas Agriculture Code and established by this subchapter.

(9) Quarter Horse--A breed of horse registered with the American Quarter Horse Association.

(10) Sire--The male parent of a foal.

(11) Stallion--An uncastrated adult male horse that stands stud in Texas during an entire breeding season.

(12) Texas-bred horse--An Appaloosa Horse, Paint Horse, or Quarter Horse that is conceived and foaled in Texas.

§17.503. Eligibility for the Program.

In order to be eligible for the Program, a foal must meet the following requirements.

(1) The foal must be a Texas-bred horse.

(2) The foal's stallion must stand stud in Texas during the entire breeding season.

(3) The mare must conceive and foal in Texas.

(4) Prior to the payment of any incentive award, the owner of the foal must file a registration report with the Texas Department of Agriculture.

§17.504. Breeding Report; Program Fee.

(a) On the filing of an annual report with a breed association, the owner of a stallion that has bred more than five mares during the 12-month period preceding the report must submit a duplicate report to the department.

(b) At the same time as filing a breeding report as required by subsection (a) of this section, the owner of a stallion shall pay the department a program fee of not less than $30.00 for each mare bred based upon the breeding report filed by the stallion owner. The program fee will be determined by the department on a calendar-year basis. On or before December 31st of each year, the department will provide notice of the program fee for the succeeding calendar year to the breed associations, and publish notice of same in the *Texas Register* on or before that date. The program fee for the initial and first full program years, from September 1, 2009, through December 31, 2010, will be $30.00 per mare bred.

(c) Breeding reports as required by subsection (a) of this section must be sent to the department for all mares bred on or before November 30th of each calendar year.

(d) The breed associations shall cooperate with the department to verify stallion breeding information.

§17.505. Opt Out.

(a) The owner of a stallion that has bred six or more mares during the 12-month period prior to filing an annual breeding report with the applicable breed association, may opt out of the Program by submitting written notice to the department informing the department that the owner will not participate in the Program.

(b) The opt out notice required by subsection (a) of this section must be delivered in person or by United States Postal Service to the department as follows:

(1) if by delivery, The Texas Department of Agriculture, Attn: Equine Incentive Program Coordinator, 1700 N. Congress, 11th Floor, Austin, Texas 78711; or

(2) if by United States Postal Service, certified mail, return receipt requested, to The Texas Department of Agriculture, Attn: Equine Incentive Program Coordinator, P.O. Box 12847, Austin, Texas 78711.

(c) The notice shall be given on or before the 30th day before the owner's annual breeding report is due to the applicable breeder's association, and must contain, at a minimum:

(1) the name and address of the owner;

(2) the name, registration number and location of the stallion; and

(3) the name, registration number and location of all mares bred during the 12-month period prior to filing an annual breeding report with the applicable breed association.

§17.506. Opt In.

The owner of a stallion that has bred fewer than six mares during the 12-month period prior to filing an annual breeding report with the applicable breed association may participate in the Program by submitting a breeding report to the department and paying the required program fee for each mare bred.

§17.507. Establishment of Incentive Awards.

(a) Commencing January 1, 2011, a point system which has been previously coordinated with the breed associations will commence for the granting of an incentive award to be paid to the owners of eligible foals under the Program.

(b) The department will determine the amount and type of incentive awards to be paid to eligible foals on a calendar year basis.

(c) On or before December 31, 2010, and on or before December 31st of each calendar year thereafter, the department shall notify the breed associations of the estimated amount and type of incentive awards available under the Program for the succeeding calendar year.

(d) The amount and type of incentive awards will be based on funds that are available under the Program.

§17.508. Foals Eligible for Awards.

In order for the owner of a foal to be eligible for an incentive award under the Program, the following requirements must be met:

(1) the foal must be a Texas-bred horse;

(2) a program fee must be paid on behalf of the foal;

(3) the foal must participate in Texas horse events;

(4) the foal must be at least two years old to accrue points for sanctioned events other than racing; and

(5) the foal must be at least three years old to accrue points for race events.

§17.509. Administrative Costs.

The department may use up to five percent of program fees collected each year for administrative costs.

This 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 September 25, 2009.

TRD-200904293
Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
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For further information, please call: (512) 463-4075

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CHAPTER 25. SPECIAL NUTRITION PROGRAMS

SUBCHAPTER A. CHILD AND ADULT CARE FOOD PROGRAM (CACFP)

The Texas Department of Agriculture (department) proposes the repeal of Chapter 25, Subchapter A, relating to the Child and Adult Care Food Program (CACFP). Subchapter A is comprised of Division 1, §§25.1 - 25.4, relating to the overview and purpose of the program; Division 2, §§25.11 - 25.37, relating to the eligibility of contractors and facilities; Division 3, §§25.61 - 25.68, relating to the contractor application process; Division 4, §§25.81 - 25.92, relating to program agreements; Division 5, §§25.111 - 25.122, relating to contractor standards and responsibilities; Division 6, §§25.141 - 25.154, relating to budgets; Division 7,

§§25.161 - 25.165, relating to financial management; Division 8, §§25.171 - 25.183, relating to reporting and record retention; Division 9, §§25.191 - 25.198, relating to meal requirements; Division 10, §§25.211 - 25.233, relating to day care homes; Division 11, §§25.261 - 25.269, relating to start-up and expansion payments; Division 12, §§25.281 - 25.290, relating to advance payments; Division 13, §§25.311 - 25.317, relating to commodities and cash-in-lieu assistance; Division 14, §§25.331 - 25.363, relating to reimbursement; Division 15, §§25.381 - 25.383, relating to overpayments; Division 16, §§25.391 - 25.406, relating to program reviews, monitoring, and management evaluations; Division 17, §§25.421 - 25.425, relating to audits; Division 18, §§25.441 - 25.472, relating to sanctions, penalties, and fiscal action; and Division 19, §§25.491 - 25.497, relating to denials and termination. The repeals are proposed so that the department may publish uniform rules relating to the department's oversight of the Child and Adult Care Food Program. The repealed sections will be replaced by revised rules addressing the same substantive areas. The proposed new rules are published in the Proposed Rules section of this issue of the *Texas Register.*

Angela Olige, Assistant Commissioner for Food and Nutrition, has determined that for the first five-year period the proposed repeals are in effect, there will be no fiscal implication for the state or local government as a result of enforcing or administering the repeals.

Ms. Olige has also determined that for each year of the first five years the proposed repeals are in effect, the public benefit anticipated as a result of enforcing the repeals will be having updated and accurate rules for the Child and Adult Care Food Program. The proposed repeals will not have a fiscal impact on micro-businesses, small businesses or individuals required to comply with the repeals.

Comments on the proposal may be submitted to Angela Olige, Assistant Commissioner for Food and Nutrition, Texas Department of Agriculture, P.O. Box 12847, Austin, Texas 78711. Comments must be received not later than 30 days from the date of publication of the proposal in the *Texas Register.*

DIVISION 1. OVERVIEW AND PURPOSE

4 TAC §§25.1 - 25.4

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

The repeal of Chapter 25, Subchapter A, Division 1, §§25.1 - 25.4, is proposed under the Texas Agriculture Code (the Code), §12.0025, which authorizes the department to administer federal and state nutrition programs including the Child and Adult Care Food Program; and the Code, §12.016, which authorizes the department to adopt rules as necessary for the administration of its powers and duties under this Code.

The code affected by the proposal is the Code, Chapter 12.

§25.1. What is the purpose of the Child and Adult Care Food Program (CACFP)?

§25.2. What do certain words and terms in this subchapter mean?

§25.3. How is the CACFP authorized?

§25.4. How may DHS use the CACFP federal 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 September 28, 2009.

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Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
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For further information, please call: (512) 463-4075

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DIVISION 2. ELIGIBILITY OF CONTRACTORS AND FACILITIES

4 TAC §§25.11 - 25.37

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

The repeal of Chapter 25, Subchapter A, Division 2, §§25.11 - 25.37, is proposed under the Texas Agriculture Code (the Code), §12.0025, which authorizes the department to administer federal and state nutrition programs including the Child and Adult Care Food Program; and the Code, §12.016, which authorizes the department to adopt rules as necessary for the administration of its powers and duties under this Code.

The code affected by the proposal is the Code, Chapter 12.

§25.11. What requirements must contractors and facilities meet in order to be eligible to participate in the CACFP?

§25.12. Must contractors and facilities be licensed or approved in order to participate in the CACFP?

§25.13. Who is the licensing authority in Texas?

§25.14. Are there any exceptions to the licensing requirements?

§25.15. When must a contractor submit copies of its license or registration?

§25.16. Must a contractor comply with training requirements in order to be eligible to participate in the CACFP?

§25.17. Must a nonprofit contractor have tax-exempt status in order to be eligible to participate in the CACFP?

§25.18. Must a proprietary for-profit organization or a sponsored for-profit facility meet specific eligibility requirements in order to be eligible to participate in the CACFP?

§25.19. Are there any exceptions to the eligibility requirements stated in 7 CFR §226.15 for a proprietary for-profit child care center or a for-profit sponsored child care facility?

§25.20. What is the Free/Reduced-Price Expanded Eligibility Pilot criterion?

§25.21. Must a renewing contractor show compliance with the single audit requirements in 7 CFR Part 3052 in order to participate in the CACFP?

§25.22. How does a contractor demonstrate compliance with the single audit requirements when applying to participate in the CACFP?

§25.23. Must child care facilities distribute information about other programs?

§25.24. Are there any exceptions to the requirement regarding distribution of materials?

§25.25. Must an organization satisfy specific requirements in order to be eligible to participate in the CACFP as a day care home sponsor?

§25.26. Where must a contractor obtain a performance bond?

§25.27. How often must an organization submit a performance bond?

§25.28. Must the dollar amount of the performance bond be adjusted?

§25.29. What happens if an organization has fewer than three years of administrative and financial history?

§25.30. When must a representative of the organization make records available at the primary physical location?

§25.31. When must a representative of the organization be available at the primary physical location?

§25.32. How must a contractor make itself available to DHS and providers?

§25.33. What must happen if a contractor's primary physical location changes?

§25.34. How do contractors and facilities qualify to participate in the CACFP At Risk Afterschool Snack program?

§25.35. Are supervised athletic activities ever allowed in the CACFP At Risk Afterschool Snack program?

§25.36. What information must contractors that operate or sponsor the participation of one or more emergency shelters provide to demonstrate that they qualify to participate in the CACFP as an emergency shelter?

§25.37. Are there any conditions that would make a contractor ineligible to participate in the CACFP?

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

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Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
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DIVISION 3. CONTRACTOR APPLICATION PROCESS

4 TAC §§25.61 - 25.68

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

The repeal of Chapter 25, Subchapter A, Division 3, §§25.61 - 25.68, is proposed under the Texas Agriculture Code (the Code), §12.0025, which authorizes the department to administer federal and state nutrition programs including the Child and Adult Care Food Program; and the Code, §12.016, which authorizes the department to adopt rules as necessary for the administration of its powers and duties under this Code.

The code affected by the proposal is the Code, Chapter 12.

§25.61. Must a contractor submit an application to participate in the CACFP?

§25.62. What must a contractor do if the information on its application changes from what was originally submitted?

§25.63. What criteria does DHS use to approve or deny applications for participation?

§25.64. Because of its status as a nonprofit, is there any information a sponsor is required to include in its application to meet Internal Revenue Service requirements?

§25.65. What information must a contractor submit in its program application?

§25.66. Does DHS conduct pre-approval visits to child care contractors applying to participate in the CACFP?

§25.67. What happens if a contractor's application is incomplete?

§25.68. Can a contractor reapply if its application is denied?

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

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Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
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DIVISION 4. AGREEMENTS

4 TAC §§25.81 - 25.92

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

The repeal of Chapter 25, Subchapter A, Division 4, §§25.81 - 25.92, is proposed under the Texas Agriculture Code (the Code), §12.0025, which authorizes the department to administer federal and state nutrition programs including the Child and Adult Care Food Program; and the Code, §12.016, which authorizes the department to adopt rules as necessary for the administration of its powers and duties under this Code.

The code affected by the proposal is the Code, Chapter 12.

§25.81. Is a contractor required to enter into an agreement with DHS in order to participate in the CACFP?

§25.82. What is the nature of this agreement?

§25.83. Is a facility required to enter into an agreement with a sponsoring organization to participate in the CACFP?

§25.84. Is this also a legally binding document that specifies the rights and responsibilities of both the sponsor and facility?

§25.85. Must a contractor that purchases meals from a food service management company (FSMC) or school food authority (SFA) enter into a contract with that entity?

§25.86. What is the term of this agreement?

§25.87. How may this agreement be extended?

§25.88. Can an extension last more than 12 months?

§25.89. What information must a contractor include in its agreement?

§25.90. What happens if an FSMC does not provide a contractor with monthly billing records by the specified date?

§25.91. Can an organization have more than one agreement with DHS to participate as a CACFP day care home contractor, child care center contractor, or adult day care center contractor?

§25.92. What if the organization is legally distinct from a current CACFP contractor?

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

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General Counsel
Texas Department of Agriculture
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For further information, please call: (512) 463-4075

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DIVISION 5. CONTRACTOR STANDARDS AND RESPONSIBILITIES

4 TAC §§25.111 - 25.122

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

The repeal of Chapter 25, Subchapter A, Division 5, §§25.111 - 25.122, is proposed under the Texas Agriculture Code (the Code), §12.0025, which authorizes the department to administer federal and state nutrition programs including the Child and Adult Care Food Program; and the Code, §12.016, which authorizes the department to adopt rules as necessary for the administration of its powers and duties under this Code.

The code affected by the proposal is the Code, Chapter 12.

§25.111. Must a contractor follow specific procurement guidelines to obtain food, supplies, and other goods and services for the CACFP?

§25.112. How must a contractor obtain the title to, use, and dispose of equipment used in the operation of the CACFP?

§25.113. Under what standards must a child care or adult day care center contractor determine a participant's eligibility for free and reduced-price meals?

§25.114. How must DHS and child care or adult day care center contractors verify the eligibility of program participants for free and reduced-price meals?

§25.115. Are there any restrictions on the type of meals that an adult day care center contractor can claim for reimbursement?

§25.116. Can a contractor consider individuals who live in residential institutions and attend the adult day care center during the day as "enrolled" on the center's claim forms?

§25.117. Is a contractor who is approved to operate the CACFP At Risk Afterschool Snack program required to provide snacks free of charge to its participants?

§25.118. Will contractors be discriminated against in the CACFP?

§25.119. Is a contractor required to prevent discrimination against participants in its CACFP operations?

§25.120. Are contractors and facilities required to ensure that health, safety, and sanitation standards are enforced?

§25.121. Must a contractor provide training and technical assistance to its center or sponsored facility staff?

§25.122. Can a contractor implement a change to its approved management plan before DHS approves the change?

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

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Dolores Alvarado Hibbs
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Texas Department of Agriculture
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DIVISION 6. BUDGETS

4 TAC §§25.141 - 25.154

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

The repeal of Chapter 25, Subchapter A, Division 6, §§25.141 - 25.154, is proposed under the Texas Agriculture Code (the Code), §12.0025, which authorizes the department to administer federal and state nutrition programs including the Child and Adult Care Food Program; and the Code, §12.016, which authorizes the department to adopt rules as necessary for the administration of its powers and duties under this Code.

The code affected by the proposal is the Code, Chapter 12.

§25.141. How must a contractor submit an administrative budget for DHS approval?

§25.142. What information must a day care home sponsor include when submitting its budget?

§25.143. What are the program functions that should be included in a budget?

§25.144. What should the contractor do if the required program functions are provided at no cost to the program?

§25.145. How must a contractor manage payment of costs that are not allowable uses of program funds?

§25.146. How does DHS handle adjustments to the budget?

§25.147. When must a contractor submit its budget to DHS?

§25.148. Will DHS approve a budget adjustment retroactively?

§25.149. What happens if a day care home sponsor operates at a deficit?

§25.150. What happens if a day care home sponsor exceeds the allowable amounts calculated under 7 CFR §226.12?

§25.151. How must a contractor report donations on its budget?

§25.152. How does DHS determine the limits of a day care home sponsor's budget?

§25.153. What part of the budget can DHS limit?

§25.154. What budget information must a contractor provide when it applies for start-up or expansion funds?

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

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DIVISION 7. FINANCIAL MANAGEMENT

4 TAC §§25.161 - 25.165

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

The repeal of Chapter 25, Subchapter A, Division 7, §§25.161 - 25.165, is proposed under the Texas Agriculture Code (the Code), §12.0025, which authorizes the department to administer federal and state nutrition programs including the Child and Adult Care Food Program; and the Code, §12.016, which authorizes the department to adopt rules as necessary for the administration of its powers and duties under this Code.

The code affected by the proposal is the Code, Chapter 12.

§25.161. Is a contractor required to implement a particular financial management system?

§25.162. Must a contractor maintain financial management system records related to its participation in the CACFP?

§25.163. Is a Day Activity and Health Services (DAHS) center that participates in the CACFP required to report any reimbursement it receives while taking part in the CACFP?

§25.164. Can a contractor use CACFP funds to assist eligible unlicensed or unregistered potential day care homes to become licensed or registered?

§25.165. Can a contractor use CACFP funds to assist potential day care homes to become licensed or registered if those providers have previously received CACFP funds?

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

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DIVISION 8. REPORTING AND RECORD RETENTION

4 TAC §§25.171 - 25.183

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

The repeal of Chapter 25, Subchapter A, Division 8, §§25.171 - 25.183, is proposed under the Texas Agriculture Code (the Code), §12.0025, which authorizes the department to administer federal and state nutrition programs including the Child and Adult Care Food Program; and the Code, §12.016, which authorizes the department to adopt rules as necessary for the administration of its powers and duties under this Code.

The code affected by the proposal is the Code, Chapter 12.

§25.171. How must a contractor submit reports to DHS?
§25.172. What information must a contractor keep to support reports submitted to DHS?
§25.173. How long must a contractor maintain records and documents pertaining to the CACFP?
§25.174. How long must a contractor maintain program-related documentation if litigation, claims, audits, or investigations involving these records occur before the end of three years and 90 days?
§25.175. When is litigation, a claim, an audit, or an investigation finding resolved?
§25.176. Must a contractor provide access to its facilities and records?
§25.177. How must a sponsoring organization with more than one approved facility maintain records?
§25.178. Can a sponsoring organization maintain CACFP records with other program records?
§25.179. Must a sponsoring organization ensure that facilities maintain certain records daily?
§25.180. What forms must a contractor use to administer the CACFP?
§25.181. What is the authority for maintaining and submitting records?
§25.182. What management information must a day care home sponsor submit each month?
§25.183. In what form must this information be submitted?
This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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DIVISION 9. MEAL REQUIREMENTS

4 TAC §§25.191 - 25.198

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the

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

The repeal of Chapter 25, Subchapter A, Division 9, §§25.191 - 25.198, is proposed under the Texas Agriculture Code (the Code), §12.0025, which authorizes the department to administer federal and state nutrition programs including the Child and Adult Care Food Program; and the Code, §12.016, which authorizes the department to adopt rules as necessary for the administration of its powers and duties under this Code.

The code affected by the proposal is the Code, Chapter 12.

§25.191. Must a contractor ensure that all meals served and claimed for reimbursement satisfy the CACFP program requirements?

§25.192. How much time can elapse between meals?

§25.193. How long can individual meal times last?

§25.194. Are there any exceptions?

§25.195. Can a day care home sponsor require the use of pre-planned pre-printed menus?

§25.196. Can a day care home sponsor provide pre-planned pre-printed menus as a training tool only?

§25.197. Can a day care home use pre-planned menus?

§25.198. Can a contractor claim reimbursement for meals served to eligible program participants during field trips?

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

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DIVISION 10. DAY CARE HOMES

4 TAC §§25.211 - 25.233

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

The repeal of Chapter 25, Subchapter A, Division 10, §§25.211 - 25.233, is proposed under the Texas Agriculture Code (the Code), §12.0025, which authorizes the department to administer federal and state nutrition programs including the Child and Adult Care Food Program; and the Code, §12.016, which authorizes the department to adopt rules as necessary for the administration of its powers and duties under this Code.

The code affected by the proposal is the Code, Chapter 12.

§25.211. What materials must a day home sponsor submit in order for a day care home to be approved to participate in the CACFP?

§25.212. Is there a time frame by which a day home sponsor must submit application materials in order for a day care home to be approved to participate in the CACFP in a given month?

§25.213. What constitutes a complete and correct Day Care Home Application?

§25.214. Is there any information on the Day Care Home Application that DHS can complete or correct on behalf of the provider?

§25.215. What constitutes a complete and correct Agreement Between Sponsor and Day Care Home Provider?

§25.216. Is there any information on the Agreement Between Sponsor and Day Care Home Provider that DHS can complete or correct on behalf of the provider?

§25.217. How does DHS determine the date a day care home can participate in the CACFP?

§25.218. Which days of the week does DHS approve as meal service days for day care homes?

§25.219. Can a day care home that is currently participating in the CACFP under one sponsor sign an agreement to participate with a different sponsor?

§25.220. Can a day care home change sponsors more than once during the program year?

§25.221. What is good cause for transferring?

§25.222. Can a day care home participate with more than one sponsor in the same month?

§25.223. Can a day care home provider that participates in the CACFP actively take part in any sponsor's day-to-day operations, either full- or part-time?

§25.224. Can a day care home provider be a board member of a sponsoring organization?

§25.225. Can a day care home provider that has been found guilty of committing fraud in the CACFP still participate in the CACFP?

§25.226. Is a day care home required to attend program-related training to qualify to participate in the CACFP?

§25.227. Does DHS limit the number of day care homes that a new contractor may sponsor?

§25.228. If DHS limits the number of day care homes that a newly approved contractor can sponsor, how can the contractor gain additional homes?

§25.229. Does DHS limit the number of day care homes that a contractor currently participating in the CACFP may sponsor?

§25.230. Does DHS approve additional day care homes for contractors already participating in the CACFP?

§25.231. How does DHS notify a contractor that its total number of day care homes has been limited?

§25.232. On what does DHS base its adjustment?

§25.233. In addition to the provisions of 7 CFR §226.13 and §226.18, what other guidelines must a contractor that sponsors day care homes follow?

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

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Dolores Alvarado Hibbs
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DIVISION 11. START-UP AND EXPANSION PAYMENTS

4 TAC §§25.261 - 25.269

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

The repeal of Chapter 25, Subchapter A, Division 11, §§25.261 - 25.269, is proposed under the Texas Agriculture Code (the Code), §12.0025, which authorizes the department to administer federal and state nutrition programs including the Child and Adult Care Food Program; and the Code, §12.016, which authorizes the department to adopt rules as necessary for the administration of its powers and duties under this Code.

The code affected by the proposal is the Code, Chapter 12.

§25.261. What are start-up and expansion payments?

§25.262. Which contractors are eligible to request start-up and expansion payments?

§25.263. How does a contractor apply to receive start-up and expansion payments?

§25.264. How does DHS issue start-up payments to contractors that sponsor or want to sponsor day care homes?

§25.265. How does DHS issue expansion payments to day care home sponsors?

§25.266. How does DHS determine the amount of expansion payments issued to a day care home sponsor?

§25.267. How must a day care home sponsor use expansion payments?

§25.268. How must a day care home sponsor use start-up payments?

§25.269. Can start-up or expansion payments awarded to day care home sponsors be used to recruit day care homes that are already participating with another DHS-approved sponsoring organization?

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

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DIVISION 12. ADVANCE PAYMENTS

4 TAC §§25.281 - 25.290

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

The repeal of Chapter 25, Subchapter A, Division 12, §§25.281 - 25.290, is proposed under the Texas Agriculture Code (the Code), §12.0025, which authorizes the department to administer federal and state nutrition programs including the Child and Adult Care Food Program; and the Code, §12.016, which authorizes the department to adopt rules as necessary for the administration of its powers and duties under this Code.

The code affected by the proposal is the Code, Chapter 12.

§25.281. Does DHS issue and monitor advance payments to contractors according to a specific procedure?

§25.282. How must a contractor account for advance funds?

§25.283. How does DHS issue advance payments to a contractor that has a claim history?

§25.284. How does DHS issue advance payments to a contractor that does not have a claim history?

§25.285. How does DHS estimate advance payment amounts?

§25.286. Does DHS issue retroactive advances?

§25.287. What happens if USDA does not provide sufficient funds for DHS to pay both advance payments and claims for reimbursement in full?

§25.288. How does DHS recoup advance payments?

§25.289. What happens if the advance payment exceeds the reimbursement earned in the month for which the advance is issued?

§25.290. What happens if a contractor who sponsors day care homes does not comply with program 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.

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DIVISION 13. COMMODITIES AND CASH-IN-LIEU ASSISTANCE

4 TAC §§25.311 - 25.317

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

The repeal of Chapter 25, Subchapter A, Division 13, §§25.311 - 25.317, is proposed under the Texas Agriculture Code (the Code), §12.0025, which authorizes the department to administer federal and state nutrition programs including the Child and Adult Care Food Program; and the Code, §12.016, which authorizes the department to adopt rules as necessary for the administration of its powers and duties under this Code.

The code affected by the proposal is the Code, Chapter 12.

§25.311. Does DHS provide commodity assistance to contractors?

§25.312. How does DHS determine whether to issue commodities or cash-in-lieu of commodities?

§25.313. If a day care home sponsor chooses to distribute bonus commodities to its day care homes, how does it determine the number of commodities to distribute to each day care home?

§25.314. Who covers the costs of distributing bonus commodities?

§25.315. Can a sponsoring organization include administrative costs associated with the distribution of bonus commodities in its CACFP costs?

§25.316. What does DHS require of a day care home sponsoring organization before that organization can submit charges to its day care homes?

§25.317. Are facilities or centers required to receive bonus commodities?

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

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DIVISION 14. REIMBURSEMENT

4 TAC §§25.331 - 25.363

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

The repeal of Chapter 25, Subchapter A, Division 14, §§25.331 - 25.363, is proposed under the Texas Agriculture Code (the Code), §12.0025, which authorizes the department to administer federal and state nutrition programs including the Child and Adult Care Food Program; and the Code, §12.016, which authorizes the department to adopt rules as necessary for the administration of its powers and duties under this Code.

The code affected by the proposal is the Code, Chapter 12.

§25.331. Under what authority does DHS reimburse a contractor for its participation in the CACFP?

§25.332. Under what authority must contractors reimburse facilities?

§25.333. How does DHS assign reimbursement rates for contractors?

§25.334. What options does DHS use to reimburse contractors?

§25.335. How does DHS compute reimbursement for approved child care centers, outside-school-hours care centers, adult day care centers, and day care homes?

§25.336. What are Title III benefits?

§25.337. Can independent adult day care centers and contractors that sponsor adult day care centers claim reimbursement for meals supported by Title III of the Older Americans Act?

§25.338. If a contractor uses a food service management company to prepare the meals served at the adult day care center, who is responsible for ensuring that neither Title III funds nor commodities were used in the meals?

§25.339. How many snacks can a CACFP At Risk Afterschool Snack program contractor claim for reimbursement?

§25.340. What are the requirements for submitting a claim for reimbursement for a snack?

§25.341. What rate does DHS use to reimburse contractors who operate the CACFP At Risk Afterschool Snack program?

§25.342. Can a contractor be reimbursed for after school snacks served to participants in an approved At Risk Afterschool program in addition to the meals provided in traditional child care?

§25.343. What is the maximum number of reimbursable meals under the CACFP?

§25.344. Are there any exceptions?

§25.345. How many meals can a contractor that sponsors or operates emergency shelters for homeless children include in a claim for reimbursement?

§25.346. Are there any meals for which emergency shelters for homeless children contractors cannot claim reimbursement?

§25.347. Must a contractor claim reimbursement within a specific time period?

§25.348. Who is responsible for the accuracy of the information submitted on the contractor's claim for reimbursement?

§25.349. Will DHS pay a claim for reimbursement if it is received or postmarked later than 60 days after the end of the claim month?

§25.350. How does DHS process a claim received later than 60 days after the end of the claim month(s)?

§25.351. What happens if DHS finds that good cause did not exist?

§25.352. What happens if DHS finds that good cause beyond the contractor's control existed?

§25.353. What happens if USDA finds that good cause existed?

§25.354. What happens if USDA finds that good cause did not exist?

§25.355. Does a contractor have the option not to submit a request for payment of a late claim based on good cause?

§25.356. If a contractor chooses not to submit a request for payment of a late claim based on good cause, can a contractor still be reimbursed for that claim?

§25.357. What guidelines must a contractor use when serving second meals?

§25.358. How must a contractor claim reimbursement for second meals?

§25.359. Can a contractor that serves meals family style claim reimbursement for second meals?

§25.360. Can a day care home claim CACFP reimbursement for meals served to another day care home provider's own children when both providers participate in the CACFP?

§25.361. Can the day care home provider's own child be considered a nonresidential child for the purpose of claiming reimbursement for a meal service at the day care home of another provider?

§25.362. What age group of children must an emergency shelter or homeless site serve in order to be eligible to participate as a contractor in the CACFP?

§25.363. Are there any exceptions?

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

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Dolores Alvarado Hibbs
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DIVISION 15. OVERPAYMENTS

4 TAC §§25.381 - 25.383

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

The repeal of Chapter 25, Subchapter A, Division 15, §§25.381 - 25.383, is proposed under the Texas Agriculture Code (the Code), §12.0025, which authorizes the department to administer federal and state nutrition programs including the Child and Adult Care Food Program; and the Code, §12.016, which authorizes the department to adopt rules as necessary for the administration of its powers and duties under this Code.

The code affected by the proposal is the Code, Chapter 12.

§25.381. How does DHS manage overpayment of claims for reimbursement, advance payments, start-up, and expansion fund payments?

§25.382. What happens to program funds that a day care home sponsor recovers from a day care home?

§25.383. Can a day care home sponsor use CACFP funds to recruit day care homes?

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

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Dolores Alvarado Hibbs
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DIVISION 16. PROGRAM REVIEWS, MONITORING, AND MANAGEMENT EVALUATIONS

4 TAC §§25.391 - 25.406

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

The repeal of Chapter 25, Subchapter A, Division 16, §§25.391 - 25.406, is proposed under the Texas Agriculture Code (the Code), §12.0025, which authorizes the department to administer federal and state nutrition programs including the Child and Adult Care Food Program; and the Code, §12.016, which authorizes the department to adopt rules as necessary for the administration of its powers and duties under this Code.

The code affected by the proposal is the Code, Chapter 12.

§25.391. Is a contractor required to monitor its own program operations?

§25.392. Does DHS conduct periodic visits to CACFP contractors?

§25.393. How does DHS determine which contractors to visit?

§25.394. Does DHS require sponsors of day care homes to verify participation of the children in their day care homes?

§25.395. How must a day care home sponsor verify the participation of the children claimed?

§25.396. How must a day care home sponsor verify a child's enrollment in a day care home?

§25.397. Can a contractor verify the participation of children in day care homes even if the day care home is neither randomly selected for verification by DHS nor requires additional verification of participation after being randomly selected by DHS?

§25.398. How does a day care home sponsor conduct reviews of day care homes?

§25.399. How does a center sponsor conduct reviews of its sponsored facilities?

§25.400. What type of monitoring reviews must a day care home sponsor conduct?

§25.401. Must the day care home sponsor observe a meal service during each monitoring review?

§25.402. What happens if the day care home sponsor cannot confirm program participation?

§25.403. When must a day care home sponsor conduct monitoring reviews of day care homes that participate on weekends?

§25.404. How does a contractor that sponsors the participation of child and adult care centers conduct monitoring reviews of its sponsored facilities?

§25.405. Is a contractor that uses a food service management company (FSMC) contract required to monitor contracts with the FSMC?

§25.406. What happens if the health and well being of a program participant is at risk because of program deficiencies identified during an FSMC review?

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

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Dolores Alvarado Hibbs
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DIVISION 17. AUDITS

4 TAC §§25.421 - 25.425

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

The repeal of Chapter 25, Subchapter A, Division 17, §§25.421 - 25.425, is proposed under the Texas Agriculture Code (the Code), §12.0025, which authorizes the department to administer federal and state nutrition programs including the Child and Adult Care Food Program; and the Code, §12.016, which authorizes the department to adopt rules as necessary for the administration of its powers and duties under this Code.

The code affected by the proposal is the Code, Chapter 12.

§25.421. Are contractors and sponsored facilities that participate in the CACFP subject to audit?
§25.422. Are certain contractors exempt from the single audit requirements?
§25.423. When is an audit considered acceptable?
§25.424. How is a contractor informed of its obligation to comply with the single audit requirements?
§25.425. Does DHS reimburse a contractor for the cost of obtaining a single audit?

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

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DIVISION 18. SANCTIONS, PENALTIES, AND FISCAL ACTION

4 TAC §§25.441 - 25.472

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

The repeal of Chapter 25, Subchapter A, Division 18, §§25.441 - 25.472, is proposed under the Texas Agriculture Code (the Code), §12.0025, which authorizes the department to administer federal and state nutrition programs including the Child and Adult Care Food Program; and the Code, §12.016, which authorizes the department to adopt rules as necessary for the administration of its powers and duties under this Code.

The code affected by the proposal is the Code, Chapter 12.

§25.441. Does DHS investigate and resolve program deficiencies, program irregularities, and evidence of violations of criminal law or civil fraud statutes?
§25.442. What does DHS do if a contractor fails to comply with the CACFP requirements in 7 CFR Part 226 and this subchapter?
§25.443. What does DHS do if DHS learns that a contractor has submitted false information on its program application?
§25.444. What happens to eligible day care home providers or centers when their sponsoring organization is disqualified?
§25.445. What happens if a contractor fails to attend mandatory DHS training?
§25.446. What happens if a day care home sponsor fails to properly monitor or train providers when program violations related to monitoring or training of providers identified during an administrative review exceed a tolerance level of one provider or 10% of the providers sampled, whichever amount is greater?
§25.447. What happens if DHS determines during the follow-up review that the day care home sponsor has not corrected all program noncompliances identified in the initial review?
§25.448. What happens after the second follow-up review if the day care home sponsor fails to demonstrate that all serious deficiencies identified by DHS have been or will be corrected?
§25.449. What happens if a day care home sponsor fails to ensure that a claim is submitted only for eligible meals served to eligible children?
§25.450. What happens if DHS determines during the test month of the initial review that 10% or more of the meals sampled and claimed for reimbursement fail to meet program requirements?
§25.451. What happens if DHS determines during the follow-up review that 10% or more of the meals sampled and claimed for reimbursement for the test month fail to meet program requirements?
§25.452. What happens even if less than 10% of all meals claimed for the test month of the follow-up are ineligible?
§25.453. What happens during the second follow-up review if the day care home sponsor fails to demonstrate that all serious deficiencies identified by DHS have been or will be corrected?
§25.454. What happens if a day care home sponsor fails to disburse program funds to providers according to program requirements when program violations related to the disbursement of program funds to providers identified during an administrative review exceed a tolerance level of one provider or 10% of the providers sampled, whichever amount is greater?
§25.455. What happens if DHS determines during the follow-up review that the day care home sponsor has not corrected all instances of program noncompliance identified in the initial review?
§25.456. What happens after the second follow-up review if the day care home sponsor fails to demonstrate that all serious deficiencies identified by DHS have been or will be corrected?
§25.457. What happens if, during a review or an audit, DHS cites a day care home sponsor for deficiencies in administrative or financial capabilities because the sponsor has too many day care homes?
§25.458. Can a day care home sponsor that is deficient in program operations add day care homes?
§25.459. What does DHS do if a contractor that is subject to the single audit requirements fails to submit an audit as required?
§25.460. What does DHS do if a contractor fails to accomplish the required corrective action and permanently correct the serious deficiency regarding its single audit?
§25.461. Can a contractor appeal this action?
§25.462. If a contractor subject to the single audit requirements fails to obtain and submit an acceptable audit by the specified due date and DHS either conducts the audit or arranges for an audit to be conducted by a third party, who must pay for the audit?

§25.463. Can DHS extend the deadline by which a contractor must submit an audit?

§25.464. How must a contractor request an extension of its audit deadline?

§25.465. Is DHS required to grant a contractor an extension of its audit deadline?

§25.466. How is a new audit due date determined?

§25.467. How is the contractor informed of the decision regarding the extension of its audit due date?

§25.468. Can a contractor request more than one extension?

§25.469. What does DHS do if DHS does not receive an audit by the specified deadline and an extension of the deadline has not been granted?

§25.470. Must a contractor repay any overpayments identified through an audit finding?

§25.471. What happens if a day care home sponsor determines during a monitoring review or by other means that a provider has been seriously deficient in its operation of the CACFP?

§25.472. What happens if a day care home sponsor conducts two or more unannounced monitoring reviews in a 12-month period and cannot confirm that children are enrolled for child care and participating in the program?

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

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DIVISION 19. DENIALS AND TERMINATION

4 TAC §§25.491 - 25.497

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

The repeal of Chapter 25, Subchapter A, Division 19, §§25.491 - 25.497, is proposed under the Texas Agriculture Code (the Code), §12.0025, which authorizes the department to administer federal and state nutrition programs including the Child and Adult Care Food Program; and the Code, §12.016, which authorizes the department to adopt rules as necessary for the administration of its powers and duties under this Code.

The code affected by the proposal is the Code, Chapter 12.

§25.491. What criteria does DHS use to deny applications and to terminate agreements for participation in the CACFP when a contractor fails to meet eligibility requirements?

§25.492. How does DHS notify a contractor of its denial of an application or proposal to terminate an agreement?

§25.493. Does DHS deny an application for participation or terminate an agreement when a contractor subject to the bonding requirement identified in 7 CFR §226.6 and Division 2 of this subchapter (relating to Eligibility of Contractors and Facilities) fails to comply with that requirement?

§25.494. Can a contractor request relief from the bonding requirement?

§25.495. What criteria must a day care home sponsor use to deny or terminate agreements with a day care home?

§25.496. How does a day care home sponsor notify a day care home participating in the CACFP of its proposal to terminate the day care home's participation in the program?

§25.497. Does DHS terminate an agreement with a contractor or deny the application of a contractor that has failed to permanently correct a serious deficiency in the administration of the CACFP?

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

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SUBCHAPTER A. CHILD AND ADULT CARE FOOD PROGRAM (CACFP)

The Texas Department of Agriculture (the department) proposes new Chapter 25, Subchapter A, concerning the Child and Adult Care Food Program (CACFP). Proposed Subchapter A is comprised of Division 1, §§25.1 - 25.4, concerning the overview and purpose of the CACFP; Division 2, §§25.11 - 25.19, concerning the eligibility of contractors and facilities; Division 3, §25.21 and §25.22, concerning the contractor application process; Division 4, §§25.31 - 25.33, concerning agreements; Division 5, §§25.41 - 25.47, concerning contractor standards and responsibilities; Division 6, §§25.51 - 25.53, concerning budgets; Division 7, §25.61 and §25.62, concerning financial management; Division 8, §§25.71 - 25.75, concerning reporting and record retention; Division 9, §25.81 and §25.82, concerning meal requirements; Division 10, §§25.91 - 25.96, concerning day care homes; Division 11, §25.101, concerning start-up and expansion funds; Division 12, §§25.111 - 25.115, concerning advances; Division 13, §§25.121 - 25.127, concerning commodities and cash-in-lieu assistance; Division 14, §§25.131 - 25.143, concerning reimbursement; Division 15, §25.151 and §25.152, regarding overpayments; Division 16, §25.161 and §25.162, regarding program reviews and monitoring; Division 17, §§25.171 - 25.174, regarding audits; Division 18, §§25.181 - 25.184, regarding adverse actions, denials, and terminations; and Division 19, §25.191, regarding appeals. The new subchapter is proposed for several reasons: First, the proposed rules reflect the

transfer of the program from the Texas Health and Human Services Commission to the Texas Department of Agriculture. Second, the new subchapter is proposed to adopt a concise and streamlined rule format; to expand rule language to accurately refer all types of sponsors participating in the program; to omit obsolete information about concluded pilot programs, and to ensure consistency with the current Code of Federal Regulations (CFR). Finally, the new subchapter is proposed to further clarify to contractors the manner in which records must be maintained and be available to TDA staff for review. The department, in a separate submission, is proposing the repeal of Chapter 25, Subchapter A, Divisions 1 - 19, which includes the existing rules for the CACFP.

Division 1, §§25.1 - 25.4, is proposed to provide an overview of the CACFP and the program's purpose. Proposed §25.1 contains a statement of purpose for the CACFP. Proposed §25.2 contains definitions related to program administration. Proposed §25.3 contains a statement of authorization for the CACFP. Proposed §25.4 contains terms of use for CACFP federal assistance.

Division 2, §§25.11 - 25.19, is proposed to address eligibility of contractors and facilities involved in the CACFP. Proposed §25.11 contains eligibility requirements for CACFP participation. Proposed §25.12 contains contractor and facility licensure requirements. Proposed §25.13 contains exceptions to the licensure requirements. Proposed §25.14 contains contractor training requirements. Proposed §25.15 contains requirements for proof of tax-exempt status. Proposed §25.16 contains eligibility requirements for for-profit organizations or sponsored for-profit facilities. Proposed §25.17 contains single audit requirements. Proposed §25.18 contains for-profit audit requirements. Proposed §25.19 contains performance bond requirements for day care home sponsors.

Division 3, §25.21 and §25.22, is proposed to address the contractor application process. Proposed §25.21 addresses the application to participate in CACFP. Proposed §25.22 contains information required of non-profit day care home sponsors.

Division 4, §§25.31 - 25.33, is proposed to address agreements related to the CACFP. Proposed §25.31 contains participant requirements. Proposed §25.32 contains information related to purchased meals. Proposed §25.33 addresses Food and Nutrition Division agreements.

Division 5, §§25.41 - 25.47, is proposed to address contractor standards and responsibilities. Proposed §25.41 contains procurement guidelines. Proposed §25.42 contains title to equipment and use and disposal guidelines. Proposed §25.43 addresses determination of a participant's eligibility for free and reduced-price meals. Proposed §25.44 addresses verification of eligibility of program participants. Proposed §25.45 contains non-discrimination rules. Proposed §25.46 addresses training and technical assistance. Proposed §25.47 contains rules regarding management plan changes.

Division 6, §§25.51 - 25.53, is proposed to address budgets. Proposed §25.51 contains submission of budget for approval requirements. Proposed §25.52 contains provisions related to retroactive approval of budget requirements. Proposed §25.53 contains provisions related to determination of budget limits.

Division 7, §25.61 and §25.62, is proposed to address financial management. Proposed §25.61 discusses the financial management system. Proposed §25.62 addresses record management and retention.

Division 8, §§25.71 - 25.75, is proposed to address reporting and record retention. Proposed §25.71 contains provisions pertaining to record maintenance. Proposed §25.72 pertains to contractor records availability. Proposed §25.73 pertains to contractor availability. Proposed §25.74 pertains to a notification of change in primary business location. Proposed §25.75 pertains to use of forms.

Division 9, §25.81 and §25.82, is proposed to address meal requirements. Proposed §25.81 pertains to program requirements for meals. Proposed §25.82 pertains to meal service guidelines.

Division 10, §§25.91 - 25.96, is proposed to address day care homes. Proposed §25.91 pertains to day care home participation. Proposed §25.92 pertains to determination of eligibility. Proposed §25.93 pertains to change of sponsor. Proposed §25.94 pertains to ineligibility for fraud. Proposed §25.95 pertains to limitations on sponsorship. Proposed §25.96 pertains to additional guidelines for day care home sponsors.

Division 11, §25.101, is proposed to address start-up and expansion funds.

Division 12, §§25.111 - 25.115, is proposed to discuss advances. Proposed §25.111 pertains to advance payments. Proposed §25.112 pertains to issuance of advances. Proposed §25.113 pertains to retroactive advances. Proposed §25.114 pertains to availability of advance funding. Proposed §25.115 pertains to recoupment of advance payments.

Division 13, §§25.121 - 25.127, is proposed to address commodities and cash-in-lieu assistance. Proposed §25.121 pertains to commodity assistance. Proposed §25.122 pertains to commodity assistance versus cash-in-lieu. Proposed §25.123 pertains to commodity distribution. Proposed §25.124 pertains to distribution costs. Proposed §25.125 pertains to administrative expenses. Proposed §25.126 pertains to charging distribution costs to day care homes. Proposed §25.127 pertains to the right to refuse commodities.

Division 14, §§25.131 - 25.143, is proposed to address reimbursement. Proposed §25.131 pertains to authority to reimburse contractors for CACFP costs. Proposed §25.132 pertains to contractor reimbursement to facilities. Proposed §25.133 pertains to reimbursement rates. Proposed §25.134 pertains to reimbursement options. Proposed §25.135 pertains to reimbursement computation. Proposed §25.136 pertains to Title III benefits. Proposed §25.137 pertains to reimbursement for Title III meals. Proposed §25.138 pertains to reimbursement for meals and snacks. Proposed §25.139 pertains to claim filing. Proposed §25.140 pertains to late claims. Proposed §25.141 pertains to second meals. Proposed §25.142 pertains to family style meals. Proposed §25.143 pertains to ineligible children.

Division 15, §25.151 and §25.152, is proposed to address overpayments. Proposed §25.151 pertains to management of overpayments. Proposed §25.152 pertains to use of CACFP funds to recruit day care homes.

Division 16, §25.161 and §25.162, is proposed to address program reviews and monitoring. Proposed §25.161 pertains to monitoring visits to CACFP contractors. Proposed §25.162 pertains to monitoring purchased meals contracts.

Division 17, §25.171 - 25.174, is proposed to address audits. Proposed §25.171 pertains to audits of contractors and sponsored facilities. Proposed §25.172 pertains to audit acceptability. Proposed §25.173 pertains to notification of contractors. Proposed §25.174 pertains to reimbursement for costs.

Division 18, §§25.181 - 25.184, is proposed to address adverse actions, denials, and terminations. Proposed §25.181 pertains to investigations. Proposed §25.182 pertains to adverse actions. Proposed §25.183 pertains to denial of applications and termination of agreements. Proposed §25.184 pertains to criteria for sponsoring organizations.

Division 19, §25.191, is proposed to address appeals. Proposed §25.191 pertains to conduct of appeals.

Angela Olige, Assistant Commissioner for Food and Nutrition, has determined that for the first five-year period the new sections 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.

Ms. Olige has also determined that for each year of the first five years the new sections are in effect, the public benefit anticipated as a result of enforcing the new sections will be having standardized agency rules and procedures for efficient administration of the CACFP. The new sections will not have a fiscal impact on micro-businesses, small businesses or individuals required to comply with the new sections.

Comments on the proposal may be submitted to Angela Olige, Assistant Commissioner for Food and Nutrition, Texas Department of Agriculture, P.O. Box 12847, Austin, Texas 78711. Comments must be received no later than thirty (30) days from the date of publication of the proposal in the *Texas Register.*

DIVISION 1. OVERVIEW AND PURPOSE

4 TAC §§25.1 - 25.4

The new §§25.1 - 25.4 are proposed under the Texas Agriculture Code (the Code), §12.0025, which authorizes the department to administer the CACFP; and the Code, §12.016, which authorizes the department to adopt rules as necessary for the administration of its powers and duties under this code.

The code affected by the proposal is the Texas Agriculture Code, Chapter 12.

§25.1. Purpose of the Child and Adult Care Food Program (CACFP).

The CACFP integrates nutritious meals with organized nonresidential child and adult care services.

§25.2. Definitions.

(a) The following words and terms, when used in this subchapter, have the following meanings unless the context clearly indicates otherwise:

(1) Appropriate Representative--Someone with knowledge of CACFP operations

(2) CACFP--Child and Adult Care Food Program.

(3) CFR--The Code of Federal Regulations.

(4) Contractor--Refers to an "institution" as defined in 7 CFR §226.2.

(5) TDA--The Texas Department of Agriculture.

(6) Publicly funded program--Any program or grant funded by public funds, including federal, state, or local government funds.

(7) Program year--The period beginning October 1 of any year and ending September 30 of the following year.

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

(9) USDA--The United States Department of Agriculture.

(b) Other terms used in this subchapter are defined in 7 CFR §226.2; 7 CFR Parts 3015, 3016, 3017, 3018, 3019, and 3052; and applicable Office of Management and Budget circulars as required by USDA's Food and Nutrition Service.

§25.3. Authorization for the CACFP.

The National School Lunch Act (42 U.S.C. §1766), as amended, authorizes federal assistance to states that administer the CACFP. In the state of Texas, TDA administers the CACFP.

§25.4. Use of CACFP Federal Assistance.

TDA may use the assistance to help start, maintain, and expand nonprofit food services for children and adults enrolled for care in nonresidential facilities or institutions.

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

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DIVISION 2. ELIGIBILITY OF CONTRACTORS AND FACILITIES

4 TAC §§25.11 - 25.19

The new §§25.11 - 25.19 are proposed under the Texas Agriculture Code (the Code), §12.0025, which authorizes the department to administer the CACFP; and the Code, §12.016, which authorizes the department to adopt rules as necessary for the administration of its powers and duties under this code.

The code affected by the proposal is the Texas Agriculture Code, Chapter 12.

§25.11. Eligibility Requirements for CACFP Participation.

(a) Contractors and facilities must meet the requirements stated in §17(a)(2)(B) of the National School Lunch Act (42 U.S.C. §1766), as amended, 7 CFR §§226.2, 226.6, 226.15 - 226.19a, 226.23, and TDA Program Handbooks.

(b) Contracting organizations applying to participate as a sponsor of unaffiliated centers in the CACFP as a new organization or reapplying to participate after a break in service must document an unmet need as outlined in the TDA CACFP Handbooks.

§25.12. Contractor and Facility Licensure/Approval Requirements.

All contractors and facilities must be licensed or approved by federal, state, or local authorities to provide child or adult care.

§25.13. Exceptions to the Licensure Requirements.

(a) Centers and facilities operated by federal and Indian tribal governments are not required to be licensed or approved by state or local authorities. The federal agency or Indian tribal government that

has oversight of the center or facility must license or approve the center or facility.

(b) Emergency shelters and participants in the CACFP At Risk After-School and Outside-School Hour Care Centers Snack program may be exempt from state licensing requirements. That center or facility must provide documentation to demonstrate that the center or facility is exempt from state licensing requirements.

§25.14. Contractor Training Requirements.

Each contractor must participate in training related to the operation of the CACFP as TDA prescribes.

§25.15. Proof of Tax-exempt Status.

To prove tax-exempt status, a contractor must submit:

(1) determination of tax-exempt status from the Internal Revenue Service; or

(2) proof of participation in another federally funded program that requires an Internal Revenue Service determination of tax-exempt status.

§25.16. Eligibility Requirements for For-profit Organizations or Sponsored For-profit Facilities.

A proprietary for-profit organization or a sponsored for-profit facility must meet the eligibility requirements in 7 CFR §226.17 and §226.19a.

§25.17. Single Audit Requirements.

Nonprofit organizations subject to single audit requirements must obtain an organization-wide or program-specific audit in accordance with the single audit requirements in 7 CFR Part 3052 and 7 CFR §226.8.

§25.18. For-Profit Audit Requirements.

For-Profit organizations subject to audit requirements must obtain a program-specific audit in accordance with 7 CFR §226.8 and TDA CACFP Handbooks.

§25.19. Performance Bond Requirements for Day Care Home Sponsors.

(a) A sponsor may be required to obtain a performance bond from a company designated in United States Treasury Circular 570 as certified to issue bonds for federally funded programs as follows.

(1) The sponsor, at the time of application or reapplication, has fewer than three but more than two years of administrative and financial history. The sponsor may request relief from the bonding requirement after 12 months of successful program participation.

(2) The sponsor has fewer than two but more than one year of administrative and financial history. The Sponsor may request relief from the bonding requirement after 24 months of successful program participation.

(3) The Sponsor has less than one year of administrative and financial history. The Sponsor may request relief from the bonding requirement after 36 months of successful program participation.

(4) TDA grants relief from the bonding requirement based on the schedule outlined above and the contractor's successful program operation.

(b) Each year, the organization must adjust the amount of the bond based on changes in the rates of reimbursement and administrative payments.

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

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DIVISION 3. CONTRACTOR APPLICATION PROCESS

4 TAC §25.21, §25.22

The new §25.21 and §25.22 are proposed under the Texas Agriculture Code (the Code), §12.0025, which authorizes the department to administer the CACFP; and the Code, §12.016, which authorizes the department to adopt rules as necessary for the administration of its powers and duties under this code.

The code affected by the proposal is the Texas Agriculture Code, Chapter 12.

§25.21. Application to Participate in the CACFP.

(a) A contractor must submit a completed application for participation in the CACFP to TDA.. Contractors are informed of the specific information needed when they receive an application packet.

(b) A contractor must report changes to the application to TDA as prescribed in the TDA Handbook Forms and Instructions.

(c) TDA approves or denies applications for participation according to 7 CFR §§226.6, 226.15 - 226.19a, and 226.23, §17(a)(2)(B) of the National School Lunch Act (42 U.S.C. §1766), as amended, and this chapter.

(d) The contractor must submit its completed application to TDA within 45 days of the date of the written request for additional information. If the information is not received within 45 days, TDA will deny the application.

(e) A contractor whose application was denied due to subsection (a) of this section may reapply by submitting a new application.

§25.22. Information Required of Nonprofit Sponsors.

Each nonprofit sponsor must include in its application sufficient detail to demonstrate that it will operate according to the following standards:

(1) The majority of the governing body must be composed of members of the community who are not financially interested in the sponsor's activities and who are not related parties. For the purpose of this section:

(A) majority means 50% plus one;

(B) individuals who are not financially interested in the activities of the organization means individuals other than the employees of the organization or sponsored facilities;

(C) a related party is an individual who is related within the second degree of consanguinity or third degree by affinity to any member of the board of directors or employee of the sponsoring organization.

(2) Members of the governing body may not vote on decisions relating to their own compensation or that of a related party.

(3) The governing body must make decisions about compensation of employees and other parties providing services to the organization.

(4) No person receiving compensation for services under CACFP may receive compensation for services from any other sponsoring organization.

(5) A sponsoring organization must accept any qualified facility, consistent with its capacity to provide services to sponsored 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.

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DIVISION 4. AGREEMENTS

4 TAC §§25.31 - 25.33

The new §§25.31 - 25.33 are proposed under the Texas Agriculture Code (the Code), §12.0025, which authorizes the department to administer the CACFP; and the Code, §12.016, which authorizes the department to adopt rules as necessary for the administration of its powers and duties under this code.

The code affected by the proposal is the Texas Agriculture Code, Chapter 12.

§25.31. Participation Requirements.

(a) According to 7 CFR §§226.6, 226.15 - 226.19a, and 226.23, a contractor must enter into an agreement with TDA in order to participate in the CACFP. The agreement is a legally binding document that specifies the rights and responsibilities of both the contractor and TDA.

(b) According to 7 CFR §§226.6, 226.15 - 226.19a, and 226.23, a facility must enter into an agreement with a sponsoring organization in order to participate in the CACFP. The agreement between the facility and the sponsoring organization is a legally binding document that specifies the rights and responsibilities of the facility and the sponsoring organization.

§25.32. Purchased Meals.

(a) According to 7 CFR §§226.6, 226.17, 226.19, 226.19a, 226.21, and 226.22, contractors who purchase meals from a FSMC, SFA, or other vendor must enter into an agreement with that FSMC, SFA, or other vendor on the TDA-approved form.

(b) The agreement shall be for a maximum of 12 consecutive months.

(c) TDA can grant contractors up to four 12-month renewals beyond the ending date of the original agreement, as long as there is no change in scope of service to the original contract.

(d) No agreement renewal can exceed 12 consecutive months.

§25.33. Food and Nutrition Division (FND) Agreement.

No organization may have more than one agreement with TDA to participate in any child nutrition program, unless the contractor provides justification for the need to have multiple agreements and that justification is approved by TDA.

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

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DIVISION 5. CONTRACTOR STANDARDS AND RESPONSIBILITIES

4 TAC §§25.41 - 25.47

The new §§25.41 - 25.47 are proposed under the Texas Agriculture Code (the Code), §12.0025, which authorizes the department to administer the CACFP; and the Code, §12.016, which authorizes the department to adopt rules as necessary for the administration of its powers and duties under this code.

The code affected by the proposal is the Texas Agriculture Code, Chapter 12.

§25.41. Procurement Guidelines.

A contractor must procure food, supplies and other goods and services in accordance with 7 CFR §§226.2, 226.6, 226.21, and 226.22, and 7 CFR Part 3015.

§25.42. Title to Equipment; Use and Disposal.

A contractor must obtain the title to, use, and dispose of equipment according to 7 CFR §226.24 and 7 CFR Part 3015.

§25.43. Determination of a Participant's Eligibility for Free and Reduced-price Meals.

A child care or adult day care center contractor or day care home sponsor must determine a participant's eligibility according to 7 CFR §§226.2, 226.6, 226.13, 226.15, 226.17- 226.19a, and 226.23.

§25.44. Verification of Eligibility of Program Participants.

TDA and child care or adult day care center contractors or day care home sponsors must verify eligibility of program participants for free and reduced-price meals according to 7 CFR §§226.2, 226.6, 226.13, 226.15, and 226.23.

§25.45. Non-discrimination.

(a) TDA administers the CACFP without regard to race, color, national origin, sex, age or disability. TDA fully complies with the nondiscrimination requirements of 7 CFR §§226.6, 226.22, and 226.23, and 7 CFR Parts 15 and 15(a).

(b) A contractor must strictly adhere to and enforce the nondiscrimination requirements of 7 CFR §225.6, the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973, and the Americans with Disabilities Act. Contractors must prevent discrimination against participants in its CACFP operations.

§25.46. Training and Technical Assistance.

A contractor must provide training and technical assistance as or which TDA deems reasonable and necessary to its center or sponsored facility staff according to 7 CFR §§226.6, 226.16 and 226.18 - 226.19a.

§25.47. Management Plan Changes.

TDA must approve all changes to a contractor's approved management plan before the contractor can implement the 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.

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DIVISION 6. BUDGETS

4 TAC §§25.51 - 25.53

The new §§25.51 - 25.53 are proposed under the Texas Agriculture Code (the Code), §12.0025, which authorizes the department to administer the CACFP; and the Code, §12.016, which authorizes the department to adopt rules as necessary for the administration of its powers and duties under this code.

The code affected by the proposal is the Texas Agriculture Code, Chapter 12.

§25.51. Submission of Budget for Approval.

A contractor must submit its administrative budget for TDA approval according to 7 CFR §§226.6, 226.7 and 226.15.

§25.52. Retroactive Approval of Budget Amendments.

TDA will not approve budget adjustments/amendments retroactively. If TDA received a request for a budget adjustment/amendment by the 25th day of the month, it may be effective for that month.

§25.53. Determination of Budget Limits.

(a) TDA will consider the size of the program, staff duties, and economic conditions of the locale.

(b) TDA may establish upper limits for salaries, overhead, and other administrative costs. All administrative costs must be necessary, reasonable, allowable, and appropriately documented.

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

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Dolores Alvarado Hibbs
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DIVISION 7. FINANCIAL MANAGEMENT

4 TAC §25.61, §25.62

The new §25.61 and §25.62 are proposed under the Texas Agriculture Code (the Code), §12.0025, which authorizes the department to administer the CACFP; and the Code, §12.016, which authorizes the department to adopt rules as necessary for the administration of its powers and duties under this code.

The code affected by the proposal is the Texas Agriculture Code, Chapter 12.

§25.61. Financial Management System.

A contractor must implement the financial management system TDA mandates, according to 7 CFR §§226.6, 226.7, 226.10, 226.11, 226.13, and 226.16, and 7 CFR Parts 3016 and 3019.

§25.62. Record Management and Retention.

A contractor must maintain records supporting the financial management system according to Division 8 of this subchapter (relating to Reporting and Record Retention).

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

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DIVISION 8. REPORTING AND RECORD RETENTION

4 TAC §§25.71 - 25.75

The new §§25.71 - 25.75 are proposed under the Texas Agriculture Code (the Code), §12.0025, which authorizes the department to administer the CACFP; and the Code, §12.016, which authorizes the department to adopt rules as necessary for the administration of its powers and duties under this code.

The code affected by the proposal is the Texas Agriculture Code, Chapter 12.

§25.71. Record Maintenance.

(a) Contractors and facilities must keep records in accordance with 7 CFR Part 226 and Program Handbooks.

(b) Contractors and facilities must maintain CACFP-related documents for a minimum of three years and after the end of the program year and until all litigation, claims, audits, or investigation findings are resolved.

§25.72. Contractor Records Availability.

(a) Contractors must make program records available to TDA at their primary business location during normal business hours, which at a minimum are 8:00 a.m. to 5:00 p.m. Monday through Friday.

(b) Contractors and their facilities must allow access to TDA to the facilities and records according to 7 CFR §§226.6, 226.16 and 226.18. TDA may inspect, copy, photograph or otherwise document the condition of facilities and condition or absence of records in any commercially reasonable manner.

§25.73. Contractor Availability.

(a) A contractor is considered available to TDA and the contractor's facilities, if applicable, if one of the following conditions exists:

(1) the contractor's representative can be contacted in person at the primary business location during normal business hours;

(2) the contractor's representative can be contacted by telephone during normal business hours; or

(3) the contractor has established a procedure that allows TDA staff and the contractor's facilities to leave a voice message and the contractor returns the call no later than 24 hours from the time the voice message was left.

(b) An appropriate representative of the contractor must be available to meet with TDA staff at the contractor's primary business location with no more than 4 hours notice during normal business hours, which are at a minimum 8:00 a.m. to 5:00 p.m. Monday through Friday.

§25.74. Notification of Change in Primary Business Location.

A contractor must notify TDA in writing in advance of a change to its primary business location.

§25.75. Use of Forms.

A contractor must use TDA forms to operate and administer the CACFP unless TDA grants approval otherwise.

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

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DIVISION 9. MEAL REQUIREMENTS

4 TAC §25.81, §25.82

The new §25.81 and §25.82 are proposed under the Texas Agriculture Code (the Code), §12.0025, which authorizes the department to administer the CACFP; and the Code, §12.016, which authorizes the department to adopt rules as necessary for the administration of its powers and duties under this code.

The code affected by the proposal is the Texas Agriculture Code, Chapter 12.

§25.81. Meals - Program Requirements.

A contractor must ensure that all meals claimed, including meals purchased from a food service management company or other vendor, meet the requirements of 7 CFR §§226.2, 226.6, 226.13, and 226.15 - 226.20 and 7 CFR Appendix A to Part 226.

§25.82. Meal Service Guidelines.

A contractor must comply with meal service requirements as outlined in TDA CACFP Handbooks.

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

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DIVISION 10. DAY CARE HOMES

4 TAC §§25.91 - 25.96

The new §§25.91 - 25.96 are proposed under the Texas Agriculture Code (the Code), §12.0025, which authorizes the department to administer the CACFP; and the Code, §12.016, which authorizes the department to adopt rules as necessary for the administration of its powers and duties under this code.

The code affected by the proposal is the Texas Agriculture Code, Chapter 12.

§25.91. Day Care Home Participation.

(a) In order for a Day Care Home provider to be approved to participate in the CACFP, a day care home sponsor must submit a correct and complete application packet as prescribed by TDA.

(b) A day care home sponsor must submit the required application packet to TDA by the 25th of the month in which the sponsor wants the day care home's participation to begin.

§25.92. Determination of Eligibility.

TDA will not approve a day care home to participate in the CACFP before the latest date of the following:

(1) the date of the provider's registration or license;

(2) the date the sponsor conducts the day care home's preapproval visit;

(3) the effective date of the Permanent Agreement Between Sponsoring Organization and Day Care Home Provider(s);

(4) the latest date that the Permanent Agreement Between Sponsoring Organization and Day Care Home Provider(s) is signed by the day care home or the sponsor;

(5) the date of participation assigned by TDA;

(6) the first day of the month in which TDA receives a complete and correct Permanent Agreement Between Sponsoring Organization and Day Care Home Provider(s) and Application Between Sponsoring Organization and Day Care Home; or

(7) the date a day care home enrolls a non-residential child for child care.

§25.93. Change of Sponsor.

(a) A day care home that is participating in the CACFP under one sponsor can sign an agreement once each program year to participate with a different sponsor as prescribed by TDA CACFP Handbooks.

(b) A day care home can enter into an agreement with a different sponsor more than once during the program year only if:

(1) the day care home sends a letter to TDA requesting the transfer and explaining why there is good cause to transfer to a different sponsor; and

(2) TDA determines that good cause exists and approves the transfer.

(c) Good cause for transferring from the sponsorship of one contractor to another during the program year is limited to either of the following conditions:

(1) A sponsor denies a provider access to the program.

(2) A sponsor reduces the level of benefit a provider receives under the program.

(d) A day care home may not participate under more than one sponsor in any one month.

(e) A day care home provider that participates in the CACFP may not actively take part in any sponsor's day-to-day operations, either full- or part-time.

(f) A day care home provider can be a board member of a sponsoring organization if it is not engaged in day-to-day operations of the sponsoring organization.

§25.94. Ineligibility Due to Fraud.

If a day care home provider has been found guilty of fraud, even if adjudication is deferred, the day care home's sponsoring organization must terminate the day care home's participation according to Division 18 of this subchapter (relating to Adverse Actions, Denials and Terminations).

§25.95. Limitations on Sponsorship.

(a) TDA may limit the number of day care homes that a contractor can sponsor.

(b) A contractor may submit a written request to sponsor additional day care homes. TDA will approve sponsorship of additional day care homes only if the contractor provides evidence of administrative and financial capability.

(c) TDA will notify the contractor in writing of all adjustments to the number of day care homes that may be sponsored.

§25.96. Additional Guidelines for Day Care Home Sponsors.

A contractor that sponsors day care homes must not allow any officer, agent, consultant, contractor, or any other employee to:

(1) solicit donations or fees from providers;

(2) require providers to engage in any kind of business on the sponsoring organization's behalf; or

(3) accept gratuities, favors, or anything of monetary value from providers.

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

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Dolores Alvarado Hibbs
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DIVISION 11. START-UP AND EXPANSION FUNDS

4 TAC §25.101

The new §25.101 is proposed under the Texas Agriculture Code (the Code), §12.0025, which authorizes the department to administer the CACFP; and the Code, §12.016, which authorizes the department to adopt rules as necessary for the administration of its powers and duties under this code.

The code affected by the proposal is the Texas Agriculture Code, Chapter 12.

§25.101. Start-up and Expansion Funds.

TDA does not provide start-up and expansion funds as defined in 7 CFR §226.2.

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.

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DIVISION 12. ADVANCES

4 TAC §§25.111 - 25.115

The new §§25.111 - 25.115 are proposed under the Texas Agriculture Code (the Code), §12.0025, which authorizes the department to administer the CACFP; and the Code, §12.016, which authorizes the department to adopt rules as necessary for the administration of its powers and duties under this code.

The code affected by the proposal is the Texas Agriculture Code, Chapter 12.

§25.111. Advance Payments.

TDA issues and monitors advance payments to eligible contractors according to 7 CFR §§226.2, 226.6, 226.7, 226.10 and 226.16.

§25.112. Issuance of Advances.

(a) TDA issues monthly advance payments to currently participating contractors based on the contractor's most recent claim received and processed.

(b) TDA issues advance payments to new contractors based on:

(1) the amount of reimbursement the contractor is projected to earn during the month for which the advance is to be issued;

(2) an estimate of one or both of the following:

(A) the number of day care homes participating; and/or

(B) the number of participants enrolled and served appropriate meals.

§25.113. Retroactive Advances.

TDA will not issue retroactive advances.

§25.114. Availability of Advance Funding.

If USDA does not provide sufficient funds for TDA to pay both advance payments and claims for reimbursement in full, TDA will pay claims for reimbursement only.

§25.115. Recoupment of Advance Payments.

(a) TDA will recoup advance payments from the reimbursement claim for the month for which the advance is issued.

(b) TDA will deduct the excess amount from subsequent advances issued or claims paid.

(c) TDA may demand payment in full.

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

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DIVISION 13. COMMODITIES AND CASH-IN-LIEU ASSISTANCE

4 TAC §§25.121 - 25.127

The new §§25.121 - 25.127 are proposed under the Texas Agriculture Code (the Code), §12.0025, which authorizes the department to administer the CACFP; and the Code, §12.016, which authorizes the department to adopt rules as necessary for the administration of its powers and duties under this code.

The code affected by the proposal is the Texas Agriculture Code, Chapter 12.

§25.121. Commodity Assistance.

TDA provides USDA-donated foods or cash-in-lieu of commodities according to 7 CFR §§226.5, 226.6, 226.15 and 226.20.

§25.122. Commodity Assistance Versus Cash-in-lieu.

TDA conducts an annual survey to determine each contractor's preference according to 7 CFR §226.6. If the majority chooses cash-in-lieu of commodities, then TDA issues cash-in-lieu of commodities to all eligible contractors.

§25.123. Commodity Distribution.

A day care home sponsor must distribute the bonus commodities based on the number of children the day care home keeps.

§25.124. Distribution Costs.

A day care home sponsor that chooses to distribute bonus commodities can pass on to the day care homes any costs it may incur for distributing bonus commodities.

§25.125. Administrative Expenses.

A sponsoring organization may include administrative costs associated with distribution of commodities in CACFP costs.

§25.126. Charging Distribution Costs to Day Care Homes.

Day care home sponsoring organizations must:

(1) submit a detailed bonus cost allocation plan to TDA that TDA must approve; and

(2) obtain the day care home's written consent.

§25.127. Right to Refuse Commodities.

Facilities and centers may choose to refuse commodities offered by sponsoring organizations.

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

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DIVISION 14. REIMBURSEMENT

4 TAC §§25.131 - 25.143

The new §§25.131 - 25.143 are proposed under the Texas Agriculture Code (the Code), §12.0025, which authorizes the department to administer the CACFP; and the Code, §12.016, which authorizes the department to adopt rules as necessary for the administration of its powers and duties under this code.

The code affected by the proposal is the Texas Agriculture Code, Chapter 12.

§25.131. Authority to Reimburse Contractors for CACFP Costs.

TDA reimburses a contractor according to 7 CFR §§226.2, 226.4, 226.6, 226.7, 226.9 - 226.19a and 226.23, 7 CFR Part 3015 and §17(a)(2)(B) of the National School Lunch Act (42 U.S.C. §1766), as amended.

§25.132. Contractor Reimbursement to Facilities.

Contractors must reimburse facilities according to 7 CFR §§226.2, 226.4, 226.6, 226.7, 226.9 - 226.19a, and 226.23; 7 CFR Part 3015, and §17(a)(2)(B) of the National School Lunch Act (42 U.S.C. §1766), as amended.

§25.133. Reimbursement Rates.

TDA assigns reimbursement rates for contractors according to the option in 7 CFR §226.9(b)(3).

§25.134. Reimbursement Options.

TDA reimburses contractors according to the options in 7 CFR §226.9(c)(1). TDA does not use the option described in 7 CFR §226.9(d).

§25.135. Reimbursement Computation.

TDA computes reimbursement according to 7 CFR §226.13 and the option in 7 CFR §226.11(c)(3).

§25.136. Title III Benefits.

Title III benefits include all benefits provided under Part C of the Older Americans Act (OAA), including commodities (or cash-in-lieu of commodities) authorized by the OAA and provided by the U.S. Department of Health and Human Services.

§25.137. Reimbursement for Title III Meals.

(a) Adult day care centers and contractors must ensure that the meals for which they claim reimbursement are not supported by Title III of the Older Americans Act.

(b) If a contractor uses a FSMC, the contractor must ensure that neither Title III funds nor commodities are used in the meals prepared for use in the CACFP.

§25.138. Reimbursement for Meals and Snacks.

TDA will only reimburse contractors for meal types and meal service days as approved in the contractor's application.

§25.139. Claim Filing.

(a) A contractor must ensure that claims for reimbursement are filed in accordance with TDA procedures outlined in TDA CACFP Handbooks.

(b) TDA will not pay a claim that is received or postmarked after the deadline unless USDA finds that good cause beyond the contractor's control delayed the submission of the claim.

§25.140. Late Claims.

(a) TDA will not pay a claim that was filed after the deadline established in TDA CACFP Handbooks unless the contractor is eligible for a one-time exception or can demonstrate good cause.

(b) TDA will process one-time exceptions and requests for good cause exceptions as established in TDA CACFP Handbooks.

(c) A contractor may choose not to use their one-time exception or submit a request for payment of a late claim based on good cause.

§25.141. Second Meals.

A contractor may only serve and claim second meals in accordance with 7 CFR §226.20(j).

§25.142. Family Style Meals.

Contractors who serve family style meals may not claim reimbursement for second meals.

§25.143. Ineligible Children.

A day care home may not claim reimbursement for meals served to the child of another day care home provider if both participate in the CACFP unless the provider's own child can be considered a nonresidential child by another day care home provider for the purpose of claiming reimbursement. This can occur only if the following conditions are met:

(1) the child is enrolled for child care at the substitute facility; and

(2) the provider for whom substitute care is being provided does not claim reimbursement for any meals served during the period of substitute 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.

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DIVISION 15. OVERPAYMENTS

4 TAC §25.151, §25.152

The new §25.151 and §25.152 are proposed under the Texas Agriculture Code (the Code), §12.0025, which authorizes the department to administer the CACFP; and the Code, §12.016, which authorizes the department to adopt rules as necessary for the administration of its powers and duties under this code.

The code affected by the proposal is the Texas Agriculture Code, Chapter 12.

§25.151. Management of Overpayments.

TDA manages overpayment according to 7 CFR §§226.6 - 226.8, 226.10 and 226.12 - 226.14.

§25.152. Use of CACFP Funds to Recruit Day Care Homes.

A day care home sponsor must not use CACFP funds to recruit day care homes that are already participating in the CACFP under an approved sponsor.

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

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DIVISION 16. REVIEWS AND MONITORING

4 TAC §25.161, §25.162

The new §25.161 and §25.162 are proposed under the Texas Agriculture Code (the Code), §12.0025, which authorizes the department to administer the CACFP; and the Code, §12.016, which authorizes the department to adopt rules as necessary for the administration of its powers and duties under this code.

The code affected by the proposal is the Texas Agriculture Code, Chapter 12.

§25.161. Monitoring Visits to CACFP Contractors.

(a) TDA conducts program reviews and monitoring according to 7 CFR §226.6(m)(6) and TDA CACFP Handbooks.

(b) Sponsors must monitor their facilities according to 7 CFR §226.16 and TDA CACFP Handbooks.

§25.162. Monitoring Purchased Meals Contracts.

Each contractor and/or facility that contracts for purchased meals must monitor the vendor according to 7 CFR §226.6(i), TDA CACFP Handbooks, and standard contract provisions as approved by TDA.

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

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DIVISION 17. AUDITS

4 TAC §§25.171 - 25.174

The new §§25.171 - 25.174 are proposed under the Texas Agriculture Code (the Code), §12.0025, which authorizes the department to administer the CACFP; and the Code, §12.016, which authorizes the department to adopt rules as necessary for the administration of its powers and duties under this code.

The code affected by the proposal is the Texas Agriculture Code, Chapter 12.

§25.171. Audits of Contractors and Sponsored Facilities.

All Contractors and sponsored facilities participating in the CACFP are subject to audit.

(1) Contractors and sponsored facilities are subject to audit requirements according to 7 CFR §226.7 and §226.8, 7 CFR Parts 3015 and 3052 and TDA Program Handbooks.

(2) A contractor participating in the CACFP as a private nonprofit organization or a public entity is subject to the single audit requirements according to 7 CFR §226.8, 7 CFR Part 3052 and TDA Program Handbooks. A contractor that is a military installation is not subject to the single-audit requirements.

(3) A contractor participating in the CACFP as a for-profit organization is subject to audit requirements according to 7 CFR §226.8 and TDA Program Handbooks.

§25.172. Audit Acceptability.

The contractor has not fulfilled the audit requirement until TDA determines that the audit is acceptable:

(1) according to the requirements of the Single Audit Act; 7 CFR Part 3052 for non-profit organizations or public entities; or

(2) according to 7 CFR §226.8 and TDA Program Handbooks for for-profit organizations

§25.173. Notification to Contractors.

TDA will notify the contractor in writing that it is subject to audit requirements in accordance with 7 CFR §226.8; 7 CFR Part 3052; and TDA Program Handbooks. The notification includes the date by which the contractor must submit an acceptable audit to TDA and also informs the contractor that failure to submit the audit to TDA by the required due date will result in adverse action, up to and including placement into the Serious Deficiency Process, termination of its agreement, and placement of the organization and each responsible principal on the National Disqualified List.

§25.174. Reimbursement for Costs.

TDA will reimburse contractors for eligible audit expenses according to 7 CFR §226.8(b) and TDA Program Handbooks.

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

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DIVISION 18. ADVERSE ACTIONS, DENIALS AND TERMINATIONS

4 TAC §§25.181 - 25.184

The new §§25.181 - 25.184 are proposed under the Texas Agriculture Code (the Code), §12.0025, which authorizes the department to administer the CACFP; and the Code, §12.016, which authorizes the department to adopt rules as necessary for the administration of its powers and duties under this code.

The code affected by the proposal is the Texas Agriculture Code, Chapter 12.

§25.181. Investigations.

TDA will investigate and resolve program deficiencies, program irregularities, and evidence of violations of criminal law or civil fraud statutes according to 7 CFR §§226.6(n), 226.8, 226.10 and 226.14.

§25.182. Adverse Actions.

TDA will impose adverse actions against any contractor for failure to comply with CACFP requirements in accordance with 7 CFR §226.6, TDA CACFP Handbooks, and Division 18 of this subchapter (relating to Adverse Actions, Denials and Terminations), up to and including:

(1) placement into the Serious Deficiency Process;

(2) termination;

(3) debarment; and

(4) placement on the National Disqualified List.

§25.183. Denial of Applications and Termination of Agreements.

TDA denies applications and terminates agreements, in whole or in part, according to 7 CFR §§226.6, 226.14 - 226.19a, 226.23 and 226.25, 7 CFR Part 3015, §17(a)(2)(B) of the National School Lunch Act (42 U.S.C. §1766), as amended, and TDA CACFP Handbooks.

§25.184. Criteria for Sponsoring Organizations.

A sponsor denies or terminates agreements with a day care home or facility according to 7 CFR §226.6 and §226.16, and TDA CACFP Handbooks.

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

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DIVISION 19. APPEALS

4 TAC §25.191

The new §25.191 is proposed under the Texas Agriculture Code (the Code), §12.0025, which authorizes the department to administer the CACFP; and the Code, §12.016, which authorizes the department to adopt rules as necessary for the administration of its powers and duties under this code.

The code affected by the proposal is the Texas Agriculture Code, Chapter 12.

§25.191. Conduct of Appeals.

TDA conducts appeals according to 7 CFR §226.6 and §226.16; and §17(d) of the National School Lunch Act (42 U.S.C. §1766), as amended; and Chapter 1, Subchapter P, §§1.1000 - 1.1004 of this title (relating to Appeal Procedures for Child and Adult Care Food Program) and §§1.1050 - 1.1053 of this title (relating to Administrative Hearing Procedures).

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

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PART 2. TEXAS ANIMAL HEALTH COMMISSION

CHAPTER 40. CHRONIC WASTING DISEASE

The Texas Animal Health Commission (Commission) proposes to amend Chapter 40, Chronic Wasting Disease (CWD). Specifically, the Commission is proposing the repeal of §40.5, concerning Identification and Recordkeeping Requirements for Elk, and new §40.5, concerning Testing Requirements for Elk.

The proposed amendments to Chapter 40 are for the purpose of ensuring that all elk sold in Texas are properly identified with associated transactional recordkeeping requirements.

The Commission currently provides a voluntary herd monitored status program for species that are susceptible to CWD. Currently, all breeders of white tail deer, through the direction of the Texas Parks and Wildlife Department (TPWD), participate in a CWD Monitoring program through either TPWD or the Commission. The intent of the Commission is to require elk to participate in surveillance for CWD. Historically, there has been a need to increase the CWD surveillance rate in the elk population in Texas. The CWD task force is helping identify a strategy for increasing elk participation in CWD surveillance.

The task force met on October 20, 2008, to assess options for significantly increasing CWD surveillance of elk in Texas. The initial discussion focused on trying to create a regulatory program requiring elk participation. The biggest obstacle identified was based on the fact that the TAHC did not have any specific authority to require participation of elk owners in a CWD surveillance program. Based on the fact that CWD is a test requiring mortality, elk are private property, and since herd locations are not necessarily known there were significant obstacles for creating and properly implementing such a program. Draft legislation was developed through the group which was used as the template for filing. Legislation was filed and identified as House Bill (H.B.) 3330. That legislation was passed and signed into law to be effective on September 1, 2009.

Based on the passage of the legislation the task force met again on June 18, 2009, to discuss the creation of an elk CWD surveillance program. There were draft rules created from discussion points and regulatory positions raised by various members of the group on how the program should be structured. The program was created to require participation in a surveillance program whenever a person transports elk in the state. The group wanted to see a distinction between commercial elk which were being held by someone for management purposes and the free ranging elk. The reason is that the two types of activities are different enough to merit different standards. For those engaging in economic management of the animals there is an involvement that is far greater than someone who traps a free ranging animal for movement and release.

The group felt like it was appropriate to have different testing schedules depending on the type of elk. For free ranging elk to authorize movement of between one (1) to ten (10) elk, there shall be one (1) valid not-detected CWD test result filed prior to movement. The number develops exponentially in the same pattern for up to twenty free ranging elk qualified for movement it would take two (2) valid not-detected CWD test result filed prior to movement. For captive elk to authorize movement of between one (1) to five (5) elk, prior to movement, there shall be one (1) valid not-detected CWD test result filed prior to movement. To authorize movement for every five (5) elk, there shall be one (1) valid not-detected CWD test result. The rule also provides for two exemptions. The first was for Captive elk enrolled with the Commission in a monitored herd program in accordance with the requirements of §40.3 of this chapter. Also, there is an exception for elk that are moved directly from the premises where they were trapped or held to a recognized slaughter facility. A recognized slaughter facility is a slaughter facility operated under the state or federal meat inspection laws and regulations. As provided in the current requirements for recordkeeping and identification those were also incorporated into this proposal, along with violations and reporting requirements.

Section by Section Analysis of the new rule.

Section 40.5(a) Definitions are provided for "Captive elk", "Free ranging elk", "Premises", and the term "Transport".

Section 40.5(b) Surveillance Requirements provides for the distinction between free ranging and captive elk. Both requirements

are triggered when someone transports or moves live elk within the state and requires a test of a specific number of elk depending on the type.

Free ranging elk: In order to authorize movement of between one (1) to ten (10) elk, prior to movement, there shall be one (1) valid not-detected CWD test result filed prior to movement. To authorize movement of between eleven (11) to twenty (20) elk, prior to movement, there shall be two (2) valid not-detected CWD tests results filed prior to movement. To authorize movement of more than thirty (30) elk, prior to movement, there shall be one valid not-detected CWD test result for every ten elk filed prior to movement

Captive elk: To authorize movement of between one (1) to five (5) elk, prior to movement, there shall be one (1) valid not-detected CWD test result filed prior to movement. To authorize movement of more than fifteen (15) elk, prior to movement, there shall be one (1) valid not-detected CWD test result for every five (5) elk, filed prior to movement.

Exemptions: Captive elk enrolled with the Commission in a monitored herd program in accordance with the requirements of §40.3 of this chapter. After the date of January 1, 2011, a herd with Level "A" status or higher as established through §40.3 of this chapter, is exempt from the testing schedule provided for in subsection (b)(2)(A) - (D), but elk movement must be reported in accordance with subsection (d) of this section. Also, elk that are moved directly from the premises where they were trapped or held to a recognized slaughter facility. A recognized slaughter facility is a slaughter facility operated under the state or federal meat inspection laws and regulations.

Section 40.5(c) Testing Requirements: CWD test samples shall be collected and submitted to an official laboratory for CWD diagnosis using a United States Department of Agriculture (USDA) validated test.

Section 40.5(d) Movement Reporting Requirements: A report of all elk that are moved onto or off of premises shall be submitted to the Commission. The movement report shall include the information provided for in this subsection.

Section 40.5(e) Identification Requirements: Elk moved or transported within this state shall be identified with an official identification device.

Section 40.5(f) Record Keeping: The buyer and seller must maintain records for all elk transported within the state or where there is a transfer of ownership, and provide those to Commission personnel upon request. The records shall contain the information identified in this section of the rule.

Section 40.5(g) Inspection: In order to authorize movement, a premise where elk are located may be inspected by the Commission.

Section 40.5(h) Violations: A person commits an offense if the person knowingly violates a rule adopted by the Commission under this section. A violation of this section is a Class C misdemeanor under §161.0541 of the Texas Agriculture Code. Also, under §161.148 of the Texas Agriculture Code the Commission may impose an administrative penalty against a person who violates this section.

FISCAL NOTE

Dr. Matt Cochran D.V.M, Acting Deputy Director for Finance and Administration, Texas Animal Health Commission, has determined for the first five-year period the rules are in effect, there will be no significant additional fiscal implications for state or local government as a result of enforcing or administering the rules. An Economic Impact Statement (EIS) is required if the proposed rule has an adverse economic effect on micro businesses. The agency has evaluated the requirements and determined that there is not an adverse economic impact because the program establishes minimum surveillance standards that are easily obtainable. It applies to anyone who wants to transport elk within the state and is that group of animals creating a higher risk of exposure and transmission of a disease within the state and therefore merits participating in a surveillance program. This program also equitably mirrors a surveillance program for white tail deer as all white tail breeder facilities within the state, through the direction of the Texas Parks and Wildlife Department (TPWD), participate in a CWD Monitoring program through either TPWD or the Commission. Therefore, the Commission has determined that there is not an adverse impact on the animals entering the state and therefore there is no need to do an EIS.

PUBLIC BENEFIT NOTE

Dr. Matt Cochran also has determined that for each year of the first five years the rules are in effect, the public benefit anticipated as a result of enforcing the rules will be that commercial elk will be required to participate in a stronger surveillance system which improves our ability to quickly respond and control disease issues related to elk.

LOCAL EMPLOYMENT IMPACT STATEMENT

In accordance with Government Code, §2001.022, this agency has determined that the proposed rules will not impact local economies.

TAKINGS ASSESSMENT

The agency has determined that the proposed governmental action will not affect private real property. These proposed rules are an activity related to the handling of animals, including requirements concerning testing, movement, inspection, identification, reporting of disease, and treatment, in accordance with 4 TAC §59.7, and are, therefore, compliant with the Private Real Property Preservation Act in Government Code, Chapter 2007. Furthermore, this activity, in part, involves the movement of animals considered to be property of the state and not private property.

REQUEST FOR COMMENT

Comments regarding the proposal may be submitted to Dolores Holubec, Texas Animal Health Commission, 2105 Kramer Lane, Austin, Texas 78758, by fax at (512) 719-0721 or by e-mail at "comments@tahc.state.tx.us."

4 TAC §40.5

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

STATUTORY AUTHORITY

The repeal is proposed under the Texas Agriculture Code, Chapter 161, §161.0541. During the last Texas Legislative Session, H.B. 3300 passed and was enacted into law to become effective on September 1, 2009. The legislation amended Chapter 161 of the Texas Agriculture Code by adding §161.0541, entitled Elk Disease Surveillance Program. The section provides that the Commission by rule may establish a disease surveillance program for elk. Rules adopted under this section must:

(1) require each person who moves elk in this state to have elk tested for chronic wasting disease or other diseases as determined by the Commission; (2) be designed to protect the health of the elk population in this state; and (3) include provisions for testing, identification, transportation, and inspection under the disease surveillance program. The Section also provides that a person commits an offense if the person knowingly violates a rule adopted by the Commission under this section. Also, that an offense under Subsection (c) is a Class C misdemeanor unless it is shown on the trial of the offense that the defendant has previously been convicted of an offense under that subsection, in which event the offense is a Class B misdemeanor.

The Commission is also vested by statute, §161.041(a), with the requirement to protect all livestock, domestic animals, and domestic fowl from disease. The Commission is authorized, by §161.041(b), to act to eradicate or control any disease or agent of transmission for any disease that affects livestock. If the Commission determines that a disease listed in §161.041 of this code or an agent of transmission of one of those diseases exists in a place in this state among livestock, or that livestock are exposed to one of those diseases or an agent of transmission of one of those diseases, the Commission shall establish a quarantine on the affected animals or on the affected place. That is found in §161.061. As a control measure, the Commission by rule may regulate the movement of animals. The Commission may restrict the intrastate movement of animals even though the movement of the animals is unrestricted in interstate or international commerce. The Commission may require testing, vaccination, or another epidemiologically sound procedure before or after animals are moved. That is found in §161.054. That authority is found in §161.048. A person is presumed to control the animal if the person is the owner or lessee of the pen, pasture, or other place in which the animal is located and has control of that place; or exercises care or control over the animal. That is under §161.002.

Section 161.007 provides that if a veterinarian employed by the Commission determines that a communicable disease exists among livestock, domestic animals, or domestic fowl or on certain premises or that livestock, domestic animals, or domestic fowl have been exposed to the agency of transmission of a communicable disease, the exposure or infection is considered to continue until the Commission determines that the exposure or infection has been eradicated through methods prescribed by rule of the Commission. Section 161.005 provides that the Commission may authorize the executive director or another employee to sign written instruments on behalf of the Commission. A written instrument, including a quarantine or written notice, signed under that authority has the same force and effect as if signed by the entire Commission.

No other statute, article or code is affected by the proposal.

§40.5. Identification and Recordkeeping Requirements for Elk.

This 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 September 25, 2009.

TRD-200904290

Gene Snelson
General Counsel
Texas Animal Health Commission
Earliest possible date of adoption: November 8, 2009
For further information, please call: (512) 719-0700

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4 TAC §40.5

STATUTORY AUTHORITY

The new rule is proposed under the Texas Agriculture Code, Chapter 161, §161.0541. During the last Texas Legislative Session, H.B. 3300 passed and was enacted into law to become effective on September 1, 2009. The legislation amended Chapter 161 of the Texas Agriculture Code by adding §161.0541, entitled Elk Disease Surveillance Program. The section provides that the Commission by rule may establish a disease surveillance program for elk. Rules adopted under this section must: (1) require each person who moves elk in this state to have elk tested for chronic wasting disease or other diseases as determined by the Commission; (2) be designed to protect the health of the elk population in this state; and (3) include provisions for testing, identification, transportation, and inspection under the disease surveillance program. The Section also provides that a person commits an offense if the person knowingly violates a rule adopted by the Commission under this section. Also, that an offense under Subsection (c) is a Class C misdemeanor unless it is shown on the trial of the offense that the defendant has previously been convicted of an offense under that subsection, in which event the offense is a Class B misdemeanor.

The Commission is also vested by statute, §161.041(a), with the requirement to protect all livestock, domestic animals, and domestic fowl from disease. The Commission is authorized, by §161.041(b), to act to eradicate or control any disease or agent of transmission for any disease that affects livestock. If the Commission determines that a disease listed in §161.041 of this code or an agent of transmission of one of those diseases exists in a place in this state among livestock, or that livestock are exposed to one of those diseases or an agent of transmission of one of those diseases, the Commission shall establish a quarantine on the affected animals or on the affected place. That is found in §161.061. As a control measure, the Commission by rule may regulate the movement of animals. The Commission may restrict the intrastate movement of animals even though the movement of the animals is unrestricted in interstate or international commerce. The Commission may require testing, vaccination, or another epidemiologically sound procedure before or after animals are moved. That is found in §161.054. That authority is found in §161.048. A person is presumed to control the animal if the person is the owner or lessee of the pen, pasture, or other place in which the animal is located and has control of that place; or exercises care or control over the animal. That is under §161.002.

Section 161.007 provides that if a veterinarian employed by the Commission determines that a communicable disease exists among livestock, domestic animals, or domestic fowl or on certain premises or that livestock, domestic animals, or domestic fowl have been exposed to the agency of transmission of a communicable disease, the exposure or infection is considered to continue until the Commission determines that the exposure or infection has been eradicated through methods prescribed by rule of the Commission. Section 161.005 provides that the Commission may authorize the executive director or another employee to sign written instruments on behalf of the Commis-

sion. A written instrument, including a quarantine or written notice, signed under that authority has the same force and effect as if signed by the entire Commission.

No other statute, article or code is affected by the proposal.

§40.5. Testing Requirements for Elk.

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

(1) Captive elk--Any elk captured or privately or publicly maintained or held within a perimeter fence or confined area that is designed to retain that elk under normal conditions at all times with a height of seven (7') feet or greater.

(2) Free ranging elk--Any elk that is not captured or contained within a fence intended to retain elk under normal conditions at all times with a height of seven (7') feet or greater.

(3) Premises--A physical location, or locations, which are contiguous, that are under common ownership or management that represent a unique and describable geographic location.

(4) Transport--Movement of an animal from one non-contiguous property or premises to another.

(b) Surveillance Requirements:

(1) Free ranging elk: In order to transport or move free ranging elk live within the state the person controlling the elk shall have tested an elk, that is sixteen (16) months of age or older and from the same population as the elk being moved, in accordance with the schedule in subparagraphs (A) - (D) of this paragraph. Tests are valid for one (1) year from date of issuance of the test results. Any CWD test results indicating 'detected' means the positive elk shall be restricted by quarantine and handled in accordance with §40.2 of this chapter (relating to General Requirements), nor may any elk associated with this elk be moved or transported. All elk being transported or moved from a premise shall be individually identified in accordance with subsection (e) of this section.

(A) To authorize movement of between one (1) to ten (10) elk, prior to movement, there shall be one (1) valid not-detected CWD test result filed prior to movement.

(B) To authorize movement of between eleven (11) to twenty (20) elk, prior to movement, there shall be two (2) valid not-detected CWD tests results filed prior to movement.

(C) To authorize movement of between twenty-one (21) to thirty (30) elk, prior to movement, there shall be three (3) valid not-detected CWD test results filed prior to movement.

(D) To authorize movement of more than thirty (30) elk, prior to movement, there shall be one valid not-detected CWD test result for every ten elk filed prior to movement.

(2) Captive elk: In order to transport or move captive elk live within the state the person controlling the elk shall have tested an elk that is sixteen (16) months of age or older, within his control, in accordance with the schedule in subparagraphs (A) - (D) of this paragraph. Test results are valid for one (1) year from date of issuance of the test result. Any CWD test results of "detected" means all elk associated, and including, the positive elk shall be restricted by quarantine and handled in accordance with §40.2 of this chapter. All elk being transported or moved from a premise shall be individually identified in accordance with subsection (e) of this section.

(A) To authorize movement of between one (1) to five (5) elk, prior to movement, there shall be one (1) valid not-detected CWD test result filed prior to movement.

(B) To authorize movement of between six (6) to ten (10) elk, prior to movement, there shall be two (2) valid not-detected CWD test results, filed prior to movement.

(C) To authorize movement of between eleven (11) to fifteen (15) elk, prior to movement, there shall be three (3) valid not-detected CWD test result, filed prior to movement.

(D) To authorize movement of more than fifteen (15) elk, prior to movement, there shall be one (1) valid not-detected CWD test result for every five (5) elk, filed prior to movement.

(E) Exemptions:

(i) Captive elk enrolled with the Commission in a monitored herd program in accordance with the requirements of §40.3 of this chapter (relating to Herd Status Plans for Cervidae). After the date of January 1, 2011, a herd with Level "A" status or higher as established through §40.3 of this chapter, is exempted from the testing schedule provided for in subparagraphs (A) - (D) of this paragraph, but elk movement must be reported in accordance with subsection (d) of this section; or

(ii) Elk that are moved directly from the premises where they were trapped or held to a recognized slaughter facility. A recognized slaughter facility is a slaughter facility operated under the state or federal meat inspection laws and regulations.

(c) Testing Requirements: CWD test samples shall be collected and submitted to an official laboratory for CWD diagnosis using a United States Department of Agriculture (USDA) validated test. Test reporting shall be directed to the Commission by either writing to Texas Animal Health Commission, c/o Elk Movement Reporting, P.O. Box 12966, Austin, Texas 78711-2966; or by fax to (512) 719-0777 or by e-mail at comments@tahc.state.tx.us.

(d) Movement Reporting Requirements: A report of all elk that are moved onto or off of premises shall be submitted to the Commission, either in hard copy on forms provided or authorized by the Commission, or an electronic copy. The person moving the elk must have documentation with the elk being moved to show compliance with the requirements of this subsection. Such report shall be submitted within forty-eight (48) hours of the movement. Movement reporting shall be directed to the Commission by either writing to Texas Animal Health Commission, c/o Elk Movement Reporting, P.O. Box 12966, Austin, Texas 78711-2966; or by fax to (512) 719-0777 or by e-mail at comments@tahc.state.tx.us. The movement report shall include the following information:

(1) Premises of origin;

(2) Premises of the destination;

(3) Number of elk being moved;

(4) Official individual identification device number;

(5) Other official or unofficial identification numbers;

(6) Age/Gender; and

(7) Test Results from the Testing Laboratory.

(e) Identification Requirements: Elk moved or transported within this state shall be identified with an official identification device, which may include an ear tag that conforms to the USDA alphanumeric national uniform ear tagging system, which is a visible and legible animal identification number (AIN) such as a Radio

Frequency Identification Device (RFID) ear tag, or other identification methods approved by the Commission.

(f) Record Keeping: The buyer and seller must maintain records for all elk transported within the state or where there is a transfer of ownership, and provide those to Commission personnel upon request. Records required to be kept under the provisions of this section shall be maintained for not less than five (5) years. The records shall include the following information:

(1) Owner's name;

(2) Location where the animal was sold or purchased;

(3) Official ID and/or Ranch tag (additional field for retag);

(4) Gender/age of animal;

(5) Source of animal (if purchased addition);

(6) Movement to other premises; and

(7) Disposition.

(g) Inspection: In order to authorize movement, a premise where elk are located may be inspected by the Commission.

(h) Violations: A person commits an offense if the person knowingly violates a rule adopted by the Commission under this section.

(1) A violation of this Section is a Class C misdemeanor, under §161.0541 of the Texas Agriculture Code. If the violation is shown on the trial of the offense that the defendant has previously been convicted of an offense under that subsection, in which event the offense is a Class B misdemeanor.

(2) Under §161.148 of the Texas Agriculture Code the Commission may impose an administrative penalty against a person who violates this section. The penalty for a violation may be in an amount not to exceed $1,000. Each day a violation continues or occurs is a separate violation for purposes of imposing a penalty. The amount of the penalty shall not be based on a per head basis.

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

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Gene Snelson
General Counsel
Texas Animal Health Commission
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CHAPTER 51. ENTRY REQUIREMENTS

4 TAC §51.9

The Texas Animal Health Commission (Commission) proposes amendments to Chapter 51, Entry Requirements, §51.9, concerning Exotic Livestock and Fowl. The purpose of the amendments to Chapter 51 is to amend the test requirements for llamas and alpacas entering the state.

The Commission has both Bovine Tuberculosis and Brucellosis requirements for llamas and alpacas, which are both classified as camelids, entering the state. A request has been made by Karen Conyngham, with the South Central Llama Association, to remove the requirements requiring a Brucellosis and Tuberculosis test. The basis for the request, for these animals entering the state, is based on lack of prevalence of either disease in this species. In support of that position two technical papers were provided to the Commission supporting the lack of prevalence for either disease in either species.

The first study was entitled *"Prevalence of Selected Diseases of Llamas and Alpacas"* by Murray E. Fowler, DVM, done through the University of California at Davis, and published in 1999. The study took a survey of existing testing for a variety of diseases potentially affecting llamas and alpacas to determine a prevalence rate. The paper made assessments regarding the susceptibility to Bovine Tuberculosis and Bovine Brucellosis. For Tuberculosis, camelids are known to experimentally or clinically become infected, but evidently not easily susceptible. *(See: "Prevalence of Selected Diseases of Llamas and Alpacas"* by Murray E. Fowler, DVM, Page 2 and 3.) The paper gives several studies or situations that would support the lack of susceptibility of these animals to Bovine Tuberculosis. They relate a five year study done by the State of New York where 1322 tuberculin tests were performed on camelids without having one reactor. *(See: "Prevalence of Selected Diseases of Llamas and Alpacas"* by Murray E. Fowler, DVM, Page 3.) Regarding Bovine Brucellosis, their findings from this same report denotes that this disease does not occur as a clinical disease in South American Camelids. *(See: "Prevalence of Selected Diseases of Llamas and Alpacas"* by Murray E. Fowler, DVM, Page 3.) Evidently, it has been produced experimentally at the United States Department of Agriculture lab in Ames, Iowa, but because most diagnoses are based on serological response they state there is reason to question the diagnoses. *(See: "Prevalence of Selected Diseases of Llamas and Alpacas"* by Murray E. Fowler, DVM, Page 3.)

The second study presented for our consideration is entitled *"Experimental Exposure of Llama to Brucella abortus"* and was authored by Michael J. Gilsdorf, Charles O. Thoen, Robert M.S. Temple, Thomas Gidlewski, Darla Ewalt, Barbara Martin, and Steven B. Heeneger. The article was accepted for publication on February 26, 2001, and was published by Veterinary Microbiology at Elsevier.

This study stated that "(b)rucelllosis has not been reported in camelids in the United States; however brucellosis (Brucella melitensis) has been diagnosed in other countries (Johnson, 1989 and Fowler, 1989). *(See: "Experimental Exposure of Llama to Brucella abortus"* by Michael J. Gilsdorf, Charles O. Thoen, Robert M.S. Temple, Thomas Gidlewski, Darla Ewalt, Barbara Martin, and Steven B. Heeneger", Page 86.) The study was conducted to determine if antibodies produced by llamas could be detected using conventional brucella serologic tests. By exposing llamas to virulent Brucella abortus they were able to show they were susceptible to transmission, but they could not evaluate whether they were more or less susceptible than other species.

Based on the documentation provided as well as the fact that Brucellosis has not shown to be a high risk threat for camelids, the Commission agrees to remove those test requirements. However, based on the fact that the studies do indicate that these animals are at least susceptible to these diseases the Commission amends the requirements by removing the test requirement, but adds language allowing the Executive Director

to require a brucellosis and tuberculosis test of any camelidae, from out of state, when there is epidemiological risk of exposure or infection to either disease. This will allow the Commission to quickly and efficiently handle any camelids associated with a risk for tuberculosis or Brucellosis.

The Commission amends §51.9(a)(3) by deleting the test requirements and replacing it with the following language: "(t)he executive director of the commission may require a brucellosis and tuberculosis test of any camelidae, from out of state, when there is epidemiological risk of exposure or infection to either disease. Entry may be denied based on the results of these tests or inspections."

FISCAL NOTE

Dr. Matt Cochran D.V.M, Acting Deputy Director for Finance and Administration, Texas Animal Health Commission, has determined for the first five-year period the rule is in effect, there will be no significant additional fiscal implications for state or local government as a result of enforcing or administering the rule. An Economic Impact Statement (EIS) is required if the proposed rule has an adverse economic effect on micro businesses. The agency has evaluated the requirements and determined that there is not an adverse economic impact because in removing the test requirements for entry we are serving to protect animals in the state from being exposed infected with Tuberculosis or Brucellosis from sources outside the state by being able to follow up and test the animals. Therefore, the Commission has determined that there is not an adverse impact on the animals entering the state and therefore there is no need to do an EIS.

PUBLIC BENEFIT NOTE

Dr. Matt Cochran also has determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be to practical entry requirements for camelids with an ability to address any risk of out of state camelids being exposed to Tuberculosis or brucellosis.

LOCAL EMPLOYMENT IMPACT STATEMENT

In accordance with Government Code, §2001.022, this agency has determined that the proposed rule will not impact local economies and, therefore, did not file a request for a local employment impact statement with the Texas Workforce Commission.

TAKINGS ASSESSMENT

The agency has determined that the proposed governmental action will not affect private real property. This proposed rule is an activity related to the handling of animals, including requirements concerning testing, movement, inspection, identification, reporting of disease, and treatment, in accordance with 4 TAC §59.7, and are, therefore, compliant with the Private Real Property Preservation Act in Government Code, Chapter 2007.

REQUEST FOR COMMENT

Comments regarding the proposal may be submitted to Delores Holubec, Texas Animal Health Commission, 2105 Kramer Lane, Austin, Texas 78758, by fax at (512) 719-0721 or by e-mail at "comments@tahc.state.tx.us."

STATUTORY AUTHORITY

The amendment is proposed under the following statutory authority as found in Chapter 161 of the Texas Agriculture Code. The Commission is vested by statute, §161.041(a), with the requirement to protect all livestock, domestic animals, and domestic fowl from disease. The Commission is authorized, by §161.041(b), to act to eradicate or control any disease or agent of transmission for any disease that affects livestock. If the Commission determines that a disease listed in §161.041 of this code or an agent of transmission of one of those diseases exists in a place in this state among livestock, or that livestock are exposed to one of those diseases or an agent of transmission of one of those diseases, the Commission shall establish a quarantine on the affected animals or on the affected place. That authority is found in §161.061.

As a control measure, the Commission, by rule may regulate the movement of animals. The commission may restrict the intrastate movement of animals even though the movement of the animals is unrestricted in interstate or international commerce. The Commission may require testing, vaccination, or another epidemiologically sound procedure before or after animals are moved. That authority is found in §161.054. An agent of the Commission is entitled to stop and inspect a shipment of animals or animal products being transported in this state in order to determine if the shipment originated from a quarantined area or herd; or determine if the shipment presents a danger to the public health or livestock industry through insect infestation or through a communicable or noncommunicable disease. That authority is found in §161.048.

Section 161.005 provides that the Commission may authorize the executive director or another employee to sign written instruments on behalf of the commission. A written instrument, including a quarantine or written notice signed under that authority, has the same force and effect as if signed by the entire Commission.

§51.9. Exotic Livestock and Fowl.

(a) Exotic Livestock. The following named species entering the State of Texas shall meet the specific requirements in paragraphs (1) - (4) of this subsection:

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

(3) Camelidae--The executive director of the commission may require a brucellosis and tuberculosis test of any camelidae, from out of state, when there is epidemiological risk of exposure or infection to either disease. Entry may be denied based on the results of these tests or inspections. [~~Negative to a brucellosis and axillary skin test for tuberculosis within six months prior to entry on all animals 18 months of age and older. All neutered camelidae are exempt from the Brucellosis test requirements.~~]

(4) (No change.)

(b) (No change.)

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

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Gene Snelson
General Counsel
Texas Animal Health Commission
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For further information, please call: (512) 719-0700

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TITLE 16. ECONOMIC REGULATION

PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

CHAPTER 25. SUBSTANTIVE RULES APPLICABLE TO ELECTRIC SERVICE PROVIDERS

SUBCHAPTER O. UNBUNDLING AND MARKET POWER

DIVISION 2. INDEPENDENT ORGANIZATIONS

16 TAC §25.366

The Public Utility Commission of Texas (commission) proposes new §25.366, relating to Internet Broadcasting of Public Meetings of an Independent Organization. The rule will implement the newly enacted Public Utility Regulatory Act (PURA) §39.1511(c), which requires the commission to ensure that an independent organization certified pursuant to PURA §39.151 will make publicly accessible without charge live internet video of all public meetings subject to PURA §39.1511 for viewing from an Internet website. This rule is a competition rule subject to judicial review as specified in PURA §39.001(e). Project Number 37262 is assigned to this proceeding.

Meena Thomas, Senior Market Economist, Competitive Markets Division has determined that for each year of 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.

Ms. Thomas has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be compliance with PURA §39.1511(c) and that interested persons will be able to view, free of charge, certain public meetings of a commission-certified independent organization from an Internet website. There will be no adverse economic effect on small businesses or micro-businesses as a result of enforcing this rule. Therefore, no regulatory flexibility analysis is required. There are likely to be economic costs to an independent organization that is required to comply with the rule. These costs are associated with the internet broadcasting of meetings and are expected to be recovered through commission-approved fees levied by the independent organization.

Ms. Thomas has also determined that for each year of the first five years the rule is in effect there should be no effect on a local economy, and therefore no local employment impact statement is required under Administrative Procedure Act (APA), Texas Government Code §2001.022.

The commission staff will conduct a public hearing on this rulemaking, if requested pursuant to the Administrative Procedure Act, Texas Government Code §2001.029, at the commission's offices located in the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701 on November 12, 2009, at 10:00 a.m. The request for a public hearing must be received by November 9, 2009 (31 days after publication).

Initial comments on the proposed rule may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326, by November 9, 2009 (31 days after publication), and reply comments may be submitted by November 19, 2009 (41 days after publication). Sixteen copies of comments on the proposed rule are required to be filed pursuant to §22.71(c) of this title. Comments should be organized in a manner consistent with the organization of the proposed rule. The commission invites specific comments regarding the costs associated with, and benefits that will be gained by, implementation of the proposed rule. The commission will consider the costs and benefits in deciding whether to adopt the rule. All comments should refer to Project Number 37262.

The rule is proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 2007 and Supp. 2008) (PURA), which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; PURA §39.151, which grants the commission broad oversight over an independent organization including the authority to approve rates that may be charged by the independent organization to recover its costs; PURA §39.1511, which sets forth the requirements that an independent organization must satisfy to ensure that the public meetings of the governing body of an independent organization are open to the public; and specifically, PURA §39.1511(c), which requires the internet broadcasting of public meetings of an independent organization.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.002, 39.151, and 39.1511.

§25.366. Internet Broadcasting of Public Meetings of an Independent Organization.

(a) Purpose. This section establishes the requirements for the internet broadcasting of public meetings of an independent organization pursuant to Public Utility Regulatory Act (PURA) §39.1511(c).

(b) Applicability. This section applies to any organization that the commission has certified as an independent organization pursuant to PURA §39.151.

(c) Internet Broadcasting. An independent organization shall make publicly accessible without charge live internet video of all public meetings for viewing from a link posted to the organization's internet website. For purposes of this subsection, public meetings are meetings of the governing body of an independent organization, and meetings of any committee or subcommittee of the governing body of the independent organization but do not include meetings of the governing body of a regional reliability entity operating under the authority of the Energy Policy Act of 2005. A governing body or a committee or a subcommittee subject to this section may enter into executive session closed to the public and without live internet video to address sensitive matters such as confidential information related to personnel matters, contracts, or lawsuits, competitively sensitive information, information related to the security of the regional electrical network, or other information that is required to be protected from release to the public.

(d) Cost Recovery by the Independent Organization. The independent organization may recover the costs of complying with this section through fees approved by the commission.

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

Filed with the Office of the Secretary of State on September 25, 2009.

TRD-200904282

Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Earliest possible date of adoption: November 8, 2009
For further information, please call: (512) 936-7223

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PART 3. TEXAS ALCOHOLIC BEVERAGE COMMISSION

CHAPTER 45. MARKETING PRACTICES
SUBCHAPTER E. MISCELLANEOUS
DIVISION 2. CASH LAW

The Texas Alcoholic Beverage Commission (commission) proposes the repeal of §45.131, regulation of beer on credit, captioned consumers and noncommercial organizations, and proposes new §45.131, captioned payment regulations for beer, which will replace the repealed section.

Section 102.31 of the Texas Alcoholic Beverage Code (Code) provides that no person may sell beer except for cash on or before the delivery to the purchaser. The section prohibits any subterfuge by which credit is extended to a purchaser for beer. A distributor who accepts payment by check or draft must deposit the payment within two days (excluding Sundays and legal holidays). A distributor must report a dishonored check or draft to the commission within two days of notice of dishonor. Reports must be made on commission forms and contain all information required by the commission. Conduct prohibited by the section is a violation of the Code. This section also provides the commission authority to adopt rules.

Existing §45.131 is proposed for repeal because it will no longer be necessary after the adoption of proposed new §45.131.

The proposed new section revises the rule to reflect the provisions of §102.31 of the Code and updates the language to a plain language standard. It also equalizes the duties of sellers and retailers for avoiding cash law violations.

Proposed new subsection (a) states the purpose of the proposed new rule section.

Proposed new subsection (b) provides definitions used in the proposed new rule section.

Proposed new subsection (c) contains the requirements for invoices.

Proposed new subsection (d) provides that it is a violation of this section to fail to make cash payment for beer. It also provides that a retailer whose license is cancelled, expires, is suspended or placed in suspense while on the delinquent list may be disqualified from receiving a new license or permit until the delinquency is satisfied. This new section is intended to discourage retailers from abusing credit restrictions by imposing adverse consequences in future licensing decisions based on past abusive practices.

Proposed new subsection (e) provides a requirement that violations and payment be reported by sellers, and makes a failure to report a violation.

Proposed new subsection (f) provides an exception to a retailer who has a good faith dispute regarding whether a violation of the section occurred.

Proposed new subsection (g) provides a penalty for repeat violations of the section for both retailers and sellers.

Charlie Kerr, Chief Financial Officer, has determined that for the first five years that the proposed new section is in effect there will be no fiscal impact on units of state or local government as a result of enforcing and administering the rule as proposed.

Mr. Kerr has determined that for the first five years that the proposed new section is in effect there will be a fiscal impact on small and micro-businesses and individuals who fail to comply with the sections. The commission does not have sufficient data at this time to accurately estimate the fiscal impact on non-compliers. There will be no fiscal impact on small and micro-business and individuals who comply with the sections.

Sherry Cook, Assistant Administrator, has determined that for each of the first five years that the new §45.131 is in effect, the public will benefit from the adoption of the proposed clarifications made, equalization of responsibilities of sellers and retailers, and the conformance of the this section to the intent of the statute to prevent cash law violations between the distributor and retailer tiers.

Comments on the proposed repeal and new rule may be addressed to Joan Carol Bates, Deputy General Counsel, Texas Alcoholic Beverage Commission, P.O. Box 13127, Austin, Texas 78711. Comments will be accepted for 30 days following publication of the repeal and proposed new rule in the *Texas Register.*

16 TAC §45.131

(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, Texas.)

The proposed repeal is authorized by §5.31 and §102.31 of the Alcoholic Beverage Code. Section 5.31 gives the commission authority to prescribe and publish rules necessary to carry out the provisions of the Code. Section 102.31 provides the specific authority to adopt these rules to give effect to the section.

Cross Reference: Sections 5.31 and 102.31 of the Alcoholic Beverage Code are affected by the repeal of the existing rule and the proposed new rule.

§45.131. Consumers and Noncommercial Organizations.

This 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 September 25, 2009.

TRD-200904285
Alan Steen
Administrator
Texas Alcoholic Beverage Commission
Earliest possible date of adoption: November 8, 2009
For further information, please call: (512) 206-3204

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16 TAC §45.131

The proposed new rule is authorized by §5.31 and §102.31 of the Alcoholic Beverage Code. Section 5.31 gives the commission

authority to prescribe and publish rules necessary to carry out the provisions of the Code. Section 102.31 provides the specific authority to adopt these rules to give effect to the section.

Cross Reference: Sections 5.31 and 102.31 of the Alcoholic Beverage Code are affected by the repeal of the existing rule and the proposed new rule.

§45.131. Payment Regulations for Beer.

(a) Purpose. This rule implements §§102.31, 11.61(b)(2), 11.66, 61.72 and 61.73 of the Texas Alcoholic Beverage Code (Code).

(b) Definitions.

(1) Beer--A malt beverage labeled or designated as beer, containing one-half of one percent or more alcohol by volume, but not more than four percent alcohol by weight.

(2) Cash equivalent--A financial transaction or instrument that is not conditioned on the availability of funds upon presentment, including, money order, cashier's check, certified check or completed electronic funds transfer.

(3) Cash payment--United States Currency and coins, or a cash equivalent financial transaction or instrument.

(4) Event--A financial transaction or instrument that fails to provide payment to a Retailer and results in one or more incidents to one or more Sellers.

(5) Incident--One financial transaction or instrument made by a Retailer that fails to provide payment in full for beer or malt beverages delivered by a Seller to the Retailer.

(6) Malt beverages--Ale or malt liquor containing more than four percent of alcohol by weight.

(7) Retailer--A license or permit holder and their agents, servants and employees, authorized to sell beer or malt beverages for on or off premise consumption to an ultimate consumer.

(8) Seller--A general, local or branch distributor permit or license holder and their agents, servants and employees authorized to sell beer or malt beverages to a retailer.

(c) Invoices. A delivery of beer or malt beverages by a Seller, to a Retailer, must be accompanied by an invoice of sale showing the name and permit number of the Seller and the Retailer, a full description of the beer or malt beverages, the price, the place and date of delivery.

(1) The Seller's copy of the invoice must be signed by the Retailer to verify receipt of beer or malt beverages and accuracy of invoice and by the Seller to acknowledge payment was received on or before the delivery.

(2) The Seller and Retailer must retain invoices for four years from the date of delivery.

(3) Invoices may be created, signed and retained in an electronic or internet based inventory system, and may be retained on or off the licensed premise, as long as the records can be accessed from the licensed premise and made available to the commission during normal business hours.

(d) Cash Payment Violation. A Retailer who fails to make a cash payment to a Seller for the delivery of beer or malt beverages violates this section unless an exception applies.

(1) A Retailer who violates this section must pay the amount due, and a Seller may accept payment, only in cash or cash equivalent financial transaction or instrument.

(2) A Retailer whose permit or license is cancelled for cause, expires, suspended or placed in suspension with an unpaid cash payment violation pending is disqualified from applying for or being issued an original or renewal permit or license until all unpaid cash payment violations are remedied.

(3) The commission will not accept a voluntary suspension or voluntary cancellation of a Retailer if the Retailer has a cash payment violation pending.

(4) For purposes of this section, the Retailer includes all persons who were owners, officers, directors, and shareholders of the Retailer at the time the cash payment violation occurred.

(e) Reporting Violation and Payment; Failure to Report.

(1) A report of a violation or payment must be submitted electronically on the forms provided on the commission's web based reporting system at www.tabc.state.tx.us.

(2) A Seller who cannot access the commission's web based reporting system must either:

(A) submit a request for exception to submit reports by paper; or

(B) contract with another seller or service provider to make electronic reports on behalf of the Seller.

(3) All reports of violations or payment under this subsection must be made to the commission within two business days from the date the violation is discovered by the Seller.

(4) A Seller who fails to report a violation or a payment as required by this subsection is in violation of this section.

(f) Exception. A Retailer who wishes to dispute a violation of this section based on a good faith dispute between the Retailer and the Seller may submit a detailed electronic or paper written statement with the commission with an electronic or paper copy to the Seller explaining the basis of the dispute.

(1) The written statement must be submitted with documents and/or other records tending to support the Retailer's dispute, which may include:

(A) a copy of the front and back of the cancelled check of Retailer showing endorsement and deposit by Seller;

(B) bank statement or records of bank showing funds were available in the account of Retailer on the date the check was delivered to Seller; and

(C) bank statement or records showing bank error or circumstances beyond the control of Retailer caused the check to be returned to Seller unpaid; or

(D) bank statement or records showing the check cleared Retailer's account and funds were withdrawn from Retailer's account in the amount of the check.

(2) The Retailer must immediately submit an electronic notice of resolution of a dispute to the commission under this subsection.

(g) Penalty for Violation. An action to cancel or suspend a permit or license may be initiated under §§11.61, 28.12, 61.71, 61.73 or 61.74 of the Code for one or more violations of this section. The commission may consider whether the violation(s) are the result of an event or incident when initiating an action under this subsection.

This 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 September 25, 2009.

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Alan Steen
Administrator
Texas Alcoholic Beverage Commission
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For further information, please call: (512) 206-3204

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PART 4. TEXAS DEPARTMENT OF LICENSING AND REGULATION

CHAPTER 72. STAFF LEASING SERVICES

The Texas Department of Licensing and Regulation (Department) proposes amendments to existing rules at 16 Texas Administrative Code (TAC), Chapter 72, §§72.1, 72.10, 72.20, 72.71, 72.80 and 72.90, the repeal of existing rules at §§72.70, 72.81, and 72.83, and the adoption of new rules at §§72.21 - 72.23, 72.40, 72.70, and 72.91, regarding the Staff Leasing Services program. These changes will be referred to collectively in this notice as "proposed rules."

These proposed rules are necessary to implement the changes proposed as a result of the rule review of Chapter 72 and to adopt the same definition of "net worth" in the rules that was formerly found in the statute.

The Department conducted its four-year rule review of Chapter 72, Staff Leasing Services, in accordance with the requirements of Texas Government Code, §2001.039. The Department found the rules to still be essential in implementing Texas Labor Code, Chapter 91, and the Texas Commission of Licensing and Regulation (Commission), the Department's governing body, re-adopted the rules in the October 10, 2008, issue of the *Texas Register* (33 TexReg 8562). As part of the *Texas Register* notice announcing the re-adoption of the rules, the Department stated that any proposed amendments to the rules as a result of the rule review would be published in the *Texas Register* at a future date for a 30-day public comment period.

As a result of that rule review, the Department is proposing reorganizing the existing rules and compiling the Department's current policies and procedures for licensing staff leasing services companies in the rules. The licensing requirements are currently found in the statute, in the rules, and in application forms and instructions. The proposed rule changes should make it easier for applicants and licensees to locate and identify the current licensing requirements.

The proposed rules are also necessary to adopt the same definition of "net worth" that was repealed from the Texas Labor Code, Chapter 91 effective September 1, 2009, as a result of House Bill (HB) 2249, 81st Legislature, Regular Session (2009). Among other changes, HB 2249 enacted amendments to Texas Labor Code, §91.014, regarding net worth requirements. The net worth requirements in §91.014 are being replaced with working capital requirements, but the working capital requirements do not take effect until December 31, 2011. As part of this change from net worth to working capital, HB 2249 repealed the definition of "net worth," but the repeal of the definition was effective September 1, 2009. The definition of "net worth" is still necessary, because the existing net worth requirements in §91.014 continue in effect until December 31, 2011. The rules propose the adoption of the same definition of "net worth" that was repealed from the statute.

Any other rules that are necessary to implement the other changes to Texas Labor Code, Chapter 91, as enacted by HB 2249, will be part of a separate rulemaking. Those proposed changes will be published in the *Texas Register* at a future date for a 30-day public comment period.

The proposed rules at Chapter 72 detail the licensing requirements, the proof of net worth requirements, and other responsibilities for staff leasing services companies that are covered by Texas Labor Code, Chapter 91. Proposed rule §72.1 states the Department's authority to promulgate rules. Proposed rule §72.10 establishes definitions, in addition to those found in Chapter 91, for the terms that are used in the statute and rules. This proposed rule includes the same definition of "net worth" that was previously found in the statute.

Proposed rules §72.20 through §72.23 document the Department's current policies and procedures for licensing staff leasing services companies and compile the licensing requirements currently found in the statute, in the rules, and in application forms and instructions. Proposed rules §72.20 and §72.21 provide details regarding the original and renewal license application requirements for full licenses. Proposed rules §72.22 and §72.23 set out the original and renewal license application requirements for limited licenses.

Proposed rule §72.40 details the proof of net worth requirements for staff leasing services companies, which are set out in general terms in the statute and which are critical for ensuring the performance of the companies' obligations to their clients and assigned employees. The proposed rules explain the options for demonstrating net worth that are available to staff leasing services companies. They detail the general requirements that are applicable to all options and the specific requirements that accompany each option.

Proposed rule §72.70 sets out the responsibilities and obligations that staff leasing services companies have to clients and assigned employees, including required notices. The proposed rule also requires staff leasing service companies to update the information they provided to the Department at the time of original or renewal application within 45 days after any change. There are no substantive changes to proposed rule §72.70; however, because of the extensive reorganization, existing rule §72.70 is being repealed and new rule §72.70 is being proposed.

Proposed rule §72.80 consolidates all of the existing fees for the staff leasing services program into one rule section. The licensing fees and the duplicate and name change fees under existing rules §72.81 and §72.83, respectively, are being moved to rule §72.80 with the application fees. Existing rules §72.81 and §72.83 are being repealed. Proposed rule §72.80 also separates fees for original and renewal licenses and separates fees for full licenses and limited licenses. There are no changes to any of the fee amounts.

Proposed rules §72.90 and §72.91 state the authority of the Commission and the Department to impose administrative penalties and sanctions and to use the enforcement authority granted under Texas Occupations Code, Chapter 51 and Texas Labor Code, Chapter 91.

William H. Kuntz, Jr., Executive Director, has determined that for each year of the first five-year period the proposed rules are in

effect there will be no direct cost to state or local government as a result of enforcing or administering the proposed rules.

Mr. Kuntz also has determined that for each year of the first five-year period the proposed rules are in effect, staff leasing services companies, their clients and assigned employees, and the public will benefit because of the clarity and detail provided in the rules regarding licensing, net worth and other requirements for staff leasing services companies operating in Texas.

Because the proposed rules are reorganizing and documenting the Department's current policies and procedures for licensing and regulating staff leasing services companies, there will be no adverse economic effect on small or micro-businesses or to persons who are required to comply with the rules as proposed.

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

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

16 TAC §§72.1, 72.10, 72.20 - 72.23, 72.40, 72.70, 72.71, 72.80, 72.90, 72.91

The amendments and new rules are proposed under Texas Occupations Code, Chapter 51, and Texas Labor Code, Chapter 91, both of which authorize the Commission to adopt rules as necessary to implement these chapters.

The statutory provisions affected by the amendments and new rules are those set forth in Texas Occupations Code, Chapter 51, and Texas Labor Code, Chapter 91. No other statutes, articles, or codes are affected by the proposed rules.

§72.1. Authority.

This chapter is [~~These rules are~~] promulgated under the authority of the Texas Labor Code, Chapter 91 and Texas Occupations Code, Chapter 51.

§72.10. Definitions.

The following words and terms, as [~~when~~] used in this chapter and Texas Labor Code, Chapter 91, [~~shall~~] have the following meanings, unless the context clearly indicates otherwise.

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

(2) Net worth--The applicant's assets minus the applicant's liabilities, as shown on the applicant's financial statement or most recent federal tax return, plus the sum of any guarantees, letters of credit, or securities that may be submitted to the department.

[~~(1) Application--A fully completed application form, all information required by the application form, finger prints as required and all required fees.~~]

(3) [~~(2)~~] Person--Any [~~Means any~~] individual, partnership, corporation, or any other business entity.

(4) [~~(3)~~] The Code--The Texas Labor Code, Chapter 91.

§72.20. Licensing Requirements.

(a) Any person who performs or offers to perform staff leasing services as defined by the Code, must be [~~first become~~] licensed with the department [~~Texas Department of Licensing and Regulation~~].

(b) To obtain an original staff leasing services license, a person must provide the department with all of the following required information, on forms prescribed by the executive director:

(1) a completed registration form, including any applicable attachments or application forms;

(2) a completed personal information form from each controlling person as defined in Texas Labor Code §91.001(7);

(3) fingerprint cards for the applicant and any controlling persons;

(4) a completed criminal history questionnaire, as applicable;

(5) documentation from the Office of the Secretary of State recognizing the person's authority to do business in this state;

(6) proof of net worth as described under §72.40; and

(7) the required fees.

(c) Each individual applicant and all controlling persons must pass a background investigation that includes:

(1) A comparison of the person's fingerprints by appropriate state or federal law enforcement agencies with fingerprints on file; and

(2) A criminal history check with appropriate state and federal law enforcement agencies.

[~~(b) Any person who desires an original or renewal staff leasing services license shall complete all necessary forms from the Texas Department of Licensing and Regulation.~~]

[~~(c) To obtain a "limited" license an applicant shall meet the requirements of Texas Labor Code Chapter 91.~~]

(d) Falsification of a required document by the applicant is grounds for denial and/or revocation of license.

(e) Falsification of documentation provided by a controlling person disqualifies that person from serving as a controlling person on the staff leasing services company.

§72.21. Licensing Renewal Requirements.

(a) In order for a staff leasing services company to continue operating in this state, a license must be renewed annually.

(b) Non-receipt of a license renewal notice from the department does not exempt a person from any requirements of this chapter.

(c) To renew a staff leasing services license, a person must provide the department with all of the following required information, on forms prescribed by the executive director:

(1) a completed registration form, including any applicable attachments or application forms;

(2) a completed personal information form from each controlling person as defined in Texas Labor Code §91.001(7);

(3) fingerprint cards for any new controlling persons;

(4) a completed criminal history questionnaire, as applicable;

(5) proof of net worth as described under §72.40; and

(6) the required fees.

(d) Each individual applicant and all controlling persons of the staff leasing service company must pass the background investigation as described in §72.20(c) each year at the time of renewal.

(e) Falsification of a required document by the applicant is grounds for denial and/or revocation of license.

(f) Falsification of documentation provided by a controlling person disqualifies that person from serving as a controlling person on the staff leasing services company.

(g) The department may refuse to renew a registration if the applicant or a controlling person of the applicant has violated Texas Labor Code, Chapter 91, this chapter, or a rule or an order issued by the commission or executive director.

§72.22. Limited License Requirements.

(a) To qualify for a limited license, a person at all times must:

(1) employ less than 50 assigned employees is this state;

(2) not assign employees to client companies that are based or domiciled in the state;

(3) not maintain an office in this state;

(4) not solicit client companies located or domiciled in this state; and

(5) provide proof of current licensure as a staff leasing services company, in good standing, in another state.

(b) A person applying for a limited license must provide the department with all of the following required information, on forms prescribed by the executive director:

(1) a completed registration form, including any applicable attachments or application forms;

(2) a completed personal information form from each controlling person as defined in Texas Labor Code §91.001(7);

(3) a completed criminal history questionnaire, as applicable;

(4) documentation from the Office of the Secretary of State recognizing the person's authority to do business in this state;

(5) proof of net worth as described under §72.40; and

(6) the required fees.

(c) Falsification of a required document by the applicant is grounds for denial and/or revocation of license.

(d) Falsification of documentation provided by a controlling person disqualifies that person from serving as a controlling person on the staff leasing services company.

(e) After the person obtains the limited license, the person must continue to meet all of the requirements under subsection (a) in order to retain the limited license. Failure to continue meeting the requirements will result in loss of the limited license.

§72.23. Limited License Renewal Requirements.

(a) In order for a limited license staff leasing services company to continue operating in this state, a limited license must be renewed annually.

(b) Non-receipt of a limited license renewal notice from the department does not exempt a person from any requirements of this chapter.

(c) To continue qualification for a limited license, a person at all times while licensed must:

(1) employ less than 50 assigned employees in this state;

(2) not assign employees to client companies that are based or domiciled in the state;

(3) not maintain an office in this state;

(4) not solicit client companies located or domiciled in this state; and

(5) provide proof of current licensure as a staff leasing services company, in good standing, in another state.

(d) To renew a limited license, a person must provide the department with all of the following required information, on forms prescribed by the executive director:

(1) a completed registration form, including any applicable attachments or application forms;

(2) a completed personal information form from each controlling person as defined in Texas Labor Code §91.001(7);

(3) a completed criminal history questionnaire, as applicable;

(4) proof of net worth as described under §72.40; and

(5) the required fees.

(e) Falsification of a required document by the applicant is grounds for denial of the application and/or revocation of a license.

(f) Falsification of documentation provided by a controlling person disqualifies that person from serving as a controlling person on the staff leasing services company.

(g) The person must continue to meet all of the requirements under subsection (a) in order to retain the limited license. Failure to continue meeting the requirements will result in loss of the limited license.

§72.40. Proof of Net Worth.

(a) A person applying for an original license or a renewal license must demonstrate the person's net worth according to the schedule set out in Texas Labor Code §91.014. Net worth may be established by:

(1) The financial statement of the business entity that;

(A) is prepared or certified by an independent certified public accountant;

(B) reflects net worth on a date not earlier than nine months before the date of the application; and

(C) is based on adequate reserves for taxes, insurance, and incurred claims that are not paid;

(2) The most recent federal tax return of the business entity;

(3) A guaranty with supporting financial documentation;

(4) A surety bond that:

(A) is issued by a surety authorized to do business in the State of Texas;

(B) conforms to the Texas Insurance Code;

(C) is on a department-approved form;

(D) is payable to the executive director on behalf of persons who are injured because of a licensee's violation of Texas Labor Code, Chapter 91 or this chapter; and

(E) states that the surety will provide the department 60 days prior written notice of its intent to cancel the bond;

(5) An original letter of credit that:

(A) is irrevocable;

(B) is issued by a qualified financial institution which is financially responsible in the amount of the letter of credit;

(C) does not require examination of the performance of the underlying transaction between the department and the licensee;

(D) is payable to the department on sight or within a reasonably brief period of time after presentation of all required documents; and

(E) does not include any condition that makes payment to the department contingent upon the consent of or other action by the licensee or other party; or

(6) Another form of security acceptable to the executive director.

(b) Any proof of net worth under subsection (a) that is issued or written for a specified term must be replaced or renewed in accordance with this chapter.

(c) Any proof of net worth under subsection (a) must be maintained by the licensee for the entire time the licensee continues to do business in this state.

(d) Any proof of net worth under subsection (a) must be kept in effect until the later of:

(1) two years after the licensee ceases to do business in this state;

(2) two years after the licensee's license expires; or

(3) the executive director receives satisfactory proof from the licensee and determines that the licensee has discharged or otherwise adequately met all its obligations under Texas Labor Code, Chapter 91 and this chapter.

(e) If any proof of net worth under subsection (a) is canceled or lapses during the term of the licensee's license, the licensee may not continue operations after the effective date of the cancellation or lapse, unless and until the licensee files with the executive director new proof of net worth that meets the requirements provided by Texas Labor Code, Chapter 91 and this chapter and that provides coverage after that date.

(f) Cancellation or lapse of the proof of net worth under subsection (a) does not affect the licensee's liability before or after the effective date of the cancellation or lapse.

§72.70. Responsibilities of Licensee--General.

(a) Notices to Clients.

(1) A licensee must notify its clients of the name, mailing address, and telephone number of the department. The notice also must contain a statement that unresolved complaints concerning a licensee or questions concerning the regulation of staff leasing services may be addressed to the department.

(2) The notice required by this subsection must be made a part of all contractual agreements between licensees and clients. The notification shall appear in a typeface no smaller than the body of the contract and shall be printed in bold face, all capital letters or contrasting color of ink to set it out from the surrounding written material.

(b) Notices to Assigned Employees.

(1) A licensee must notify each assigned employee of the name, mailing address, and telephone number of the department. The notice also must contain a statement that unresolved complaints concerning a licensee or questions concerning the regulation of staff leasing services may be addressed to the department.

(2) A licensee must notify each assigned employee that, pursuant to §91.032(c) of the Code, a client company is solely obligated to pay any wages for which:

(A) an obligation to pay is created by an agreement, contract, plan, or policy between the client company and the assigned employee; and

(B) the staff leasing services company has not contracted to pay.

(3) A licensee must provide the notices required by this subsection in writing. The required notices shall be provided either as:

(A) a wallet size card;

(B) a notice printed not less often than once every six months on a pay check stub; or

(C) a separate piece of paper provided to the assigned employee which may be part of a contract or other agreement with the assigned employee.

(4) A licensee shall have each assigned employee sign a document indicating the assigned employee has received the required notices set forth in this subsection. The signed document must be kept on file for two years after employment is terminated. The signed document may be included as part of a contract or other agreement with the assigned employee or may be a separate document.

(c) Notwithstanding subsection (b)(2), a staff leasing company may process payments for wages that it has not contracted to pay at the request or direction of its clients.

(d) A licensee must update the information provided to the department as part of the original or renewal license application within 45 days after any change to the information.

§72.71. Responsibility of Licensee--Records.

(a) Upon notification, the licensee shall allow the executive director or his designee to audit records required by the Code and any records required by this chapter [~~these rules~~].

(b) All licensees shall maintain the following documents for two (2) years following the termination of a staff leasing services contract:

(1) insurance coverage documents which may be required for filing with the Texas Department of Insurance, or insurance coverage documents which the licensee may be required to retain by the Texas Department of Insurance;

(2) all documents pertaining to insurance claims;

(3) workers compensation coverage documents;

(4) all documents pertaining to workers' [~~Workers~~] compensation claims;

(5) staff leasing services contracts between the license holder and client companies;

(6) employee tax records that [~~which~~] may be required to be retained by or filed with the Texas Workforce Commission;

(7) employee tax records that [~~which~~] may be required to be retained by or filed with the Internal Revenue Service; and

(8) employee tax records that [~~which~~] may be required to be retained by or filed with the county or state.

(c) This section does not require a licensee to obtain documents that it would not otherwise obtain in the course of business and does not require a licensee to obtain documents from any other person or entity. This section requires licensees to maintain copies of documents actually received in the course of business or required to be maintained by the governmental entities listed in this section.

§72.80. Fees[~~--Licensing Application~~].

(a) Application Fees.

(1) All application fees are non-refundable.

(2) The application fee is a required fee that is separate from the required licensing fee.

(3) [~~(b)~~] The original application fee is [~~shall be~~] $150.

(4) [~~(c)~~] The renewal application fee is [~~shall be~~] $150.

(5) [~~(d)~~] The limited license original application fee is [~~shall be~~] $150.

(6) The limited license renewal application fee is $150.

(b) Licensing Fees.

(1) The licensing fee is a required fee that is separate from the required application fee.

(2) The original licensing fee is:

(A) $250 for 0 to 249 assigned employees;

(B) $500 for 250 to 750 assigned employees; and

(C) $750 for more than 750 assigned employees.

(3) The renewal licensing fee is:

(A) $250 for 0 to 249 assigned employees;

(B) $500 for 250 to 750 assigned employees; and

(C) $750 for more than 750 assigned employees.

(4) The limited license original licensing fee is $750.

(5) The limited license renewal licensing fee is $750.

(c) Late renewal fees for licenses and limited licenses issued under this chapter are provided under §60.83 of this title (relating to Late Renewal Fees).

(d) The fee for issuing a duplicate license or limited license or for changing the name on a license or limited license is $25.

§72.90. Sanctions--Administrative Sanctions/Penalties.

If a person violates Texas Labor Code, Chapter 91, this chapter, or a rule, or order of the executive director [~~Executive Director~~] or commission [~~Commission relating to this Code and Chapter~~], proceedings may be instituted to impose administrative sanctions, [~~and/or~~] administrative penalties or both in accordance with Texas Labor Code, Chapter 91, [~~this Code or~~] Texas Occupations Code, Chapter 51, and any associated rules [~~16 Texas Administrative Code, Chapter 60 of this title (relating to the Texas Commission of Licensing and Regulation)~~].

§72.91. Enforcement Authority.

The enforcement authority granted under Texas Occupations Code, Chapter 51, Texas Labor Code, Chapter 91, and any associated rules may be used to enforce Texas Labor Code, Chapter 91 and 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 September 28, 2009.

TRD-200904369
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Earliest possible date of adoption: November 8, 2009
For further information, please call: (512) 463-7348

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16 TAC §§72.70, 72.81, 72.83

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

The repeals are proposed under Texas Occupations Code, Chapter 51, and Texas Labor Code, Chapter 91, both of which authorize the Commission to adopt rules as necessary to implement these chapters.

The statutory provisions affected by the repeals are those set forth in Texas Occupations Code, Chapter 51, and Texas Labor Code, Chapter 91. No other statutes, articles, or codes are affected by the proposed repeals.

§72.70. Responsibility of Licensee.
§72.81. Fees--Licensing.
§72.83. Fees--Duplicate Licensing/Name Change.

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

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William H. Kuntz, Jr.
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Texas Department of Licensing and Regulation
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TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 61. SCHOOL DISTRICTS
SUBCHAPTER AA. COMMISSIONER'S RULES ON SCHOOL FINANCE

19 TAC §61.1014

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

The Texas Education Agency (TEA) proposes the repeal of §61.1014, concerning additional state aid for school employee benefits. The section establishes the methods the TEA uses to determine, for each school district and open-enrollment charter school, eligibility to receive additional state aid to pay contributions under a group health insurance plan. The proposed repeal is necessary because of the repeal of the Texas Education Code (TEC), §42.2514.

The TEC, §42.2514, authorized the commissioner of education to adopt rules to implement the provision of additional state aid for school employee benefits. The commissioner exercised rulemaking authority to adopt 19 TAC §61.1014, Additional State Aid for School Employee Benefits, effective May 4, 2008.

House Bill (HB) 3646, 81st Texas Legislature, 2009, made amendments to the TEC, §42.2516, Additional State Aid for Tax Reduction, which incorporated the funding previously delivered in a separate allotment for the state aid authorized under the TEC, §42.2514. Accordingly, the TEC, §42.2514, was repealed. Instead, state aid for school employee benefits will be included as part of a larger funding payment.

The proposed repeal of 19 TAC §61.1014 would implement the statutory changes by removing from rule a separate provision relating to additional state aid for school employee benefits.

Shirley Beaulieu, associate commissioner for finance/chief financial officer, has determined that for the first five-year period the repeal is in effect there will be no additional costs for state or local government as a result of enforcing or administering the repeal.

Ms. Beaulieu has determined that for each year of the first five years the repeal is in effect the public benefit anticipated as a result of enforcing the repeal would be the reflection of statutory changes and the removal of obsolete provisions from rule. There is no anticipated economic cost to persons who are required to comply with the proposed repeal.

There is no direct adverse economic impact for small businesses and microbusinesses; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

The public comment period on the proposal begins October 9, 2009, and ends November 9, 2009. Comments on the proposal may be submitted to Cristina De La Fuente-Valadez, Policy Coordination Division, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701, (512) 475-1497. Comments may also be submitted electronically to *rules@tea.state.tx.us* or faxed to (512) 463-0028. A request for a public hearing on the proposal submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 15 calendar days after notice of the proposal has been published in the *Texas Register* on October 9, 2009.

The repeal is proposed under the TEC, §42.2514, as added by HB 3343, 77th Texas Legislature, 2001, which initially authorized the commissioner of education to adopt rules to implement additional state aid for school employee benefits. HB 3646, 81st Texas Legislature, 2009, repealed the TEC, §42.2514, and incorporated the funding into the TEC, §42.2516, Additional State Aid for Tax Reduction.

The repeal implements the repeal of the TEC, §42.2514.

§61.1014. Additional State Aid for School Employee 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.

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Cristina De La Fuente-Valadez
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Texas Education Agency
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CHAPTER 74. CURRICULUM REQUIREMENTS

SUBCHAPTER A. REQUIRED CURRICULUM

19 TAC §74.3

The State Board of Education (SBOE) proposes an amendment to §74.3, concerning curriculum requirements. The section establishes the description of a required secondary curriculum. The proposed amendment would make the rule consistent with recent legislation passed by the 81st Texas Legislature, 2009.

The 81st Texas Legislature passed House Bill (HB) 3, amending the Texas Education Code, §28.025, to increase flexibility in graduation requirements for students. HB 3 removes SBOE authority to designate a specific course or a specific number of credits in the enrichment curriculum as requirements for the recommended high school program, effective immediately. HB 3 also added a new requirement regarding fine arts for the minimum high school program.

The proposed amendment to 19 TAC Chapter 74, Curriculum Requirements, Subchapter A, Required Curriculum, §74.3, Description of a Required Secondary Curriculum, would add language in SBOE rule to address the graduation requirements for the minimum and recommended high school programs mandated by HB 3.

The proposed amendment would have no new procedural and reporting requirements. The proposed amendment would have no new locally maintained paperwork requirements.

Anita Givens, associate commissioner for standards and programs, has determined that for the first five-year period the amendment is in effect there will be no additional costs for the state as a result of enforcing or administering the amendment. Fiscal implications are anticipated for local school districts that may not already have enough certified teachers to teach fine arts courses to all students, including students on the minimum high school program. Some school districts might experience changes in enrollment for certain courses which might require adjustments in staffing. As staffing decisions are made at the local district level, it is difficult to estimate the amount of impact on any given district.

Ms. Givens has determined that for each year of the first five years the amendment is in effect the public benefit anticipated as a result of enforcing the amendment would include added flexibility for students regardless of the graduation program they select. There is no anticipated economic cost to persons who are required to comply with the proposed amendment.

In addition, there is no direct adverse economic impact for small businesses and microbusinesses; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

Comments on the proposal may be submitted to Cristina De La Fuente-Valadez, Policy Coordination Division, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701, (512) 475-1497. Comments may also be submitted electronically to *rules@tea.state.tx.us* or faxed to (512) 463-0028. A request for a public hearing on the proposed amendment submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 15 calendar days after notice of the proposal has been published in the *Texas Register.*

The amendment is proposed under the Texas Education Code, §7.102(c)(4), which authorizes the SBOE to establish curriculum and graduation requirements; §28.002, which authorizes the SBOE to by rule designate subjects constituting a well-balanced curriculum and to require each district to provide instruction in the essential knowledge and skills at appropriate grade levels; and §28.025, which authorizes the SBOE to by rule determine curriculum requirements for the minimum, recommended, and advanced high school programs that are consistent with §28.002.

The amendment implements the Texas Education Code, §§7.102(c)(4), 28.002, and 28.025.

§74.3. Description of a Required Secondary Curriculum.

(a) Middle Grades 6-8. A school district that offers Grades 6-8 must provide instruction in the required curriculum as specified in §74.1 of this title (relating to Essential Knowledge and Skills). The district must ensure that sufficient time is provided for teachers to teach and for students to learn English language arts, mathematics, science, social studies, fine arts, health, physical education, technology applications, and to the extent possible, languages other than English. The school district may provide instruction in a variety of arrangements and settings, including mixed-age programs designed to permit flexible learning arrangements for developmentally appropriate instruction for all student populations to support student attainment of course and grade level standards.

(b) Secondary Grades 9-12.

(1) A school district that offers Grades 9-12 must provide instruction in the required curriculum as specified in §74.1 of this title (relating to Essential Knowledge and Skills). The district must ensure that sufficient time is provided for teachers to teach and for students to learn the subjects in the required curriculum. The school district may provide instruction in a variety of arrangements and settings, including mixed-age programs designed to permit flexible learning arrangements for developmentally appropriate instruction for all student populations to support student attainment of course and grade level standards.

(2) The school district must offer the courses listed in this paragraph and maintain evidence that students have the opportunity to take these courses:

(A) English language arts--English I, II, III, and IV;

(B) mathematics--Algebra I, Algebra II, Geometry, Precalculus, and Mathematical Models with Applications;

(C) science--Integrated Physics and Chemistry, Biology, Chemistry, and Physics. Science courses shall include at least 40% hands-on laboratory investigations and field work using appropriate scientific inquiry;

(D) social studies--United States History Studies Since Reconstruction, World History Studies, United States Government, and World Geography Studies;

(E) economics, with emphasis on the free enterprise system and its benefits--Economics with Emphasis on the Free Enterprise System and Its Benefits;

(F) physical education--Foundations of Personal Fitness and at least two courses selected from Adventure/Outdoor Education; Aerobic Activities; Individual Sports; or Team Sports;

(G) health education--Health 1;

(H) fine arts--courses selected from at least two of the four fine arts areas (art, music, theatre, and dance)--Art I, II, III, IV; Music I, II, III, IV; Theatre I, II, III, IV; or Dance I, II, III, IV;

(I) career and technology education--courses selected from at least three of the eight career and technology areas (agricultural science and technology education, business education, career orientation, health science technology education, family and consumer sciences education/home economics education, technology education/industrial technology education, marketing education, and trade and industrial education) taught on a campus in the school district with provisions for contracting for additional offerings with programs or institutions as may be practical;

(J) languages other than English--Levels I, II, and III or higher of the same language;

(K) technology applications--at least four courses selected from Computer Science I, Computer Science II, Desktop Publishing, Digital Graphics/Animation, Multimedia, Video Technology, Web Mastering, or Independent Study in Technology Applications; and

(L) speech--Communication Applications.

(3) Districts may offer additional courses from the complete list of courses approved by the State Board of Education to satisfy graduation requirements as referenced in this chapter.

(4) The school district must provide each student the opportunity to participate in all courses listed in subsection (b)(2) of this section. The district must provide students the opportunity each year to select courses in which they intend to participate from a list that includes all courses required to be offered in subsection (b)(2) of this section. If the school district will not offer the required courses every year, but intends to offer particular courses only every other year, it must notify all enrolled students of that fact. The school district must teach a course in which ten or more students indicate they will participate or that is required for a student to graduate. For a course in which fewer than ten students indicate they will participate, the district must either teach the course or employ options described in Subchapter C of this chapter (relating to Other Provisions) to provide the course and must maintain evidence that it is employing those options.

(5) For students entering Grade 9 beginning with the 2007-2008 school year, districts must ensure that one or more courses offered in the required curriculum for the recommended and advanced high school programs include a research writing component.

(c) Courses in the foundation and enrichment curriculum in Grades 6-12 must be provided in a manner that allows all grade promotion and high school graduation requirements to be met in a timely manner. Nothing in this chapter shall be construed to require a district to offer a specific course in the foundation and enrichment curriculum except as required by this subsection.

(d) Notwithstanding any other graduation requirements in this chapter, a student is required to complete one credit in physical edu-

cation to satisfy the graduation requirements under the recommended high school program. A student is also not required to complete one-half credit of health or one credit of technology applications to satisfy the graduation requirements under the recommended high school program. A student entering Grade 9 in the 2010-2011 school year and thereafter and who opts into the minimum high school program must complete one fine arts credit to satisfy the graduation 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.

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Cristina De La Fuente-Valadez
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SUBCHAPTER C. OTHER PROVISIONS

19 TAC §74.35, §74.37

The State Board of Education (SBOE) proposes an amendment to §74.35 and new §74.37, concerning curriculum requirements. Section 74.35 establishes additional requirements for high school health classes. In accordance with recent legislation passed by the 81st Texas Legislature, 2009, the proposed amendment would reorganize §74.35 and add provisions relating to alcohol awareness. Proposed new §74.37 would add requirements related to physical education.

The 81st Texas Legislature, 2009, passed House Bill (HB) 3076, Senate Bill (SB) 1219, and SB 1344, each of which are related to health education, and SB 891, which is related to physical education.

Health Education

HB 2176, passed by the 80th Texas Legislature, 2007, added the Texas Education Code (TEC), §28.002(p), which required the SBOE, in conjunction with the Office of the Attorney General, to develop a parenting and paternity awareness (p.a.p.a.) program that school districts must use in the high school health curriculum. This program must address parenting skills and responsibilities, including child support and other legal rights, and relationship skills, including money management, communication skills, and marriage preparation. In high schools that do not have a family violence prevention program, skills relating to the prevention of family violence must be included. The SBOE adopted 19 TAC §74.35, Additional Requirements for High School Health Classes, to outline school district and open-enrollment charter school requirements for implementation of this program. The materials for the p.a.p.a. program were approved by the SBOE at the January 2008 meeting. These materials are provided to school districts at no charge.

HB 3076 and SB 1219, passed by the 81st Texas Legislature, 2009, amend the TEC, §28.002(p), to allow a teacher to modify the suggested sequence and pace of the p.a.p.a. program. HB 3076 also amended the TEC, §28.002(p), to allow the p.a.p.a. program to be used in middle and junior high schools. HB 3076 added the TEC, §28.002(p-4), which specifies that a student under 14 years of age may not participate in the p.a.p.a. program without parental consent. HB 3076 also added the TEC, §28.002(p-2), which allows school districts to develop or adopt research-based programs to be used in conjunction with the p.a.p.a. program and the TEC, §28.002(p-3), which requires agency evaluation and distribution of information relating to programs and materials.

SB 1344, passed by the 81st Texas Legislature, 2009, amends the TEC, §28.002, by adding language that requires the SBOE to adopt Texas Essential Knowledge and Skills (TEKS) that address binge drinking and alcohol poisoning.

The proposed amendment to 19 TAC §74.35, Additional Requirements for High School Health Classes, would reorganize the rule to specify modified requirements for the p.a.p.a. program and to add provisions relating to alcohol awareness in accordance with HB 3076, SB 1219, and SB 1344.

Physical Education

SB 891, passed by the 81st Texas Legislature, 2009, amends the TEC, §28.002, by adding language that requires the SBOE, in identifying TEKS, to ensure that the curriculum emphasizes lifetime physical activity; is consistent with national physical education standards; requires that, on a weekly basis, at least 50% of the physical education class be used for actual student physical activity; offers students an opportunity to choose among many types of physical activity; meets the needs of students of all physical ability levels; takes into account the effect that gender and cultural differences might have on student interest in physical activity; teaches self-management and movement skills, cooperation, fair play, and responsible participation in physical activity; promotes student participation in physical activity outside of school; and allows physical education classes to be an enjoyable experience for students. In addition, SB 891 added the TEC, §25.114, addressing a student-to-teacher ratio for physical education classes and student safety.

The proposed new 19 TAC §74.37, Public School Physical Education Curriculum, would identify in rule the essential knowledge and skills of physical education in accordance with SB 891.

Revisions to the TEKS for health and physical education are scheduled to be adopted by the SBOE in 2013. The proposed revisions to 19 TAC Chapter 74, Curriculum Requirements, Subchapter C, Other Provisions, would put the requirements into rule as part of the required curriculum until the TEKS for health and physical education are revised.

The proposed rule actions would have no new procedural and reporting requirements. The proposed rule actions would have no new locally maintained paperwork requirements.

Anita Givens, associate commissioner for standards and programs, has determined that for the first five-year period the amendment and new section are in effect there will be no additional costs for the state as a result of enforcing or administering the rule actions. Fiscal implications are anticipated for school districts to acquire materials to support the teaching of alcohol awareness. School districts would be required to select from a Texas Education Agency list of alcohol awareness evidence-based programs to include in the health curriculum. School districts would incur administrative costs to purchase these programs. Costs would vary depending on which program was selected. There might also be fiscal implications for school districts to implement the additional requirements in physical education classes. School districts might experience

administrative costs to comply with the new physical education requirements. These costs could vary widely depending on whether school districts currently meet or partially meet the new physical education curriculum requirements. As decisions regarding instructional methodology are made by each individual school district, it is difficult to estimate the amount of impact on any given district.

Ms. Givens has determined that for each year of the first five years the amendment and new section are in effect the public benefit anticipated as a result of enforcing the amendment and new section would include stronger curriculum for health education and physical education. There is no anticipated economic cost to persons who are required to comply with the proposed rule actions.

In addition, there is no direct adverse economic impact for small businesses and microbusinesses; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

Comments on the proposal may be submitted to Cristina De La Fuente-Valadez, Policy Coordination Division, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701, (512) 475-1497. Comments may also be submitted electronically to *rules@tea.state.tx.us* or faxed to (512) 463-0028. A request for a public hearing on the proposed amendment and new section submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 15 calendar days after notice of the proposal has been published in the *Texas Register.*

The amendment and new section are proposed under the Texas Education Code, §7.102(c)(4), which authorizes the SBOE to establish curriculum and graduation requirements; §28.002(d), which authorizes the SBOE to identify the essential knowledge and skills of physical education that ensure specific curriculum; §28.002(p), which authorizes the SBOE, in conjunction with the Office of the Attorney General, to develop a parenting and paternity awareness program that a school district shall use in the district's high school health curriculum; and §28.002(r), which authorizes the SBOE to adopt essential knowledge and skills that address binge drinking and alcohol poisoning.

The amendment and new section implement the Texas Education Code, §7.102(c)(4) and §28.002(d), (p), (p-2), (p-3), (p-4), and (r).

§74.35. Additional Requirements for High School Health Classes.

(a) Parenting and paternity awareness.

(1) [~~(a)~~] A school district and an open-enrollment charter school shall incorporate instruction in parenting awareness into any course meeting a requirement for a health education credit, using the materials approved by the State Board of Education for this purpose in accordance with Texas Education Code (TEC), §28.002(p). Implementation of this requirement shall comply with requirements that the board of trustees of each school district establish a local school health advisory council to assist the district in ensuring that local community values are reflected in the district's health education instruction as stated in TEC, §28.004.

(2) [~~(b)~~] A school district may add elements at its discretion but must include the following areas of instruction:

(A) [~~(1)~~] parenting skills and responsibilities, including child support;

(B) [~~(2)~~] relationship skills, including money management, communication, and marriage preparation; and

(C) [~~(3)~~] skills relating to the prevention of family violence, only if the school district's high schools do not have a family violence prevention program.

(3) [~~(c)~~] If the required high school health education credit is earned through a course taken prior to Grade 9, the materials and parenting awareness instruction must be incorporated into that course or, at the district's discretion, may be incorporated into another course available to all students in Grades 9-12.

(4) At the discretion of the district, a teacher may modify the suggested sequence and pace of the program at any grade level.

(5) A student under 14 years of age may not participate in a parenting and paternity awareness program without the permission of the student's parent or person standing in parental relation to the student.

(6) [~~(d)~~] A school district shall use the materials approved by the State Board of Education for this purpose beginning with the 2008-2009 school year.

(b) Alcohol awareness.

(1) A school district and an open-enrollment charter school shall incorporate instruction in the dangers, causes, consequences, signs, symptoms, and treatment of binge drinking and alcohol poisoning into any course meeting a requirement for a health education credit in accordance with TEC, §28.002(r).

(2) A school district shall choose an evidence-based alcohol awareness program to use in the district's middle school, junior high school, and high school health curriculum from a list of programs approved by the commissioner of education for this purpose.

§74.37. Public School Physical Education Curriculum.

(a) The essential knowledge and skills for physical education shall:

(1) emphasize the knowledge and skills capable of being used during a lifetime of regular physical activity;

(2) be consistent with national physical education standards for:

(A) the information that students should learn about physical activity; and

(B) the physical activities that students should be able to perform;

(3) meet the needs of students of all physical ability levels, including students who have a disability, chronic health problem, or other special need that precludes the student from participating in regular physical education instruction but who might be able to participate in physical education that is suitably adapted and, if applicable, included in the student's individualized education program;

(4) take into account the effect that gender and cultural differences might have on the degree of student interest in physical activity or on the types of physical activity in which a student is interested;

(5) ensure students develop self-management and movement skills;

(6) ensure students develop cooperation, fair play, and responsible participation in physical activity; and

(7) promote student participation in physical activity outside of school.

(b) A physical education course shall:

(1) offer students an opportunity to choose among many types of physical activity in which to participate;

(2) offer students both cooperative and competitive games; and

(3) be an enjoyable experience for students.

(c) On a weekly basis, at least 50% of a physical education class shall be used for actual student physical activity and the activity shall be, to the extent practicable, at a moderate or vigorous level.

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

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Cristina De La Fuente-Valadez
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CHAPTER 89. ADAPTATIONS FOR SPECIAL POPULATIONS

SUBCHAPTER DD. COMMISSIONER'S RULES CONCERNING HIGH SCHOOL EQUIVALENCY PROGRAMS

The Texas Education Agency (TEA) proposes the repeal of §89.1401, new §89.1401, and amendments to §§89.1403, 89.1405, 89.1409, 89.1411, 89.1413, 89.1415, 89.1417, and 89.1419, concerning the high school equivalency program (HSEP). The rules in 19 TAC Chapter 89, Subchapter DD, implement provisions for the implementation and administration of HSEPs. The proposed rule actions would update attendance and funding rules for HSEPs to correspond with other administrative rules that provide for alternative attendance accounting programs. The proposed rule actions would also clarify student eligibility criteria, update the assessment requirement for a student entering an HSEP, and make minor technical corrections throughout the subchapter.

The Texas Education Code (TEC), §29.087(n), authorizes the commissioner to adopt rules for the implementation and administration of HSEPs. The rules adopted in 19 TAC Chapter 89, Subchapter DD, implement the provisions of the TEC, §29.087.

The proposed rule actions would modify the existing HSEP attendance accounting and funding rules to match those for the Optional Flexible School Day Program. The proposed rule actions would also clarify student eligibility criteria, update the assessment requirement for a student entering an HSEP, and make minor technical corrections. Following is a description of the proposed rule actions.

Section 89.1401, Definitions, would be repealed and proposed as new §89.1401, Purpose.

Section 89.1403, Student Eligibility, would be modified in paragraph (2)(D) to clarify student eligibility criteria. Language in clause (ii) addressing students who left school prior to Grade 9 would be removed in alignment with the TEC, §29.087(d)(2)(D). Also, language in clause (i) would be reorganized as subparagraph (D) for clarification purposes. The provision in subparagraph (D) would allow students who left school prior to enrollment in Grade 9, but were subsequently served in other educational settings that resulted in their Grade 9 enrollment two years prior to the initial participation in an HSEP, to be served by an HSEP as long as they meet the criteria specified in §89.1403(1) or (2). Minor technical corrections would also be made in the section.

Section 89.1405, Application to Operate a High School Equivalency Program, would be amended to make minor technical corrections.

Section 89.1409, Assessment, would be updated in subsection (a) to reflect the assessment requirement for a student entering an HSEP. A corresponding update would be made in subsection (c). Minor technical corrections would also be made in the section.

Section 89.1411, Attendance, would be modified in subsection (a) to reflect an increase from six to ten hours in the maximum number of hours of instruction in an HSEP that a student may attend per day. Subsection (c) would be changed to require that school districts or open-enrollment charter schools report total contact minutes instead of total contact hours and identify any excess minutes, instead of hours, not eligible for funding. Minor technical corrections would also be made in the section.

Section 89.1413, Funding Under Texas Education Code, Chapters 41, 42, and 46, would be changed in subsection (a)(2), regarding the minimum amount of instructional time a student must receive in a given day for instructional contact time to be recorded, from two hours to 45 minutes. The existing subsection (a)(4), which requires instructional contact time to be recorded in 30-minute increments, would be deleted, and subsequent paragraphs would be renumbered. In existing subsection (a)(6), to be renumbered (a)(5), a sentence stating that school districts are permitted to designate students receiving instruction in HSEPs as either full-day eligible or half-day eligible would be removed. In that same paragraph, a change would be made in the maximum amount of instructional time allowed each school day for a student receiving instruction in an HSEP. In existing subsection (a)(7), to be renumbered (a)(6), the existing formula for determining instructional contact time for a six-week period for students receiving instruction in an HSEP would be removed. Minor technical corrections would also be made in the section.

Section 89.1415, Extracurricular Participation, would be amended to make minor technical corrections.

Section 89.1417, Conditions of Program Operation, would be modified in subsection (a) to allow flexibility in the manner in which data is collected. Subsection (d) would also be modified to clarify that a seven-hour school day is the minimum length of time that must be offered to a student enrolled in an HSEP. A minor technical correction would also be made in subsection (e).

Section 89.1419, Revocation of Authorization to Operate a High School Equivalency Program, would be modified in subsection (e) to clarify reference to the TEC. Minor technical corrections would also be made in the section.

The proposed amendment to §89.1417 would allow for flexibility in the manner in which data is collected on behalf of the General Educational Development Testing Service. No additional data collection is anticipated. No new locally maintained paperwork requirement is anticipated.

Julie Harris-Lawrence, deputy associate commissioner for student services and GED, has determined that for the first five-year period the rule actions are in effect there will be no additional costs for state or local government as a result of enforcing or administering the rule actions.

Ms. Harris-Lawrence has determined that for each year of the first five years the rule actions are in effect the public benefit anticipated as a result of enforcing the rule actions will be to bring attendance accounting and funding rules for the HSEP in line with those for other alternative attendance accounting programs, making attendance accounting easier for school districts. There is no anticipated economic cost to persons who are required to comply with the proposed rule actions.

There is no direct adverse economic impact for small businesses and microbusinesses; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

The public comment period on the proposal begins October 9, 2009, and ends November 9, 2009. Comments on the proposal may be submitted to Cristina De La Fuente-Valadez, Policy Coordination Division, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701, (512) 475-1497. Comments may also be submitted electronically to *rules@tea.state.tx.us* or faxed to (512) 463-0028. A request for a public hearing on the proposal submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 15 calendar days after notice of the proposal has been published in the *Texas Register* on October 9, 2009.

19 TAC §89.1401

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

The repeal is proposed under the Texas Education Code, §29.087, which authorizes the commissioner of education to adopt rules to implement the requirement that the TEA develop a process by which a school district or open-enrollment charter school may apply to the commissioner for authority to operate a program to prepare eligible students to take a high school equivalency examination.

The repeal implements the Texas Education Code, §29.087.

§89.1401. 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 September 28, 2009.

TRD-200904302

Cristina De La Fuente-Valadez
Director, Policy Coordination
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Earliest possible date of adoption: November 8, 2009
For further information, please call: (512) 475-1497

19 TAC §§89.1401, 89.1403, 89.1405, 89.1409, 89.1411, 89.1413, 89.1415, 89.1417, 89.1419

The new section and amendments are proposed under the Texas Education Code, §29.087, which authorizes the commissioner of education to adopt rules to implement the requirement that the TEA develop a process by which a school district or open-enrollment charter school may apply to the commissioner for authority to operate a program to prepare eligible students to take a high school equivalency examination.

The new section and amendments implement the Texas Education Code, §29.087.

§89.1401. Purpose.

The purpose of a High School Equivalency Program approved by the commissioner of education is to prepare eligible students to take the high school equivalency examination.

§89.1403. Student Eligibility.

A student is eligible to participate in a High School Equivalency Program if:

(1) the student has been ordered by a court under the Code of Criminal Procedure, Article 45.054, or by the Texas Youth Commission to:

(A) participate in a preparatory class for the high school equivalency examination; or

(B) take the high school equivalency examination administered under the Texas Education Code (TEC), §7.111; or

(2) the following conditions are satisfied:

(A) the student is at least 16 years of age at the beginning of the school year or semester;

(B) the student is at risk of dropping out of school, as defined by the TEC, §29.081;

(C) the student and the student's parent, or person standing in parental relation to the student, agree in writing to the student's participation; and

(D) at least two school years have elapsed since the student first enrolled in Grade 9 and the student has accumulated less than one third of the credits required to graduate under the minimum graduation requirements of the district or school.

[~~(D) either:~~]

[~~(i)~~ ~~at least two school years have elapsed since the student first enrolled in Grade 9 and the student has accumulated less than one third of the credits required to graduate under the minimum graduation requirements of the district or school; or~~]

[~~(ii)~~ ~~for students who left school prior to being enrolled in Grade 9, at least three years have elapsed since the student last enrolled in Grade 8, or four years since the student last enrolled in Grade 7, or five years since the student last enrolled in Grade 6.~~]

§89.1405. Application to Operate a High School Equivalency Program.

(a) Applicant eligibility. Any school district or open-enrollment charter school may apply for authorization to operate a High School Equivalency Program (HSEP).

(b) Cooperative HSEP criteria. A cooperative of school districts or open-enrollment charter schools may apply for permission to operate a cooperative HSEP if it operates pursuant to a written agreement. The fiscal agent of a cooperative HSEP is responsible for complying with all requirements of this subchapter.

(c) Application process.

(1) As part of the application process, the commissioner of education will [~~shall~~] require a school district or open-enrollment charter school to provide information regarding the operation of any similar program during the preceding five years.

(2) Reported historical information disaggregated by ethnicity, age, gender, and socioeconomic status will include, but not be limited to:

(A) the total number of students served in the program;

(B) the number of program participants who passed the high school equivalency examination; and

(C) when available, information on students' subsequent attendance in postsecondary educational programs.

(3) The Texas Education Agency (TEA) will [~~agency shall~~] make available to eligible school districts and open-enrollment charter schools an application form that must be completed and submitted to the TEA [~~agency~~] for approval.

§89.1409. Assessment.

(a) A student entering a High School Equivalency Program (HSEP) must take:

(1) prior to entering the program, the appropriate Grade 9 Texas Assessment of Knowledge and Skills (TAKS) assessment in reading and mathematics if the student first enters Grade 9 prior to the 2011-2012 school year, or the appropriate end-of course (EOC) assessment(s) required by the applicable sections of the Texas Education Code, Chapter 39, if the student first enters Grade 9 during or after the 2011-2012 school year.

[~~(1) the Grade 9 assessment required by Texas Education Code, §39.025(a), prior to entering the program;~~]

(2) each TAKS or EOC [~~grade level~~] assessment instrument required to be administered during the period in which the student is enrolled in the program; and

(3) the assessment instruments required by this subsection before taking the high school equivalency examination.

(b) A student entering an HSEP by order of the court pursuant to the Code of Criminal Proceedings, Article 45.054, or by order of the Texas Youth Commission (TYC), is exempt from the assessment requirements specified in subsection (a) of this section.

(c) The school district or open-enrollment charter school operating an approved HSEP must present to the General Educational Development (GED) testing center, on a form provided by the Texas Education Agency [~~agency~~], proof that a student has been administered the assessment instruments required by subsection (a) of this section [~~TEC, §39.025(a) and §39.023(a)~~]. GED testing centers will not allow an HSEP student to take the high school equivalency examination without proof from the approved HSEP that the student has been administered the required assessment instruments. A student who is enrolled in an HSEP as described in this section and withdraws from the HSEP before taking the assessment instruments required by this subsection cannot take the GED until after the individual's 18th birthday.

(d) The school district or open-enrollment charter school operating an approved HSEP must inform each student who has completed the program of the time and place at which the student may take the high school equivalency examination as authorized by the TEC, §7.111. A student must be over 17 years of age or meet other requirements specified in the TEC, §7.111, to take the high school equivalency examination.

§89.1411. Attendance.

(a) A student may attend a High School Equivalency Program (HSEP) a maximum of 600 minutes, or ten [~~six~~] hours, of instruction per day.

(b) A student may only participate in an HSEP that is operated by the school district or open-enrollment charter school in which the student is enrolled.

(c) School districts and open-enrollment charter schools must report student HSEP attendance in a manner provided by the Texas Education Agency [~~agency~~]. The school district or open-enrollment charter school must report total contact minutes [~~hours~~] and identify excess minutes [~~hours~~] not eligible for funding purposes.

(d) A student may be enrolled [~~only~~] in only an HSEP or may be enrolled in an [~~a~~] HSEP in combination with regular attendance and/or special program attendance during the school day.

§89.1413. Funding Under the Texas Education Code, Chapters 41, 42, and 46.

(a) For a student [~~only~~] enrolled in only a High School Equivalency Program (HSEP), the following funding rules apply.

(1) A student is counted as in attendance based on the actual number of minutes [~~hours~~] each school day the student receives instruction in the HSEP and/or traditional classes toward graduation requirements.

(2) A student must receive instruction in the HSEP (or HSEP in combination with traditional coursework) at least 45 minutes [~~two hours~~] on a given day [~~in order~~] for instructional contact time to be recorded. If actual instructional contact time in the HSEP (or HSEP in combination with traditional classes [~~coursework~~]) does not equal at least 45 minutes [~~equal two hours~~], the district must [~~shall~~] record zero minutes [~~hours~~] of instructional contact time for that day.

(3) A log of program instructional contact time must be separately maintained for each student participating in the HSEP.

[~~(4) Instructional contact time is to be recorded in increments of 30 minutes (i.e., two hours and thirty minutes will equate to 2.5 instructional contact hours, two hours and 29 minutes will equate to 2.0 instructional contact hours).~~]

(4) [~~(5)~~] During the time a student receives instruction in the HSEP, any time in attendance in courses that may be counted toward graduation credit will also be measured as instructional contact time, but must be separately recorded.

(5) [~~(6)~~] [~~School districts may designate students who receive instruction in HSEPs as either full-day eligible or half-day eligible for purposes of determining the number of days absent and the related attendance rate for accountability purposes.~~] The maximum number of instructional minutes [~~contact hours~~] allowed each school day, including any instructional time accounted for in traditional courses toward graduation requirements, is 600 minutes or ten hours [~~shall be six hours for students designated as full-day eligible and three hours for students designated as half-day eligible~~].

(6) [~~(7)~~] To determine attendance for Public Education Information Management System (PEIMS) reporting and Foundation School Program (FSP) funding purposes, instructional contact time recorded for the HSEP will be summed with attendance time in courses toward graduation each six-week reporting period. [~~The sum will be divided by six and rounded down to determine the number of days to be reported as present for that reporting period for students that are designated as full-day eligible. For a student reported as full-day eligible, the number of days absent shall be reported as the difference between the days of instruction and the number of days of attendance that will be reported as described in this paragraph. For students reported as half-day eligible, the sum of instructional contact time recorded for the HSEP program and attendance time in courses toward graduation shall be divided by six and rounded down to the nearest number evenly divisible by 0.5 to determine the number of days present. For a student reported as half-day eligible, the number of days absent shall be reported as the difference between half the number of days of instruction and the number of days of attendance that will be reported as described in this paragraph.~~]

(7) [~~(8)~~] Instructional contact time is funded at the same rate under the FSP formulas as attendance for a full-time equivalent student. A full-time equivalent student is expected to have 1,080 contact hours per year.

(b) Attendance in an HSEP that is not authorized or does not meet the requirements of the Texas Education Code, §29.087, or this subchapter is not eligible for state funding.

§89.1415. Extracurricular Participation.

Under the [~~In accordance with~~] Texas Education Code, §29.087(g), a student enrolled in a High School Equivalency Program [~~an HSEP~~] may not participate in a competition or activity sanctioned by the University Interscholastic League.

§89.1417. Conditions of Program Operation.

(a) A school district or open-enrollment charter school operating a High School Equivalency Program (HSEP) must comply with all assurances in the program application. Approved HSEPs will be required to submit annually one progress report as instructed [~~on a form to be provided~~] by the General Educational Development Testing Service (GEDTS) to the Texas Education Agency [~~agency. The data in the progress reports must be disaggregated by ethnicity, age, gender, and socioeconomic status~~]. Approved HSEPs will submit data as stated in the assurances section of the program application.

(b) A school district or open-enrollment charter school authorized by the commissioner of education on or before August 31, 2003, to operate a program in accordance with this subchapter may continue to operate that program in accordance with this section.

(c) Enrollment in an HSEP may not exceed by more than 5% the total number of students enrolled in a similar program operated by the school district or charter school during the 2000-2001 school year.

(d) A student enrolled in an HSEP must be offered at a minimum a seven-hour school day and a 180-day instructional year calendar.

(e) Beginning with the 2003-2004 school year, a student may be enrolled in an HSEP that was authorized by the commissioner on or before August 31, 2003; however, the student cannot [~~can not~~] take any portion of the GED test after September 1, 2003, without meeting the assessment requirements specified in §89.1409 of this title (relating to Assessment).

§89.1419. Revocation of Authorization to Operate a High School Equivalency Program.

(a) The commissioner of education may revoke authorization of a High School Equivalency Program (HSEP) based on the following factors:

(1) noncompliance with application assurances and/or the provisions of this subchapter;

(2) lack of program success as evidenced by progress reports, program data including factors specified in the Texas Education Code (TEC), §29.087(l), and/or on-site monitoring visits; or

(3) failure to provide accurate, timely, and complete information as required by the Texas Education Agency [~~agency~~] and specified in the TEC, §29.087, to evaluate the effectiveness of the HSEP.

(b) A revocation of an approved HSEP takes effect for the semester immediately following the date on which the revocation is issued.

(c) An HSEP is entitled to a ten-day notice of the proposed revocation and an informal review by the commissioner's designee.

(d) A decision by the commissioner to revoke the authorization of an HSEP is final and may not be appealed.

(e) The HSEP is a state program subject to a special accreditation investigation under the TEC, Chapter 39. [~~that may be monitored by an on-site visit under TEC, §39.075.~~] Sanctions under the TEC, Chapter 39, [~~§39.131,~~] may be imposed on a school district or an open-enrollment [~~open enrollment~~] charter school for failure to comply with the HSEP 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 September 28, 2009.

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Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
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For further information, please call: (512) 475-1497

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CHAPTER 100. CHARTERS
SUBCHAPTER A. OPEN-ENROLLMENT CHARTER SCHOOLS

19 TAC §100.105

The State Board of Education (SBOE) proposes an amendment to §100.105, concerning open-enrollment charter schools. The section establishes the applicability of existing rule and statute to public senior college or university charters. The proposed amendment would include public junior colleges as potential charter holders, granted under the Texas Education Code (TEC), Chapter 12, Subchapter E, as amended by House Bill (HB) 1423, 81st Texas Legislature, 2009.

The TEC, Chapter 12, Charters, Subchapter E, College or University Charter School, was added by HB 6, 77th Texas Legislature, 2001, authorizing the SBOE to grant open-enrollment charters to public senior colleges or universities as defined in the TEC, §61.003. HB 6 required that public senior college or

university charters be combined into one category with open-enrollment charters and limited the total number of charters to 215. In addition, HB 6 gave the SBOE authority to grant charters, outside the 215 limit, to public senior colleges or universities that met additional requirements.

HB 1423, 81st Texas Legislature, 2009, amended the TEC, Chapter 12, Subchapter E, to allow public junior colleges to be awarded charters. The proposed amendment to 19 TAC §100.105 would update the rule to incorporate the statutory change.

The proposed amendment would have no new procedural and reporting requirements. The proposed amendment would have no new locally maintained paperwork requirements.

Laura Taylor, associate commissioner for accreditation, has determined that for the first five-year period the amendment is in effect there will be no additional costs for state or local government as a result of enforcing or administering the amendment.

Ms. Taylor has determined that for each year of the first five years the amendment is in effect the public benefit anticipated as a result of enforcing the amendment would be the strengthening of the open-enrollment charter school system by including public junior colleges as active sponsors of charter schools. Open-enrollment charter schools provide avenues for local restructuring, flexibility, innovation, and choice for parents and students. There is no anticipated economic cost to persons who are required to comply with the proposed amendment.

In addition, there is no direct adverse economic impact for small businesses and microbusinesses; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

Comments on the proposal may be submitted to Cristina De La Fuente-Valadez, Policy Coordination Division, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701, (512) 475-1497. Comments may also be submitted electronically to *rules@tea.state.tx.us* or faxed to (512) 463-0028. A request for a public hearing on the proposed amendment submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 15 calendar days after notice of the proposal has been published in the *Texas Register.*

The amendment is proposed under the Texas Education Code, §12.152, which authorizes the SBOE to grant a charter on the application of a public senior college or university or a public junior college for an open-enrollment charter school, and §12.154, which authorizes the SBOE to grant a charter to a public senior college or university or a public junior college if the entity satisfies specific criteria in the application, as determined by the SBOE.

The amendment implements the Texas Education Code, §12.152 and §12.154.

§100.105. Application to Public Senior College or University Charters <u>and Public Junior College Charters</u>.

The following provisions of the rules in this subchapter apply as indicated in this section to a public senior college or university charter school <u>or a public junior college charter school</u> as though the public senior college or university charter school <u>or the public junior college charter school</u> were granted a charter under Texas Education Code (TEC), Chapter 12, Subchapter D (Open-Enrollment Charter School).

(1) Section 100.1(a) of this title (relating to Application and Selection Procedures and Criteria) applies, except that the State Board of Education (SBOE) may adopt a separate application form for applicants seeking a charter to operate a public senior college or university charter school <u>or a public junior college charter school</u>, which need not be similar to the application form adopted under that subsection for other charter applicants. The SBOE may adopt or amend this separate application form without regard to the selection cycle referenced in that subsection.

(2) Section 100.1(c), (g)(1)-(4), (g)(8), (j), and (k) apply.

(3) Except as provided in this section, this subchapter does not apply to a public senior college or university charter school <u>or a public junior college charter school</u>.

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

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Cristina De La Fuente-Valadez
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Texas Education Agency
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CHAPTER 101. ASSESSMENT

The State Board of Education (SBOE) proposes amendments to §§101.5, 101.7, 101.9, 101.11, 101.31, and 101.33 and the repeal of §101.23, concerning assessment. The sections establish provisions relating to requirements for student testing, graduation, grade advancement, remediation, release of tests, performance standards, and private school administration of state tests. The proposed amendments and repeal would implement significant changes to the Texas student assessment program made by House Bill (HB) 3, 81st Texas Legislature, 2009.

In June 2009, the 81st Texas Legislature enacted HB 3, which made significant changes to the Texas student assessment program. These legislative changes include: restricting the administration of the Texas Assessment of Knowledge and Skills (TAKS) assessments in Spanish to eligible students of limited English proficiency in Grades 3-5 instead of Grades 3-6; removing exemptions from statewide testing that are no longer allowed under state and federal law for certain students served by special education; specifying that the Texas Education Agency (TEA) is no longer required to develop TAKS study guides; excluding from release assessments administered for the purpose of retesting; revising the Student Success Initiative (SSI) requirements, including the removal of the automatic grade level retention provision for students in Grade 3 who do not meet the TAKS reading assessment standard; and requiring the commissioner of education to determine satisfactory performance levels for assessment instruments.

These changes in statute require the amendment and repeal of SBOE rules in 19 TAC Chapter 101. In addition, other technical and conforming changes are required to align the SBOE rules in 19 TAC Chapter 101 with state and federal law. Some of these changes stem from the enactment of HB 3, while others were identified during the statutorily required four-year rule review of 19 TAC Chapter 101 adopted by the SBOE in March 2009. The

proposed rule actions to 19 TAC Chapter 101, Subchapters A and B, include the following.

Section 101.5, Student Testing Requirements, would be amended to limit the administration of the TAKS assessments in Spanish to eligible students of limited English proficiency in Grades 3-5. Other technical changes would be made to align the rule with state and federal law.

Section 101.7, Testing Requirements for Graduation, would be amended to reference state assessment performance standards determined by the commissioner of education. HB 3 transfers the statutory authority to set the standards from the SBOE to the commissioner of education. The adoption of commissioner's rules relating to testing requirements for graduation will be coordinated with the amendment to §101.7.

Section 101.9, Grade Advancement Requirements, would be amended to reflect new SSI requirements, including the removal of the automatic grade level retention provision for students in Grade 3 who do not meet the TAKS reading assessment standard.

Section 101.11, Remediation, would be amended to specify that the TEA is no longer required to develop TAKS study guides and to reference a new remediation requirement in HB 3 for students in Grades 3-8 who fail any TAKS assessment.

Section 101.23, Performance Standards, would be repealed because HB 3 transfers the statutory authority to set state assessment performance standards from the SBOE to the commissioner of education.

Section 101.31, Private Schools, would be amended to incorporate technical changes due to the enactment of HB 3.

Section 101.33, Release of Tests, would be amended to reflect the exclusion from release of assessments administered for the purpose of retesting.

The proposed rule action eliminating the Spanish Grade 6 TAKS would remove all reporting and procedural requirements for the TEA that are directly associated with these assessments. The proposed rule actions would have no new locally maintained paperwork requirements.

Criss Cloudt, associate commissioner for assessment, accountability, and data quality, has determined that for the first five-year period the amendments and repeal are in effect there would be fiscal implications for the state and local government as a result of enforcing or administering the proposed rule actions.

Eliminating the requirement for the TEA to release test items and answers from assessments administered for the purpose of retesting would result in a savings for the state of approximately $200,000 each year for fiscal years 2010-2014.

Eliminating the administration of the Spanish-version TAKS assessments in Grade 6 to eligible students of limited English proficiency would result in an estimated annual savings for the state of $250,000 for fiscal years 2010-2014.

The elimination of the second and third administrations of the TAKS Grade 3 reading assessment would result in an estimated annual savings for the state of $550,000 for fiscal years 2010-2014.

In fiscal years 2010-2014, not developing the study guides could result in an estimated savings for the state of $13.4 million per fiscal year.

The TEA has determined that there will be some administrative savings for school districts and charter schools because of reduced testing. The amount of savings to school districts and charter schools is unknown.

Dr. Cloudt has determined that for each year of the first five years the amendments and repeal are in effect the public benefit anticipated as a result of enforcing the rule actions would be updated rules to reflect new assessment requirements in statute and to help ensure that these requirements are clearly defined for students, school districts, and the public. There is no anticipated economic cost to persons who are required to comply with the proposed rule actions.

In addition, there is no direct adverse economic impact for small businesses and microbusinesses; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

Comments on the proposal may be submitted to Cristina De La Fuente-Valadez, Policy Coordination Division, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701, (512) 475-1497. Comments may also be submitted electronically to *rules@tea.state.tx.us* or faxed to (512) 463-0028. A request for a public hearing on the proposed amendments and repeal submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 15 calendar days after notice of the proposal has been published in the *Texas Register.*

SUBCHAPTER A. GENERAL PROVISIONS

19 TAC §§101.5, 101.7, 101.9, 101.11

The amendments are proposed under the Texas Education Code, Chapter 39, Subchapter B, which authorizes the State Board of Education to adopt rules to create and implement a statewide assessment program.

The amendments implement the Texas Education Code, Chapter 39, Subchapter B.

§101.5. Student Testing Requirements.

(a) Every student receiving instruction in the essential knowledge and skills shall take the appropriate criterion-referenced assessments [~~tests~~], as required by the Texas Education Code (TEC), Chapter 39, Subchapter B [~~§39.023(a), (b), (c), (l) and~~ §39.027(e)].

(b) A student receiving special education services under the TEC, Chapter 29, Subchapter A, enrolled in Grades 3-11 [~~3-10~~] and who is receiving instruction in the essential knowledge and skills, shall take the assessment of academic skills unless the student's admission, review, and dismissal (ARD) committee determines that it is an inappropriate measure of the student's academic progress as outlined in the student's individualized education program (IEP). If the student's ARD committee determines that the assessment of academic skills is an inappropriate measure of the student's academic progress in one or more subjects [~~whole or part~~], the student shall take the alternate [~~alternative~~] assessment of academic skills in the subject or subjects [~~whole or part~~]. Each testing accommodation shall be documented in the student's IEP in accordance with 34 Code of Federal Regulations (CFR) §300.347(a)(5)(i) and (ii), relating to the content of the IEP and participation in statewide or districtwide assessments.

[~~(c) A student receiving special education services under the TEC, Chapter 29, Subchapter A, enrolled in Grades 3-10, according to the grade implementation schedule in subsection (b) of this section, and who is not receiving any instruction in the essential knowledge and skills, shall be considered exempt in accordance with the TEC,~~

§39.027. Each exemption shall be documented in the student's IEP in accordance with 34 CFR §300.347(a)(5)(i) and (ii), relating to the content of the IEP and participation in statewide or districtwide assessments. Each exempted student receiving special education services shall take an appropriate locally selected assessment, as determined by the student's ARD committee, in accordance with procedures developed by the Texas Education Agency (TEA). Student performance results on these alternate assessments must be reported to the TEA.]

(c) [(d)] In Grades 3-12, a limited English proficient (LEP) student, as defined by the TEC, Chapter 29, Subchapter B, shall participate in the assessments as required by this section and Subchapter AA of this chapter (relating to Commissioner's Rules Concerning the Participation of Limited English Proficient Students in State Assessments). In Grades 3-5 [3-6], the language proficiency assessment committee (LPAC) shall determine whether a nonexempt LEP student whose primary language is Spanish will take the assessment of academic skills in English or in Spanish. The decision as to the language of the assessment shall be based on the assessment that will provide the most appropriate measure of the student's academic progress.

(d) [(e)] A foreign exchange student who has waived in writing his or her intention to receive a Texas high school diploma may be excused from the assessment [testing] requirement as specified in the TEC, Chapter 39, Subchapter B.

§101.7. Testing Requirements for Graduation.

(a) To be eligible to receive a high school diploma, a student must demonstrate satisfactory performance as determined by the commissioner of education [State Board of Education (SBOE)] on the assessments required for graduation as specified in the Texas Education Code (TEC), Chapter 39, Subchapter B.

(1) To fulfill the testing requirements for graduation, a student must be tested by either a Texas school district, Texas education service center, open-enrollment charter school, the Texas Education Agency (TEA), or other individual or organization designated by the commissioner of education.

(2) On the tests required for graduation, a student shall not be required to demonstrate performance at a standard higher than the one in effect when he or she was first eligible to take the test.

(b) Beginning with the 2003-2004 school year, students who were enrolled in Grade 8 or a lower grade on January 1, 2001, must fulfill testing requirements for graduation with the Grade 11 exit level tests, as specified in the TEC, §39.023(c), as that section existed before amendment by Senate Bill 1031, 80th Texas Legislature, 2007.

(c) A student receiving special education services under the TEC, Chapter 29, Subchapter A, who successfully completes the requirements of his or her individualized education program (IEP) shall receive a high school diploma.

(d) According to procedures specified in the applicable test administration materials, an eligible student or out-of-school individual who has not met graduation requirements may retest on a schedule determined by the commissioner of education.

§101.9. Grade Advancement Requirements.

Each school district and charter school shall test eligible students in accordance with [to] the grade advancement requirements as specified in the Texas Education Code (TEC), §28.0211(a). These requirements pertain to [the reading test at Grade 3, beginning in the 2002-2003 school year;] the reading and mathematics assessments [tests] at Grade 5 and Grade 8 [, beginning in the 2004-2005 school year, and the reading and mathematics tests at Grade 8, beginning in the 2007-2008 school year].

(1) The Texas Education Agency [(TEA)] shall provide three opportunities for the assessments [tests] required for grade advancement as specified in the TEC, §28.0211(b). The commissioner of education shall specify the dates of these administrations in the assessment calendar.

(2) A school district or charter school shall provide accelerated instruction for students who fail to demonstrate satisfactory performance as specified in the TEC, §28.0211(a-1) and (c) [§28.0211(c)].

(3) The commissioner of education shall approve the assessments for local use by school districts or charter schools as provided under the TEC, §28.0211(b).

§101.11. Remediation.

(a) Each school district and charter school shall provide remediation for students in the third, fourth, fifth, sixth, seventh, or eighth grade who fail to demonstrate satisfactory performance on any section of the assessments of academic skills, as required by the Texas Education Code (TEC), §28.0211(a-1) and (a-2) and §28.0213.

(b) As authorized under [In compliance with] the TEC, §39.0241(c) [§39.024(c)], the Texas Education Agency may [(TEA) shall] develop summer remediation study guides to help parents in providing assistance to students who do not perform satisfactorily on one or more parts of the assessments of academic skills specified in the TEC, §39.023(a) and (c). [The TEA shall distribute these study guides as required to school districts and charter schools.] Each school district and charter school shall make available any [distribute the] summer remediation study guides in the manner most effective for them, and shall observe the requirements for maintaining confidentiality of student assessment [testing] results. [Each student who does not perform satisfactorily on one or more subject-area tests shall receive a remediation study guide.]

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

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Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
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For further information, please call: (512) 475-1497

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SUBCHAPTER B. DEVELOPMENT AND ADMINISTRATION OF TESTS

19 TAC §101.23

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

The repeal is proposed under the Texas Education Code, §39.0241(a), which authorizes the commissioner of education to determine the level of performance considered to be satisfactory on assessment instruments.

The repeal implements the Texas Education Code, §39.0241(a).

§101.23. Performance Standards.

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

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Cristina De La Fuente-Valadez
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Texas Education Agency
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19 TAC §101.31, §101.33

The amendments are proposed under the Texas Education Code, Chapter 39, Subchapter B, which authorizes the State Board of Education to adopt rules to create and implement a statewide assessment program.

The amendments implement the Texas Education Code, Chapter 39, Subchapter B.

§101.31. Private Schools.

(a) A private school administering the assessments [~~tests~~] under the Texas Education Code (TEC), Chapter 39, Subchapter B, shall follow procedures specified in the applicable test administration materials. Each private school shall maintain test security and confidentiality as delineated in the TEC, §39.030.

(b) A private school administering the assessments [~~tests~~] under the TEC, Chapter 39, Subchapter B, shall reimburse the Texas Education Agency for each assessment [~~test~~] administered. The per-student cost may not exceed the cost of administering the same assessment [~~test~~] to a student enrolled in a school district.

(c) A private school administering the assessments [~~tests~~] under the TEC, Chapter 39, Subchapter B, shall provide to the commissioner of education, as required by law and determined appropriate by the commissioner, academic excellence indicator information described in the TEC, §39.053(c) and 39.301(c) [~~§39.051(b)~~]. For indicator information defined and collected through the Public Education Information Management System (PEIMS), private schools shall follow the PEIMS Data Standards.

§101.33. Release of Tests.

Beginning in 2009 with the 2008-2009 school year and each subsequent third school year, the Texas Education Agency shall release all test items and answer keys only for primary administration [~~each~~] assessment instruments [~~instrument~~] administered under the Texas Education Code, §39.023(a), (b), (c), (d), and (l). In the nonrelease [~~non-release~~] years, a set of representative field test items that are at least four years old and that are no longer eligible for inclusion on a subsequent test form will be released.

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

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Cristina De La Fuente-Valadez
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CHAPTER 105. FOUNDATION SCHOOL PROGRAM
SUBCHAPTER B. USE OF STATE FUNDS

19 TAC §105.11

The State Board of Education (SBOE) proposes an amendment to §105.11, concerning the Foundation School Program (FSP). The section prescribes the maximum allowable indirect cost for school district use of FSP funds. The proposed amendment would update the rule to reflect a change to the use of special program allotments for indirect or administrative expenses, in accordance with House Bill (HB) 3646, 81st Texas Legislature, 2009.

Through 19 TAC §105.11, the SBOE establishes the maximum percentage of FSP special allotments under the Texas Education Code (TEC), Chapter 42, Subchapter C, that school districts may expend for indirect costs for specific programs. Currently, no more than 15% of FSP special allotments can be expended on indirect costs related to the following programs: compensatory education, gifted and talented education, bilingual education and special language programs, and special education. The rule also limits the maximum indirect cost for career and technical education to no more than 10%, as authorized by the General Appropriations Act, Rider 74, 78th Texas Legislature, 2003. In addition, the rule specifies the expenditure function codes to which the indirect costs may be attributed, as defined in the Texas Education Agency publication, *Financial Accountability System Resource Guide.*

HB 3646, 81st Texas Legislature, 2009, amended the TEC, §42.152(c), to provide that up to 45%, rather than 15%, may be expended from FSP special allotments for indirect costs. HB 3646 also added the TEC, §42.1541, directing the SBOE to by rule increase the indirect cost allotments established for special education, compensatory education, bilingual education, and career and technical education programs. HB 3646 directs the SBOE to take action not later than the date that permits the increased indirect cost allotments to apply beginning with the 2009-2010 school year.

The proposed amendment to 19 TAC §105.11 would increase the percent allowances for indirect costs for the FSP special allotments under the TEC, Chapter 42, Subchapter C, to no more than 45% for the compensatory education program and no more than 35% for gifted and talented education, bilingual education, career and technical education, and special education programs, in accordance with the TEC, §42.152(c) and §42.1541.

The proposed amendment would have no new procedural and reporting requirements. The proposed amendment would have no new locally maintained paperwork requirements.

Laura Taylor, associate commissioner for accreditation, has determined that for the first five-year period the amendment is in effect there will be no additional costs for state or local government as a result of enforcing or administering the amendment. The proposed amendment would allow schools to real-

locate their special revenue funds with a different indirect cost rate. The change does not increase or decrease the amount of funds available to the schools.

Ms. Taylor has determined that for each year of the first five years the amendment is in effect the public benefit anticipated as a result of enforcing the amendment would be the implementation of the statutory change related to the use of state funds for special program allotments. There is no anticipated economic cost to persons who are required to comply with the proposed amendment.

In addition, there is no direct adverse economic impact for small businesses and microbusinesses; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

Comments on the proposal may be submitted to Cristina De La Fuente-Valadez, Policy Coordination Division, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701, (512) 475-1497. Comments may also be submitted electronically to *rules@tea.state.tx.us* or faxed to (512) 463-0028. A request for a public hearing on the proposed amendment submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 15 calendar days after notice of the proposal has been published in the *Texas Register.*

The amendment is proposed under the Texas Education Code, §§42.151(h), 42.152(c), 42.153(b), 42.154(c), and 42.156(b), which authorize the SBOE to establish rules relating to funding allocations for special education, compensatory education, bilingual education, career and technology education, and gifted and talented education. In addition, the Texas Education Code, §42.1541, authorizes the SBOE to by rule increase the indirect cost allotments established for special education, compensatory education, bilingual education, and career and technical education programs.

The amendment implements the Texas Education Code, §§42.151(h), 42.152(c), 42.153(b), 42.154(c), 42.1541, and 42.156(b).

§105.11. Maximum Allowable Indirect Cost.

No more than 45% [~~15%~~] of each school district's Foundation School Program (FSP) special allotments under the Texas Education Code, Chapter 42, Subchapter C, may be expended for indirect costs related to the compensatory education program. No more than 35% of each school district's FSP special allotments under the Texas Education Code, Chapter 42, Subchapter C, may be expended for indirect costs related to the following programs: [~~compensatory education,~~] gifted and talented education, bilingual education [~~and special language programs~~], career and technical education, and special education. [~~No more than 10% of each district's FSP special allotments may be expended for indirect costs related to career and technology education programs.~~] Indirect costs may be attributed to the following expenditure function codes: 34--Student Transportation; 41--General Administration; 81--Facilities Acquisition and Construction; and the Function 90 series of the general fund, as defined in the Texas Education Agency publication [~~bulletin~~], Financial Accountability System Resource Guide.

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

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Cristina De La Fuente-Valadez
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Texas Education Agency
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CHAPTER 129. STUDENT ATTENDANCE
SUBCHAPTER AA. COMMISSIONER'S RULES

19 TAC §129.1027

The Texas Education Agency proposes an amendment to §129.1027, concerning the optional flexible school day program (OFSDP). The section establishes provisions for administering the program. The proposed amendment would update the current rule to reflect statutory changes resulting from the 81st Texas Legislature, 2009.

The Texas Education Code (TEC), §29.0822, authorizes the commissioner of education to adopt rules for the administration of OFSDPs provided by school districts and open-enrollment charter schools for certain eligible students. Through 19 TAC §129.1027, Optional Flexible School Day Program, adopted to be effective July 4, 2007, and amended to be effective October 23, 2008, the commissioner exercised rulemaking authority, specifying in rule OFSDP general provisions, definitions, student eligibility, application requirements, attendance and funding criteria, program operation requirements, and review and evaluation provisions, as well as circumstances under which OFSDP authorization would be revoked or denied.

House Bill (HB) 1297 and HB 3646, 81st Texas Legislature, 2009, amended the TEC, §29.0822, to increase the number of students eligible for participation in OFSDPs. Specifically, the changes removed language limiting program participation to students in Grades 9-12 and added a criterion for student eligibility to allow students who would be denied credit for one or more classes as a result of attendance requirements to be eligible for participation.

To implement statutory changes, the proposed amendment to 19 TAC §129.1027 would remove references to Grades 9-12 and expand eligibility to include students who would be denied credit as a result of attendance requirements. The proposed amendment would also delete the definition for school year; cross reference 19 TAC §97.1051, Definitions, for the description of innovative redesign; specify the maximum allowable attendance for funding purposes; and update references to TEC sections that were renumbered by HB 3, 81st Texas Legislature, 2009.

Additional changes relating to formatting and word usage would also be made.

School districts and open-enrollment charter schools would be required to report annually through the Public Education Information Management System which students participating in an OFSDP were participating to recover credits that they would otherwise be denied as a result of attendance requirements under the TEC, §25.092. Any locally maintained paperwork requirements resulting from the proposed amendment would cor-

respond with and support the stated procedural and reporting implications.

Shirley Beaulieu, associate commissioner for finance/chief financial officer, has determined that for the first five-year period the amendment is in effect there will be no additional costs for state or local government as a result of enforcing or administering the amendment.

Ms. Beaulieu has determined that for each year of the first five years the amendment is in effect the public benefit anticipated as a result of enforcing the amendment would be the incorporation of recent statutory changes that increase opportunity for students to participate in the OFSDP. There is no anticipated economic cost to persons who are required to comply with the proposed amendment.

There is no direct adverse economic impact for small businesses and microbusinesses; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

The public comment period on the proposal begins October 9, 2009, and ends November 9, 2009. Comments on the proposal may be submitted to Cristina De La Fuente-Valadez, Policy Coordination Division, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701, (512) 475-1497. Comments may also be submitted electronically to *rules@tea.state.tx.us* or faxed to (512) 463-0028. A request for a public hearing on the proposal submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 15 calendar days after notice of the proposal has been published in the *Texas Register* on October 9, 2009.

The amendment is proposed under the TEC, §29.0822, which authorizes the commissioner of education to adopt rules for the administration of the OFSDP.

The amendment implements the Texas Education Code, §29.0822.

§129.1027. Optional Flexible School Day Program.

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

(1) Campus--For the purposes of this section, a campus is an organization that provides instructional services to students [~~in Grades 9-12~~], maintains a separate budget, and has an administrator whose primary duty is the full-time administration of the campus.

(2) Instructional contact hours--For the purposes of this section, instructional contact hours are the hours spent learning the curriculum under the direct supervision of an educator meeting the qualifications of the State Board for Educator Certification or the employing charter school.

(3) Optional Flexible School Day Program (OFSDP)--An OFSDP is a program authorized [~~Authorized~~] under the Texas Education Code (TEC), §29.0822, that is [~~a program~~] approved by the commissioner [~~of education~~] to provide flexible hours and days of attendance for eligible students [~~in Grades 9-12~~], as defined in subsection (b) of this section.

(4) School district--For the purposes of this section, the definition of a school district includes an open-enrollment charter school.

(5) School district board of trustees--For the purposes of this section, the definition of a school district board of trustees includes a charter holder board.

[~~(6) School year--For funding purposes, a school year cannot exceed 1,080 instructional hours in a 12-month consecutive period as adopted by the school district board of trustees.~~]

(b) Student eligibility. A student is eligible to participate in an OFSDP if:

(1) the student [~~is enrolled in Grade 9, 10, 11, or 12 and at least one of the following conditions is satisfied~~]:

(A) [~~the student~~] is at risk of dropping out of school, as defined by the TEC, §29.081;

(B) [~~the student~~] is attending a campus implementing an innovative redesign, as described by §97.1051(7)(B) of this title (relating to Definitions) [~~defined by the TEC, §39.132~~]; [~~or~~]

(C) [~~the student~~] is attending an approved early college high school program, as defined by the TEC, §29.908; or [~~and~~]

(D) as a result of attendance requirements under the TEC, §25.092, will be denied credit for one or more classes in which the student has been enrolled; and

(2) either:

(A) the student and the student's parent, or person standing in parental relation to the student, agree in writing to the student's participation if the student is less than 18 years of age and not emancipated by marriage or court order; or

(B) the student agrees in writing to participate if the student is 18 years of age or older or has otherwise attained legal status as an adult by reason of marriage or court order.

(c) Application to operate an OFSDP. Any school district may apply for authorization to operate an OFSDP.

(1) The Texas Education Agency (TEA) shall make available to each eligible school district an application form for initial approval or renewal that must be completed and submitted annually to the TEA for approval.

(2) The board of trustees of a school district must approve the application. The board of trustees of a school district must include the OFSDP as an item on a regular agenda for a board meeting providing options for public input concerning the proposed application before applying to operate an OFSDP.

(3) A school district must submit an application in accordance with instructions provided by the TEA.

(4) As part of the application process, a school district shall include the following information: [~~implementation plan description, staff plans, schedules, and student attendance accounting security procedures and documentation.~~]

(A) implementation plan description;

(B) staff plans;

(C) schedules; and

(D) student attendance accounting security procedures and documentation.

(5) The school district must have submitted the required annual audit report for the immediate prior fiscal year to the TEA division responsible for financial audits. The annual audit must be determined by the TEA to be in compliance with applicable audit standards.

(6) The commissioner may consider academic and financial performance at a campus or a district when reviewing application qualifications.

(7) The TEA may defer or reject an application based on pending or final audit of data submitted, irregularities in assessment administration, accreditation status, accountability ratings, or interventions or sanctions under the TEC, Chapter 39.

(8) The TEA may grant or reject an entire application or grant or reject any campus submitted on an application.

(9) The TEA will notify each applicant of its approval or nonapproval to operate an OFSDP.

(10) The school district must receive notice of approval to continue or begin participation in the program.

(d) Attendance. A school district must report student OFSDP attendance in a manner provided by the TEA in the Student Attendance Accounting Handbook adopted under §129.1025 of this title (relating to Adoption By Reference: Student Attendance Accounting Handbook). Funding for attendance in an OFSDP is proportionate to attendance in a full-time program meeting the requirements of the TEC, §25.081 and §25.082.

(e) Funding under the TEC, Chapters 41, 42, and 46. Attendance in an OFSDP that is not authorized or does not meet the requirements of the TEC, §29.0822, or this section is not eligible for state funding. For funding purposes, attendance for a student for a 12-consecutive-month school year cannot exceed the equivalent of one student in average daily attendance with perfect attendance.

(f) Extracurricular participation. A student enrolled in an OFSDP may participate in a competition or activity sanctioned by the University Interscholastic League (UIL) only if the student meets all UIL eligibility criteria.

(g) Conditions of program operation. A school district and campus operating an OFSDP must comply with all assurances in the program application. Approved OFSDPs will be required to submit annually one progress report on a form to be provided by the TEA and signed by the district superintendent or executive officer. The data in the progress reports must be disaggregated by ethnicity, age, gender, and socioeconomic status. Approved OFSDPs will submit data as stated in the assurances section of the program application.

(1) A school district with a campus operating an OFSDP must reapply annually to continue to operate an OFSDP to verify that student eligibility requirements specified in subsection (b) of this section are met.

(2) A student participating in an OFSDP must take all assessment instruments as defined by the TEC, §39.023, during the regularly scheduled administration periods.

(3) A school district operating an OFSDP must conduct audits every other year of the OFSDP student attendance processes, procedures, and data quality to maintain eligibility for the program. Audits may be conducted by an internal auditor, external auditor, or an authorized school district administrator responsible for student attendance accounting.

(4) The commissioner may consider academic performance and student attendance accounting documentation and procedures to continue district or campus eligibility for the OFSDP.

(h) School district annual performance review.

(1) Annually, each school district shall review its progress in relation to the performance indicators required by this subsection. Progress should be assessed based on information that is disaggregated with respect to race, ethnicity, gender, and socioeconomic status.

(A) A school district must include high school graduation as one of the performance indicators for students participating in the OFSDP.

(B) A school district operating an OFSDP for a campus will select and report student performance indicators appropriate to the population being served. The selected performance indicators must measure student achievement on an annual basis.

(2) At an open meeting of the board of trustees, a school district shall establish and review annual performance goals for the OFSDP related to performance indicators appropriate to the program, as established in paragraph (1) of this subsection and approved by the TEA.

(3) A school district shall ensure that decisions on the continuation of the OFSDP are based on state student assessment results and other student performance data.

(i) Evaluation of programs.

(1) The TEA shall evaluate the OFSDP based on performance indicators established in subsection (h) of this section.

(2) In addition to the evaluation on the indicators identified in subsection (h) of this section, a school district shall be evaluated based on student assessment administration and student attendance accounting processes and procedures.

(j) Revocation of or denial to renew authorization to operate an OFSDP.

(1) The commissioner may revoke authorization or deny renewal of an OFSDP based on the following factors:

(A) noncompliance with application assurances and/or the provisions of this section;

(B) failure to keep timely and accurate audit and attendance accounting records;

(C) failure to maintain student eligibility requirements specified in subsection (b) of this section if one of these designations was used as an eligibility criteria for OFSDP;

(D) lack of program success as evidenced by progress reports or program data; or

(E) failure to provide accurate, timely, and complete information as required by the TEA to evaluate the effectiveness of the OFSDP.

(2) A revocation or nonrenewal of an approved OFSDP takes effect for the semester immediately following the date on which the revocation or nonrenewal is issued unless another date is determined by the commissioner.

(3) An OFSDP is entitled to a ten-day notice of the proposed revocation or nonrenewal and an informal review by the commissioner's designee.

(4) A decision by the commissioner to revoke the authorization or deny renewal of an OFSDP is final and may not be appealed.

(5) The OFSDP is a state program subject to a special accreditation investigation [~~that may be monitored by an on-site visit~~] under the TEC, Chapter 39 [~~§39.075~~]. Student attendance accounting records are subject to audit under §129.21 of this title (relating to Requirements for Student Attendance Accounting for State Funding Purposes). The commissioner may impose interventions and sanctions on

a school district under the TEC, Chapter 39 [~~§39.131~~], for failure to comply with the OFSDP requirements of this section.

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

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

PART 3. TEXAS BOARD OF CHIROPRACTIC EXAMINERS

CHAPTER 73. LICENSES AND RENEWALS

22 TAC §73.7

The Texas Board of Chiropractic Examiners (Board) proposes an amendment to §73.7, Approved Continuing Education Courses, to remove a reference to the specific fee amount for submittal of an application for board approval of a continuing education course. The specific amounts for all board fees are listed in §75.7, Required Fees and Charges.

Glenn Parker, Executive Director, has determined that for each year of the first five years that this amended rule is in effect there will be no additional cost to state or local governments.

Mr. Parker has also determined that for each year of the first five years that this amended rule is in effect the public benefit will be that §73.7 will not need to be amended should the board change the fee for submittal of an application for approval of a continuing education course. Mr. Parker has also determined that there will be no adverse economic effect to individuals, small or micro businesses during the first five years that this amended rule will be in effect as this rule imposes no burdens.

Comments on the proposed amendment to §73.7 and/or a request for a public hearing on the proposed rule amendment may be submitted to Glenn Parker, Executive Director, Texas State Board of Chiropractic Examiners, 333 Guadalupe St., Tower III, Suite 825, Austin, TX 78701, (512) 305-6705 fax, no later than 30 days from the date that this proposed amendment is published in the *Texas Register*.

The rule amendment is proposed under Texas Occupations Code §201.152, relating to rules and §201.356 relating to continuing education. Section 201.152 authorizes the Board to adopt rules necessary to regulate the practice of chiropractic; §201.356 requires the board to adopt rules concerning continuing education.

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

§73.7. Approved Continuing Education Courses.

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

(c) Application deadline and fee. A sponsor may submit an application no later than 60 days prior to the date of the course, along with a nonrefundable application fee as set by the board [~~of $25~~] for each course. For the purpose of this subsection, where the same course is held in multiple cities or towns, with different speakers, each location is considered a separate course. If a continuing education program consists of separate sessions or modules, on different topics and on different dates, each session or module is considered a separate course.

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

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

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Glenn Parker
Executive Director
Texas Board of Chiropractic Examiners
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For further information, please call: (512) 305-6901

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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 101. GENERAL AIR QUALITY RULES

The Texas Commission on Environmental Quality (commission or TCEQ) proposes amendments to §§101.1, 101.390 - 101.394, 101.396, and 101.399 - 101.401.

The proposed sections will be submitted to the United States Environmental Protection Agency (EPA) as revisions to the state implementation plan (SIP).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

The Houston-Galveston-Brazoria (HGB) metropolitan area was designated nonattainment for the 1997 eight-hour ozone National Ambient Air Quality Standard (NAAQS) as a moderate area effective June 15, 2004. In October 2008, the HGB area was reclassified as a severe ozone nonattainment area by the EPA as requested by the governor of Texas. The HGB area is required to attain the 1997 eight-hour ozone standard of 0.08 parts per million as expeditiously as practicable, but no later than by June 15, 2019. The EPA requires submittal of the HGB Attainment Demonstration SIP Revision for the 1997 Eight-Hour Ozone Standard by April 15, 2010. This rulemaking would be submitted as part of the HGB Attainment Demonstration SIP Revision for the 1997 Eight-Hour Ozone Standard.

Photochemical modeling analysis demonstrates that a 25% reduction of the Highly Reactive Volatile Organic Compound (HRVOC) cap in Harris County would contribute to attainment of the 1997 eight-hour ozone NAAQS by reducing the future 2018 ozone design values for all HGB area monitors. The largest reductions are projected at the Deer Park monitoring site, which is the area's driving design value monitor.

In addition, some regulated entities participating in the HRVOC Emissions Cap and Trade (HECT) program have commented that the initial allocation of HRVOC allowances was not equitably distributed. The existing allocation methodology is based on the total amount, in pounds, of HRVOC produced as an intermediate, byproduct, or final product, or used by a process unit at each participating site. Subsequent analysis of the HRVOC emissions data reported under the HECT program for the 2007 and 2008 calendar-year control periods supports the assertion that some industry sectors may have been over-allocated while others may have received an insufficient allocation. Revisions to the rule are designed to result in a more equitable approach while establishing HRVOC limitations in support of HGB's attainment of the NAAQS as expeditiously as practicable.

As part of the December 2004 HGB SIP mid-course review for the one-hour ozone standard, the commission developed a dual approach to achieve the necessary HRVOC reductions: address variable short-term emissions through a not-to-exceed hourly emission limit and address steady-state and routine emissions through an annual cap. The annual HRVOC cap reduced the overall reactivity in the airshed by removing the compounds that are most prevalent and most likely to react rapidly enough to cause one-hour ozone exceedances.

For Harris County, the annual HRVOC cap was distributed and enforced through the HECT program under 30 TAC Chapter 101, Subchapter H, Division 6. This program established a mandatory annual HRVOC emissions cap on all sites subject to the HRVOC control requirements of 30 TAC Chapter 115, Subchapter H, Division 1 or Division 2, and having a potential to emit greater than ten tons per year (tpy). The cap is enforced through the allocation, trading, and banking of allowances. An allowance is the equivalent of one ton of HRVOC emissions. This HRVOC cap, initially implemented on January 1, 2007, was established at a level demonstrated as necessary to allow the HGB area to attain the one-hour ozone standard along with a 5% reduction to safeguard against potential emissions variations. The HECT program also requires subject sites with new or modified HRVOC sources to obtain unused allowances for any increased HRVOC emissions from other sites already participating in the program. For sites that have the potential to emit ten tpy or less of HRVOC from sources subject to the HRVOC control requirements of Chapter 115, Subchapter H, Divisions 1 or 2, the total, aggregate HRVOC emissions from those sources is limited to ten tpy. Sites exempt from the HECT program were extended an opportunity to opt-in, receive an HRVOC allocation, and thereby not be restricted to the ten tpy limit.

Proposed revisions to the HECT program under this rulemaking would reduce the total HECT cap by 25% by the attainment year and revise the HRVOC allocation methodology to address inequities from the initial allocation. Photochemical modeling analysis demonstrates that a 25% reduction of the total HRVOC cap in Harris County would advance attainment of the 1997 eight-hour ozone NAAQS by reducing the future 2018 ozone design values at all HGB monitors. The largest decrease in the projected design value, 0.24 parts per billion (ppb), was at the Deer Park monitor. The average decrease for all sites was 0.11 ppb.

HRVOC monitoring data reported for 2006 - 2008 indicates that the total actual emissions from sources in the HECT program have been approximately 50% of the total current HRVOC cap. Because the HRVOC rules in Chapter 115, Subchapter H, Divisions 1 and 2, require emissions from maintenance, startup, and shutdown activities and emissions events be included in the HECT program, the total surplus observed in the two years that the program has been active cannot be removed. Therefore, a buffer in the cap is still needed to account for the inherent variability of HRVOC emissions associated with these activities.

The proposed rule would implement an initial 10% reduction on the existing available cap of 3,451.5 tons beginning with the 2014 calendar-year control period. The available cap would then be reduced in a "stepdown" fashion, similar to the existing Mass Emissions Cap and Trade Program (MECT) for Nitrogen Oxide, in 5% increments at the start of each calendar-year control period for 2015, 2016, and 2017. Therefore, the full 25% cap reduction will have been in effect for one full calendar-year control period by January 1, 2018. While historical data demonstrates an overall surplus in the HRVOC cap, the cap reduction and reallocation may require some individual sites to install additional controls. The commission is therefore proposing this stepdown approach to allow companies time to install controls if necessary.

Following the initial allocation of allowances, companies participating in the HECT program commented that the allocation was not equitably distributed. Emissions reported by industry based on their HRVOC monitoring data supports the assertion of an inequitable distribution of allowances. In addition, HECT program participants commented that certain HRVOC-emitting industry sectors were more adversely affected under the existing allocation methodology due to different HRVOC emission rates associated with production throughput. Facilities that use HRVOC as a raw material in the production of olefins have higher HRVOC emissions associated with their process as compared to other chemical manufactures and refineries. Therefore, under the existing HECT program, sites in the refinery and non-polymer chemical sectors generally have the largest excess HRVOC allowances as compared to actual emissions. HECT program participants also commented on the reluctance of sites to trade due to the inclusion of emissions events in determining compliance with the program and the risk of trading away allowances that may be needed for compliance due to an emission event later in the calendar-year control period. The commission proposes to reallocate HRVOC allowances under the HECT program based on actual emissions data and implement several significant program changes to encourage market activity through trading.

The existing HECT allocation methodology is a level of activity production-based calculation of the total amount of HRVOC, in pounds, produced or used by a process unit. This production-based methodology was developed prior to the implementation of monitoring requirements for applicable sources of HRVOC in Harris County. HECT program participants have been reporting actual monitored emissions data to the HECT program since 2006.

The rule revision proposes a new allocation methodology based on actual emissions data with the goals of fairly and equitably distributing the compliance burden for HECT program participants, applying credit for controlling and reducing HRVOC emissions, and not rewarding or encouraging emissions from emissions events. Cap and trade programs aim to provide economic incentives for reducing emissions through controls by allowing excess allowances to be sold to other program participants. However, an allocation methodology based solely on actual emissions has the potential of penalizing sites that are well controlled and/or rewarding sites that are not well controlled. To allow for applicable sites to establish a representative baseline emission period, the proposal would allow sites to use

their two highest consecutive calendar-year control periods out of the four years from 2006 - 2009.

The proposed rulemaking includes a provision for HECT participants that qualify to have the ability to request from the executive director the use of an alternate baseline period from 2004 and 2005 for the purpose of establishing baseline emissions. The owner or operator of a site must submit a request to the executive director by July 1, 2010, demonstrating that they were performing speciated testing and continuous flow monitoring of HRVOC emissions during the requested alternative baseline period. This provision is available for participants with substantial HRVOC reductions. In addition, the emission reductions must be permanent, voluntary, and quantifiable of an amount equal to or greater than 50% of the site's total annual HRVOC emissions or a site-wide reduction in HRVOC emissions subject to the HECT program of 50 tons or greater. The emissions reductions must also have been made enforceable under an action submitted to the executive director no later then April 1, 2010.

Additionally, an owner or operator of qualifying sites not in operation during the baseline emissions period may request to retain their current allocation until an alternate baseline period is established. Beginning with the 2014 calendar-year control period, all sites under the HECT program will receive an allocation in accordance with the proposed allocation methodology.

Allocations would then be distributed based on the new allocation methodology beginning with the 2011 calendar-year control period. Baseline emissions for the purpose of calculating the site allocations would be the average of the actual emissions for the two consecutive calendar-year control periods as submitted in the Form ECT-6H, Highly-Reactive Volatile Organic Compound Emissions Cap and Trade Baseline Emissions Certification Form.

Recent economic conditions have prompted concerns from industry that the 2006 - 2009 years proposed for establishing baseline emissions activity may not be representative of general production and emission rates due to the recent economic downturn. However, the proposed reallocation methodology is based on the percentage of individual site emissions contributing to the total industry sector emissions and the fraction that each industry sector's emissions make up toward the total of all HRVOC emissions in the county. Therefore, the proposed allocation of allowances for any individual site would not be significantly affected by general changes in economic conditions. An individual site's allocations would only be changed if their uncontrolled emissions significantly increased as a proportion of the total industry sector emissions. The commission is seeking comment on the proposal for establishing baseline emissions, including choosing the two highest consecutive calendar-year control periods from the four-year period 2006 - 2009.

The proposed reallocation methodology would be based on calculating "uncontrolled" or "precontrolled" emissions for facilities using reported control efficiencies based on the specifications for flares in 30 TAC §115.725(d). Dividing actual emissions by one minus the percent control efficiency calculates the amount of emissions before controls, therefore allowing sites, who have controlled their HRVOC emissions from flares well, to receive credit for these reductions in the allocation. In addition, heaters, boilers, and furnaces combusting HRVOC streams would calculate "uncontrolled" emissions by dividing actual emissions by one minus a control efficiency of 99%. By allowing these facilities to claim a control efficiency of 99%, the methodology recognizes that the average percent control efficiency from these types of combustion units provides better combustion and control efficiency than flares due to their closed combustion design and higher flame temperatures. Other facilities subject to Chapter 115, Subchapter H, Divisions 1 and 2, and the HECT program will be included in the equation for calculating uncontrolled emissions, however because they do not have a specified control efficiency under Chapter 115, their uncontrolled emissions will be equal to their actual emissions. This methodology cannot account for flare-gas recovery, recycle streams, or other processes resulting in differing emission control rates. Therefore, the commission is considering rule provisions to award credit for well controlled facilities that have installed flare minimization programs, flare gas recovery systems, HRVOC stream recycling and/or recirculation. The commission is seeking comment on suitable methodologies for awarding allowance credit for well controlled facilities during reallocation.

The proposed reallocation methodology also creates four industry-type sector pools to account for different HRVOC emission rates associated with the processes of the industry sectors with HRVOC emissions in Harris County. These industry sector definitions reflect those used in existing regulations and are readily defined by process type and product. The existing application of Best Available Control Technology (BACT) and other federal standards within industry sectors would assure a comparable cost of control within the industry sector, and the division of the cap into industry sector share would therefore reflect a more equitable allocation methodology. In addition, the amount of HRVOC product that is recycled and recovered for sites within the same industry sector should be comparable due to market forces and competition within the sector. Sites within industry sectors that produce HRVOC as product share the economic incentive to reduce emissions using similar recovery techniques.

The four industry sectors proposed are petroleum refining, nonpolymer chemical producers, polymer producers, and storage/loading/other. The proposed methodology then calculates each sector's share of the available cap by dividing the total amount of actual average emissions over the emissions baseline period for the sector by the total available cap. The resulting fraction expressed as a percentage becomes the industry sector share. Applying this sector share to the individual site allocation equation creates a methodology in which only facilities within the individual industry sectors compete with one another for allowances. Some sites contain facilities from two or more industry sectors, and these sites would be separated by the various facility process-type into "sub-sites" that would be included in the respective industry sectors, with emissions and allocations for the industry sector and site calculated accordingly.

To address the reluctance of sites to trade HECT allowances in order to reserve their allowances to cover emissions from emissions events under the current HECT program, the proposed reallocation methodology would create an emissions event set-aside pool. This set-aside would come out of the available cap before allocation. The total HRVOC cap would therefore not be increased. The proposed emissions event set-aside amount of 250 tons is intended to exceed the anticipated HRVOC emissions from emissions events during any calendar-year control period. This amount is based on records of emissions events from the 2006 Special Inventory, 223 tons, and those associated with Hurricane Ike, 196 tons. HECT participating sites would still be held accountable for emissions events under the existing Chapter 101 regulations. The regulated community is under continuous pressure to prevent and control emissions events and there is a strong enforcement action mechanism in place to

discourage excessive emissions events. The use of allowances from the set-aside by the agency to cover emissions from emissions events from a site would not in any way alleviate or replace the site's compliance burden with other Chapter 101 and Chapter 115 regulations for emissions events.

The 250 ton emissions event set-aside would be solely dedicated to covering emissions from emissions events for all sites under the HECT program. Allowances from the set-aside would not be distributed to any individual site on any basis, and any remaining allowances from the emissions event set-aside would not be available for sale or use as vintage allowances after each control period. Emissions from emissions events at individual sites would not be included in the calculation to determine the annual operating emissions for HECT account compliance until total emissions from emissions events in the county have exceeded the 250 ton set aside amount during any control period. Emissions from reportable emissions events, as defined under §101.1(87), in Harris County during each calendar-year control period would be counted toward the set-aside in reported chronological order to the State of Texas Environmental Electronic Reporting System (STEERS) until the end of each calendar-year control period or until the set-aside amount of 250 tons has been met. Allowances for non-reportable emissions from emissions events will be accounted under the 250 ton set aside on March 31st after each calendar-year control period in order of reported chronology. Emissions from emissions events would be applied toward the 250 ton set-aside in actual pounds per hour of HRVOC emissions and would not be calculated according to the 1,200 pound per hour short-term limit allowed under existing §101.396(b). In the event that the sum total of emissions events in any control period exceeds the 250 ton amount, individual sites would be required to cover any emissions from emissions events in excess of the 250 ton set-aside from their allocation or through the acquisition of allowances on the open market. Therefore, emissions from reportable emissions events would in effect be counted toward the set-aside before emissions from non-reportable emissions events. Using a hypothetical Scenario: during an emergency in Harris County over a period at the end of August, a total of 240 tons of HRVOC were emitted as reportable emissions events from HECT participating sites. During the first week of September, an individual site had a one ton non-reportable emission event and a second site had a nine ton reportable emission event. The 249 tons of emissions from reportable emissions events would be counted toward the 250 ton set-aside when reported to STEERS two weeks later. The one ton of emissions from the non-reportable emission event would be covered by the set-aside when the site submitted its ECT-1H, Annual Compliance Report, on March 31st of the following year, in the event that there were no other reportable emissions events after the first week in September. These emissions would then be covered by the set-aside. Any and all emissions from emissions events reported as occurring after the 250 ton limit was reached during the first week of September would be required to be covered by allowances from the individual site's compliance account.

In order to allow HECT participants to plan facility operations and HECT program trades and activities, reportable emissions events during the calendar-year control period, reported to STEERS as a final record under §101.201(b), will be counted toward the 250 ton set-aside in chronologically reported order, posted quarterly, and made available to the public and EPA on the emissions banking and trading webpage. The commission is seeking comment and suggested alternatives on the proposed approach for tracking and posting reportable emissions events and the status of emissions covered under the emission event set-aside for the purpose of HECT program planning, including methods to estimate and post non-reportable emissions events during the calendar-year control period.

As part of the reallocation methodology, the commission proposes to increase the minimum allocation from five to ten tons. The current HECT program includes a minimum allocation of five tons for all sites whose product throughput/use level of activity-based allocation was less than or equal to five tons. However, the program also exempts sites with a potential to emit less than ten tons from the program. The original rationale for establishing the minimum allocation lower than the exemption level was to prevent companies with low emissions from "opting-in," and thereby automatically receiving allowances greater than their emissions. Under §101.392(b), any site wishing to opt-in must have requested to participate by April 30, 2005. As there is no longer an opportunity for sites to "opt-in," the reallocation proposal would raise the minimum allocation to ten tons in order to meet the exemption level. Under this proposal, sites with a potential to emit equal to or greater than ten tons that are required to participate in the program, but with average emissions over the baseline period of less than ten tons, would receive a minimum ten ton allocation.

According to the reallocation principals above, including a methodology based on average actual emissions from over the emissions baseline period, calculating "uncontrolled" or "precontrolled" emissions using reported control efficiencies, setting aside 250 tons for emissions events, and raising the minimum allocation to ten tons, the commission proposes a revised reallocation methodology for HRVOC allowances beginning with the 2011 calendar-year control period. The total modeled (future base) cap on HRVOC emissions in Harris County is currently 3,633.1 tons. After deducting the required 5% EPA environmental contribution of 181.65 tons, the total HRVOC cap would be 3,451.4 tons. After then subtracting the 250 ton emissions event set-aside, the commission will allocate 3,201.4 tons to individual sites at the beginning of the 2011 calendar-year control period. The first 10% cap stepdown would occur at the beginning of the 2014 calendar-year control period. The total amount of HRVOC allowances available in 2014 would therefore be 3,106.3 tons. After subtracting the 250 ton emissions event set-aside, the commission will allocate 2,856.3 tons to individual sites in the 2014 calendar-year control period.

The proposed rulemaking would then continue to reduce the cap to a total of 25% in annual 5% reductions from 2015 to 2017. Therefore, the final available cap beginning with the 2017 control period would be 2,338.6 tpy. The 2,338.6 ton value represents the amount modeled in the 2018 future case 25 Percent HECT Cap Reduction sensitivity run of 2,588.6 tons, minus the 250 ton set-aside, as HRVOC allowances. The allocation methodology for each calendar-year control period would be identical to the proposed methodology for 2011.

The commission is also seeking comment on an alternative allocation methodology that would allocate to each site a quantity of allowances equal to their highest emissions over the emissions baseline period plus a flat percentage of the remaining cap. This alternative, a "flat percentage of highest emissions-based" methodology, proposes that each site receive an allocation equal to their highest emissions during any one year of the baseline emissions period from 2006 - 2009, plus an additional amount

of the remaining cap such that each site receives an equal percentage of their highest emissions.

The total highest emissions from HECT program participants during the baseline emissions period is estimated to be approximately 75% of the total cap prior to any reduction in the cap for the eight-hour ozone attainment demonstration. Therefore, this alternative proposes that the remaining 25% then be divided among the sites. This proposed methodology would calculate each site's allocation by multiplying the site's highest emissions by the total available cap divided by the sum of all highest emissions from all sites. Because the total available cap is greater than the sum of all of the sites' highest emissions, each site would therefore receive an allocation greater than 100% of their emissions during their highest emission year.

Consider an example where the total HRVOC cap is 3,500 tons and the sum of all of the site's highest emissions during the baseline emissions period is 3,181.8 tons; dividing the total cap of 3,500 by 3,181.8 equals 1.10 or 110%. Each site's highest emissions is then multiplied by this percentage yielding an allocation for each site of 110% of each site's highest emissions. If a site's highest emissions were 100 tons, then their allocation under this proposal would be equal to 110 tons.

SECTION BY SECTION DISCUSSION

In addition to the proposed amendments to §§101.1, 101.390 - 101.394, 101.396, and 101.399 - 101.401 discussed elsewhere in this preamble, the commission also proposes to make various stylistic non-substantive changes to update rule language to current Texas Register style and format requirements, as well as establish more consistency in the rules. Such changes include appropriate and consistent use of acronyms, punctuation, section references, and certain terms such as "must" and "shall." These changes are non-substantive and generally are not specifically discussed in this preamble.

§101.1, Definitions

Proposed changes to §101.1 would amend the definition of reportable quantity for 1,1,1,2,3,3,3-heptafluoropropane (HFC-227ea) in §101.1(88)(A)(i)(III)(-y-). The commission adopted a reportable quantity of 5,000 pounds for HFC-227ea in 2005 and the adopted rule was published in the December 30, 2005, issue of the *Texas Register* (30 TexReg 8886). However, the reportable quantity value of 5,000 pounds was inadvertently omitted in the version filed with the Secretary of State's Office. The commission is only proposing to correct this omission in §101.1(88)(A)(i)(III)(-y-) and no other changes to the definition of reportable quantity will be addressed in this rulemaking. Additionally, the commission proposes to update the definition of volatile organic compound in §101.1(115) to be consistent with the current definition in the 40 Code of Federal Regulations, §57.100(s) amended on January 21, 2009 (74 FR 3441).

§101.390, Definitions

The commission proposes to revise §101.390(4) and add §101.390(9) to include the definitions of "Baseline emissions period" and "Uncontrolled emissions." "Baseline emissions period" is defined as any two consecutive calendar-year control periods designated by the site for the purpose of establishing baseline emissions for the allocation of allowances. "Uncontrolled emissions" is defined as taking the total emissions calculated over the baseline emissions period for each facility and dividing them by one minus the average percent control efficiency specifications found in Chapter 115. For heaters, boilers, and furnaces combusting HRVOC streams, the definition would provide for these emissions to be calculated as actual average emissions over the baseline emissions period for each facility divided by one minus 99%. The commission also proposes renumbering §101.390.

§101.391, Applicability

The commission proposes deleting the term "covered" and replacing it with "applicable" in describing sites and facilities subject to the rulemaking for rule consistency clarity.

§101.392, Exemptions

The commission proposes deleting the term "covered" and replacing it with "applicable" in describing sites and facilities subject to the rulemaking for rule consistency clarity.

§101.393, General Provisions

The commission proposes deleting the term "covered" and replacing it with "applicable" in describing sites and facilities subject to the rulemaking for rule consistency clarity.

§101.394, Allocation of Allowances

The commission proposes repealing figure located at §101.394(a)(1) and adding a new figure to be located at §101.394(a)(1)(A). In addition, the commission proposes §101.394(a)(1)(B) to revise the reallocation methodology for allowances beginning in the calendar-year control period 2011. The proposed figure located at §101.394(a)(1)(B) provides the equation for calculating the new allocation methodology and for a stepped down reduction in the total cap of allowances. The first reduction is a 10% reduction of the total cap in calendar-year control period 2014, followed by successive 5% reductions per calendar-year control period until the 25% total reduction in the cap is reached in calendar-year control period 2017.

The commission also proposes to add §101.394(a)(1)(C) to allow sites not in operation during the baseline emissions period to use the allocation methodology provided under §101.394(a)(1)(A) until the alternate baseline emissions are established where the site has made HRVOC reductions. Proposed subparagraph (C) allows owners or operators of sites to request from the executive director the ability to retain the allocation received under §101.394(a)(1)(A), provided: that it is less than the HRVOC permit allowable limit and the baseline emissions period for any site qualifying will be any two consecutive calendar-year control periods from 2010 - 2012. However, the owner or operator of the site, should note that beginning with the 2014 calendar-year control period, all sites will receive an allocation in accordance with the proposed methodology under §101.394(a)(1)(B).

The commission also proposes to add §101.394(a)(1)(D) for HECT participants that implemented permanent, voluntary, and quantifiable HRVOC emission reductions and monitoring programs before the beginning of the 2006 calendar-year period. The proposed subparagraph (D) provides the ability to request from the executive director the use of an alternative baseline period from 2004 and 2005 for the purpose of establishing baseline emissions. To qualify for this provision, owners or operators of sites must be able to demonstrate to the executive director that they were performing speciated testing and continuous flow rate monitoring of HRVOC emissions during the requested alternative baseline period. In addition, the emission reductions must be permanent, voluntary, and quantifiable of an amount equal to or greater than 50% of the site's total annual HRVOC

emissions or a site-wide reduction in HRVOC emissions subject to the HECT program of 50 tons or greater. The emissions reductions must also have been made enforceable under an action submitted to the executive director no later then April 1, 2010. This provision would ensure that sites that made early reductions before the proposed baseline emissions period of 2006 - 2009 would receive adequate credit for those early reductions.

The commission proposes to repeal §101.394(c) because it is no longer applicable. The existing §101.394(d) will be relettered as subsection (c). Proposed §101.394(d) would ensure that sites to be allocated less than ten tons of allowances would instead receive a minimum allocation of ten tons of allowances per calendar-year control period. The commission also proposes renumbering §101.394.

§101.396, Allowance Deductions

The commission proposes to add §101.396(c) to differentiate between routine emissions from normal operations and scheduled maintenance, startup, and shutdowns, and emissions from emissions events for the purposes of identifying those emissions to be applied against the 250 ton emission event set-aside. In addition, proposed subsection (d) states that once total emissions from all emissions events in Harris County exceed 250 tons in any one calendar-year control period, emissions from emissions events are to be covered by allowances from each individual site. The commission also proposes renumbering §101.396.

§101.399, Allowance Banking and Trading

The commission proposes to amend §101.399(h)(5) to delete the reference to §101.394(c) because it is no longer applicable. In addition, the commission proposes to add §101.399(e) to prohibit the transfer of allowances allocated to sites under §101.394(a)(1)(C) that have yet to establish a baseline emissions period. The commission also proposes renumbering the remaining subsections in §101.399.

§101.400, Reporting

The commission proposes to add §101.400(a)(4) to require sites to report the total amount and respective dates of HRVOC emissions from emissions events for potential applicability to the emission event set-aside.

§101.401, Level of Activity Certification

The commission proposes to add §101.401(f) and (g). Proposed §101.401(f) will require the Form ECT-6H, Highly-Reactive Volatile Organic Compound Emissions Cap and Trade Baseline Emissions Certification Form, to be submitted no later than April 30, 2010. Proposed §101.401(g) will require sites to select two consecutive calendar-year control periods to establish a baseline emissions period.

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. Other units of state or local governments are not expected to experience any fiscal implications as a result of the proposed rules since they do not participate in the types of activities to which the rules would apply.

The proposed rules would revise Chapter 101, Subchapter H, Division 6 to: 1) propose a 25% reduction in the allowance cap of the total HECT Program and 2) revise the allocation methodology currently used in the program. The proposed 25% reduction in the allowance cap would be phased in with a 10% reduction occurring in calendar-year 2014 and a 5% reduction per year starting calendar-year 2015 - 2017. Currently, the HECT program only applies to Harris County. The proposed rules implement a strategy to reduce HRVOC emissions and assist with the attainment of the 1997 eight-hour ozone NAAQS for the HGB non-attainment area.

Local governments and state agencies in Harris County are not expected to experience any fiscal impacts as a result of the proposed rules since they do not participate in the types of activities that produce HRVOC emissions and do not own allowances. The proposed rule is expected to impact petroleum refineries, non-polymer chemical manufacturers, polymer manufacturers, and petrochemical storage and loading facilities in Harris County.

PUBLIC BENEFITS AND COSTS

Nina Chamness also determined that for each year of the first five years the proposed new rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be increased environmental protection because of a lower allowance cap in Harris County and a more equitable distribution of HRVOC allowances among industry participants in the county.

The proposed rules are not expected to have a fiscal impact on individuals.

The most affected industry sectors are petroleum refining, nonpolymer chemical producers, polymer producers, and storage and loading facilities in Harris County. Agency records show that there could be as many as 28 nonpolymer chemical producers, 11 polymer producers, seven storage and loading facilities, and five refineries that will be subject to the proposed rule starting in calendar-year 2011. Emissions reported for these facilities indicate that actual emissions are lower than total allowances available for trading when the county as a whole is considered. Therefore, the proposed phased in 25% reduction in the HECT allowance cap will have no overall fiscal impact on these industrial groups as a whole if they continue to produce at historic levels. However, if a reallocation of allowances does not occur, some owners of chemical manufacturing and polymer manufacturing facilities would continue to have actual emissions exceed historically allocated allowances. The proposed reallocation of allowances to cover certified actual emission levels could save some nonpolymer chemical producers and polymer producers in Harris County the cost of purchasing allowances or installing controls.

Cost impacts of reallocation cannot be estimated. The costs for controls vary widely depending on product, plant configurations, and equipment. Not having to install a control could save as much as $6,000 to $11.5 million depending on the operations of these manufacturers.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses in Harris County as a result of the proposed rules since these small businesses do not typically own businesses that produce HRVOCs.

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 this proposed rulemaking in light of the regulatory impact analysis requirements of Texas Government Code, §2001.0225, and determined that the proposed rulemaking action meets the definition of a "major environmental rule" as defined in that statute. A "major environmental rule" is a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

The proposed amendments to Chapter 101 and revisions to the SIP would reduce the total cap amount of HRVOC allowances for the HECT program by 25% and revise the allocation methodology for allowances for participants of the HECT program. The HECT program was adopted as a control measure for the HGB one-hour attainment demonstration SIP, and it is currently only applicable in Harris County. Photochemical modeling analysis demonstrates that a 25% reduction of the cap on the total Harris County HRVOC allocation would contribute to attainment of the 1997 eight-hour ozone NAAQS by reducing future ozone design values at all HGB monitors.

Following the initial allocation of allowances, stakeholder comments indicated that the allocation was not equitably distributed. Information from the first three years of monitoring data supports the assertion of an inequitable distribution of allowances. The proposed revisions are necessary to implement a more equitable allocation methodology, while contributing to HGB's attainment of the 1997 eight-hour ozone NAAQS as expeditiously as practicable. The proposed change in allocation methodology will result in allowance reductions for certain facilities, and it is possible facilities that have made significant investments on future HRVOC stream trades may see the value of these investments reduced or nullified. Facilities that have their HRVOC allowances reduced, either through the reallocation or reduction of the total HRVOC cap, may incur costs from the installation of additional controls or having to purchase allowances from other sources if necessary to comply with their lower allowances. If the cap is reduced, the price of HRVOC allowances available in the market may increase.

This rulemaking does not meet any of the four applicability criteria of a "major environmental rule" as defined in the Texas Government Code. Texas Government Code, §2001.0225 applies only to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. Specifically, the proposed amendments will result in a decrease in the HECT program cap, and will adjust the allocation methodology for allowances under the program. The HECT program was adopted as a control measure for the HGB one-hour attainment demonstration SIP, and the proposed changes to the program will contribute to HGB's attainment of the 1997 eight-hour ozone NAAQS as expeditiously as practicable. The rulemaking does not exceed an express requirement of federal or state law or a requirement of a delegation agreement, and was not developed solely under the general powers of the agency, but was specifically developed under federal law and authorized under the Texas Health and Safety Code (THSC).

The rulemaking implements requirements of 42 United States Code (USC), §7410, which requires states to adopt a SIP that provides for "implementation, maintenance, and enforcement" of the NAAQS in each air quality control region of the state. While 42 USC, §7410 does not require specific programs, methods, or reductions to meet the standard, SIPs must include "enforceable emission limitations and other control measures, means or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance as may be necessary or appropriate to meet the applicable requirements of this chapter," (meaning 42 USC, Chapter 85, Air Pollution Prevention and Control). It is true that the Federal Clean Air Act (FCAA) does require some specific measures for SIP purposes, such as the inspection and maintenance program, but those programs are the exception, not the rule, in the SIP structure of 42 USC, §7410. The provisions of the FCAA recognize that states are in the best position to determine what programs and controls are necessary or appropriate in order to meet the NAAQS. This flexibility allows states, affected industry, and the public to collaborate on the best methods to attain the NAAQS for the specific regions in the state. Even though the FCAA allows states to develop their own programs, this flexibility does not relieve a state from developing a program that meets the requirements of 42 USC, §7410. Thus, while specific measures are not generally required, the emission reductions are required. States are not free to ignore the requirements of 42 USC, §7410, and must develop programs to assure that the nonattainment areas of the state would be brought into attainment on schedule. The proposed amendments will help the HBG area attain the 1997 eight-hour ozone NAAQS as expeditiously as practicable.

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

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

In addition, 42 USC, §7502(a)(2) requires attainment as expeditiously as practicable, and 42 USC, §7511(a), requires states to submit ozone attainment demonstration SIPs for ozone nonattainment areas, such as the HGB eight-hour ozone nonattainment area. As discussed earlier in this preamble, the proposed amendments will help the HBG area attain the 1997 eight-hour ozone NAAQS as expeditiously as practicable.

The commission has consistently applied this construction to its rules since this statute was enacted in 1997. Since that time, the legislature has revised the Texas Government Code but left this provision substantially un-amended. The commission presumes that "when an agency interpretation is in effect at the time the legislature amends the laws without making substantial change in the statute, the legislature is deemed to have accepted the agency's interpretation." *Central Power & Light Co. v. Sharp*, 919 S.W.2d 485, 489 (Tex. App. Austin 1995), *writ denied with per curiam opinion respecting another issue*, 960 S.W.2d 617 (Tex. 1997); *Bullock v. Marathon Oil Co.*, 798 S.W.2d 353, 357 (Tex. App. Austin 1990), *no writ*; *Cf. Humble Oil & Refining Co. v. Calvert*, 414 S.W.2d 172 (Tex. 1967); *Sharp v. House of Lloyd, Inc.*, 815 S.W.2d 245 (Tex. 1991); *Southwestern Life Ins. Co. v. Montemayor*, 24 S.W.3d 581 (Tex. App. Austin 2000), *pet. denied*; and *Coastal Indust. Water Auth. v. Trinity Portland Cement Div.*, 563 S.W.2d 916 (Tex. 1978).

As discussed, this rulemaking action implements requirements of 42 USC, §7410. There is no contract or delegation agreement that covers the topic that is the subject of this action. Therefore, the rulemaking does not exceed a standard set by federal law, exceed an express requirement of state law, exceed a requirement of a delegation agreement, nor is it adopted solely under the general powers of the agency. Finally, this rulemaking action was not developed solely under the general powers of the agency, but is authorized by specific sections of THSC, Chapter 382 Texas Clean Air Act (TCAA), and the Texas Water Code that are cited in the STATUTORY AUTHORITY section of this rulemaking, including THSC, §§382.002, 382.011, 382.012, 382.016, and 382.017. Therefore, this rulemaking action is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b), because the rulemaking does not meet any of the four applicability requirements.

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 completed a takings impact assessment for this rulemaking action under Texas Government Code, §2007.043. The proposed amendments would reduce the total cap amount of HRVOC allowances for the HECT program by 25% and revise the allocation methodology for allowances for participants of the HECT program. Photochemical modeling analysis demonstrates that a 25% reduction of the cap on the total Harris County HRVOC allocation would contribute to attainment of the 1997 eight-hour ozone NAAQS by reducing future ozone design values at all HGB monitors. The proposed changes to the HECT program will result in allowance reductions for certain facilities and it is possible facilities that have made significant investments on future HRVOC stream trades may see the value of these investments reduced or nullified. Facilities that have their HRVOC allowances reduced, either through the reallocation or reducing the total HRVOC cap, may incur costs from the installation of additional controls or having to purchase allowances from other sources if necessary to comply with their lower allowances. If the cap is reduced, the price of HRVOC allowances available in the market may increase. However, the allowances that will be affected by these rules are not property rights (§101.393(e)), and therefore reductions or changes in the allowances does not constitute a taking. Consequently, this rulemaking action does not meet the definition of a takings under Texas Government Code, §2007.002(5).

Additionally, Texas Government Code, §2007.003(b)(4) provides that Chapter 2007 does not apply to this rulemaking action because it is reasonably taken to fulfill an obligation mandated by federal law. The proposed changes to the HECT program within the HGB area that would be implemented by these proposed rules were developed to advance attainment of the 1997 eight-hour ozone NAAQS in the HGB ozone nonattainment area. States are primarily responsible for ensuring attainment and maintenance of NAAQS once the EPA has established them. Under 42 USC, §7410, and related provisions, states must submit, for approval by the EPA, SIPs that provide for the attainment and maintenance of NAAQS through control programs directed to sources of the pollutants involved. Therefore, one purpose of this proposed rulemaking action is to meet the air quality standards established under federal law as NAAQS. However, this rulemaking is only one step among many necessary for attaining the ozone NAAQS.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rulemaking and found 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. CMP goals applicable to the proposed amendments is the goal to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(l)). The proposed amendments update a definition, reallocate allowances, and lower the HRVOC cap. No new sources of air contaminants will be authorized and the revisions will maintain the same level of emissions control as previous rules. CMP policies applicable to the proposed amendments are the policy that the commission's rules comply with federal regulations in Code of Federal Regulations, Title 40, to protect and enhance air quality in the coastal areas (31 TAC §501.32). Promulgation and enforcement of these rules will not violate or exceed any standards identified in the applicable CMP goals and policies because the proposed rules are consistent with these CMP goals and policies because these rules do not create or have a direct or significant adverse effect on any coastal natural resource areas. Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMITS PROGRAM

Chapter 101, Subchapter H is an applicable requirement under 30 TAC Chapter 122, Federal Operating Permits Program. Owners or operators subject to the Federal Operating Permits Program must, consistent with the revision process in Chapter 122, upon the effective date of the proposed rulemaking, revise their operating permit to include the new Chapter 101, Subchapter H requirements.

ANNOUNCEMENT OF HEARINGS

The commission will hold public hearings on this proposal in conjunction with the HGB SIP revision, HGB Attainment Demonstration and Reasonable Further Progress SIP revisions, Control Techniques Guidelines rulemaking, and the Mass Emissions Cap and Trade Program Cap Integrity for the HGB Ozone Nonattainment Area revisions in Houston on October 28, 2009, at 2:00 p.m. and 6:00 p.m. in Conference Room A at the Houston-Galveston Area Council, located at 3555 Timmons Lane, and in Austin on October 29, 2009, at 3:00 p.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. Each hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during each hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to each hearing.

Persons who have special communication or other accommodation needs who are planning to attend a hearing should contact Charlotte Horn, Office of Legal Services at (512) 239-0779. 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, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: *http://www5.tceq.state.tx.us/rules/ecomments/*. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2009-006-101-EN. The comment period closes November 9, 2009. Copies of the proposed rulemaking can be obtained from the commission's Web site at *http://www.tceq.state.tx.us/nav/rules/propose_adopt.html*. For further information, please contact Jay C. Tonne Jr., P.E., Air Quality Planning Section, (512) 239-1453.

SUBCHAPTER A. GENERAL RULES

30 TAC §101.1

STATUTORY AUTHORITY

The amendment is proposed under Texas Water Code (TWC), §5.102, concerning General Powers, that provides the commission with the general powers to carry out its duties under the Texas Water Code; TWC, §5.103, concerning Rules, that authorizes the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code; TWC, §5.105, concerning General Policy, that authorizes the commission by rule to establish and approve all general policy of the commission; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, that authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amendment is also proposed under THSC, §382.002, concerning Policy and Purpose, that establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, that authorizes the commission to control the quality of the state's air; and §382.012, concerning State Air Control Plan, that authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air. The amendment is also proposed under THSC, §382.016, concerning Monitoring Requirements; Examination of Records, that authorizes the commission to prescribe reasonable requirements for the measuring and monitoring of air contaminant emissions. The amendment is also proposed under Federal Clean Air Act (FCAA), 42 United States Code (USC), §§7401, *et seq*., which requires states to submit state implementation plan (SIP) revisions that specify the manner in which the National Ambient Air Quality Standard (NAAQS) will be achieved and maintained within each air quality control region of the state.

The proposed amendment implements THSC, §§382.002, 382.011, 382.012, 382.016, and 382.017 and FCAA, 42 USC, §§7401 *et seq*.

§101.1. Definitions.

Unless specifically defined in the Texas Clean Air Act (TCAA) or in the rules of the commission, the terms used by the commission have the meanings commonly ascribed to them in the field of air pollution control. In addition to the terms that are defined by the TCAA, the following terms, when used in the air quality rules in this title, have the following meanings, unless the context clearly indicates otherwise.

(1) Account--For those sources required to be permitted under Chapter 122 of this title (relating to Federal Operating Permits Program), all sources that are aggregated as a site. For all other sources, any combination of sources under common ownership or control and located on one or more contiguous properties, or properties contiguous except for intervening roads, railroads, rights-of-way, waterways, or similar divisions.

(2) Acid gas flare--A flare used exclusively for the incineration of hydrogen sulfide and other acidic gases derived from natural gas sweetening processes.

(3) Agency established facility identification number--For the purposes of Subchapter F of this chapter (relating to Emissions Events and Scheduled Maintenance, Startup, and Shutdown Activities), a unique alphanumeric code required to be assigned by the owner

or operator of a regulated entity that the emission inventory reporting requirements of §101.10 of this title (relating to Emissions Inventory Requirements) are applicable to each facility at that regulated entity.

(4) Ambient air--That portion of the atmosphere, external to buildings, to which the general public has access.

(5) Background--Background concentration, the level of air contaminants that cannot be reduced by controlling emissions from man-made sources. It is determined by measuring levels in non-urban areas.

(6) Boiler--Any combustion equipment fired with solid, liquid, and/or gaseous fuel used to produce steam or to heat water.

(7) Capture system--All equipment (including, but not limited to, hoods, ducts, fans, booths, ovens, dryers, etc.) that contains, collects, and transports an air pollutant to a control device.

(8) 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.

(9) Carbon adsorber--An add-on control device that uses activated carbon to adsorb volatile organic compounds from a gas stream.

(10) Carbon adsorption system--A carbon adsorber with an inlet and outlet for exhaust gases and a system to regenerate the saturated adsorbent.

(11) Coating--A material applied onto or impregnated into a substrate for protective, decorative, or functional purposes. Such materials include, but are not limited to, paints, varnishes, sealants, adhesives, thinners, diluents, inks, maskants, and temporary protective coatings.

(12) Cold solvent cleaning--A batch process that uses liquid solvent to remove soils from the surfaces of parts or to dry the parts by spraying, brushing, flushing, and/or immersion while maintaining the solvent below its boiling point. Wipe cleaning (hand cleaning) is not included in this definition.

(13) Combustion unit--Any boiler plant, furnace, incinerator, flare, engine, or other device or system used to oxidize solid, liquid, or gaseous fuels, but excluding motors and engines used in propelling land, water, and air vehicles.

(14) Combustion turbine--Any gas turbine system that is gas and/or liquid fuel fired with or without power augmentation. This unit is either attached to a foundation or is portable equipment operated at a specific minor or major source for more than 90 days in any 12-month period. Two or more gas turbines powering one shaft will be treated as one unit.

(15) 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 that disposes only waste generated on-site or a facility that accepts waste only from other facilities owned or effectively controlled by the same person.

(16) Commercial incinerator--An incinerator used to dispose of waste material from retail and wholesale trade establishments.

(17) Commercial medical waste incinerator--A facility that accepts for incineration medical waste generated outside the property boundaries of the facility.

(18) Component--A piece of equipment, including, but not limited to, pumps, valves, compressors, and pressure relief valves that has the potential to leak volatile organic compounds.

(19) Condensate--Liquids that result from the cooling and/or pressure changes of produced natural gas. Once these liquids are processed at gas plants or refineries or in any other manner, they are no longer considered condensates.

(20) Construction-demolition waste--Waste resulting from construction or demolition projects.

(21) Control system or control device--Any part, chemical, machine, equipment, contrivance, or combination of same, used to destroy, eliminate, reduce, or control the emission of air contaminants to the atmosphere.

(22) Conveyorized degreasing--A solvent cleaning process that uses an automated parts handling system, typically a conveyor, to automatically provide a continuous supply of parts to be cleaned or dried using either cold solvent or vaporized solvent. A conveyorized degreasing process is fully enclosed except for the conveyor inlet and exit portals.

(23) Criteria pollutant or standard--Any pollutant for which there is a national ambient air quality standard established under 40 Code of Federal Regulations Part 50.

(24) Custody transfer--The transfer of produced crude oil and/or condensate, after processing and/or treating in the producing operations, from storage tanks or automatic transfer facilities to pipelines or any other forms of transportation.

(25) *De minimis* impact--A change in ground level concentration of an air contaminant as a result of the operation of any new major stationary source or of the operation of any existing source that has undergone a major modification that does not exceed the following specified amounts.
Figure: 30 TAC §101.1(25) (No change.)

(26) Domestic wastes--The garbage and rubbish normally resulting from the functions of life within a residence.

(27) Emissions banking--A system for recording emissions reduction credits so they may be used or transferred for future use.

(28) Emissions event--Any upset event or unscheduled maintenance, startup, or shutdown activity, from a common cause that results in unauthorized emissions of air contaminants from one or more emissions points at a regulated entity.

(29) Emissions reduction credit--Any stationary source emissions reduction that has been banked in accordance with Chapter 101, Subchapter H, Division 1 of this title (relating to Emission Credit Banking and Trading).

(30) Emissions reduction credit certificate--The certificate issued by the executive director that indicates the amount of qualified reduction available for use as offsets and the length of time the reduction is eligible for use.

(31) Emissions unit--Any part of a stationary source that emits, or would have the potential to emit, any pollutant subject to regulation under the Federal Clean Air Act.

(32) Excess opacity event--When an opacity reading is equal to or exceeds 15 additional percentage points above an applicable opacity limit, averaged over a six-minute period.

(33) Exempt solvent--Those carbon compounds or mixtures of carbon compounds used as solvents that have been excluded from the definition of volatile organic compound.

(34) External floating roof--A cover or roof in an open top tank that rests upon or is floated upon the liquid being contained and is equipped with a single or double seal to close the space between the roof edge and tank shell. A double seal consists of two complete and separate closure seals, one above the other, containing an enclosed space between them.

(35) Federal motor vehicle regulation--Control of Air Pollution from Motor Vehicles and Motor Vehicle Engines, 40 Code of Federal Regulations Part 85.

(36) Federally enforceable--All limitations and conditions that are enforceable by the United States Environmental Protection Agency administrator, including those requirements developed under 40 Code of Federal Regulations (CFR) Parts 60 and 61; requirements within any applicable state implementation plan (SIP); and any permit requirements established under 40 CFR §52.21 or under regulations approved under 40 CFR Part 51, Subpart 1, including operating permits issued under the approved program that is incorporated into the SIP and that expressly requires adherence to any permit issued under such program.

(37) Flare--An open combustion unit (i.e., lacking an enclosed combustion chamber) whose combustion air is provided by uncontrolled ambient air around the flame, and that is used as a control device. A flare may be equipped with a radiant heat shield (with or without a refractory lining), but is not equipped with a flame air control damping system to control the air/fuel mixture. In addition, a flare may also use auxiliary fuel. The combustion flame may be elevated or at ground level. A vapor combustor, as defined in this section, is not considered a flare.

(38) Fuel oil--Any oil meeting the American Society for Testing and Materials (ASTM) specifications for fuel oil in ASTM D396-01, Standard Specifications for Fuel Oils, revised 2001. This includes fuel oil grades 1, 1 (Low Sulfur), 2, 2 (Low Sulfur), 4 (Light), 4, 5 (Light), 5 (Heavy), and 6.

(39) Fugitive emission--Any gaseous or particulate contaminant entering the atmosphere that could not reasonably pass through a stack, chimney, vent, or other functionally equivalent opening designed to direct or control its flow.

(40) Garbage--Solid waste consisting of putrescible animal and vegetable waste materials resulting from the handling, preparation, cooking, and consumption of food, including waste materials from markets, storage facilities, and handling and sale of produce and other food products.

(41) Gasoline--Any petroleum distillate having a Reid vapor pressure of four pounds per square inch (27.6 kilopascals) or greater that is produced for use as a motor fuel, and is commonly called gasoline.

(42) Hazardous wastes--Any solid waste identified or listed as a hazardous waste by the administrator of the United States Environmental Protection Agency under the federal Solid Waste Disposal Act, as amended by Resource Conservation and Recovery Act, 42 United States Code, §§6901 *et seq*., as amended.

(43) Heatset (used in offset lithographic printing)--Any operation where heat is required to evaporate ink oil from the printing ink. Hot air dryers are used to deliver the heat.

(44) High-bake coatings--Coatings designed to cure at temperatures above 194 degrees Fahrenheit.

(45) High-volume low-pressure spray guns--Equipment used to apply coatings by means of a spray gun that operates between 0.1 and 10.0 pounds per square inch gauge air pressure measured at the air cap.

(46) Incinerator--An enclosed combustion apparatus and attachments that is used in the process of burning wastes for the primary purpose of reducing its volume and weight by removing the combustibles of the waste and is equipped with a flue for conducting products of combustion to the atmosphere. Any combustion device that burns 10% or more of solid waste on a total British thermal unit (Btu) heat input basis averaged over any one-hour period is considered to be an incinerator. A combustion device without instrumentation or methodology to determine hourly flow rates of solid waste and burning 1.0% or more of solid waste on a total Btu heat input basis averaged annually is also considered to be an incinerator. An open-trench type (with closed ends) combustion unit may be considered an incinerator when approved by the executive director. Devices burning untreated wood scraps, waste wood, or sludge from the treatment of wastewater from the process mills as a primary fuel for heat recovery are not included under this definition. Combustion devices permitted under this title as combustion devices other than incinerators will not be considered incinerators for application of any rule within this title provided they are installed and operated in compliance with the condition of all applicable permits.

(47) Industrial boiler--A boiler located on the site of a facility engaged in a manufacturing process where substances are transformed into new products, including the component parts of products, by mechanical or chemical processes.

(48) Industrial furnace--Cement kilns; lime kilns; aggregate kilns; phosphate kilns; coke ovens; blast furnaces; smelting, melting, or refining furnaces, including pyrometallurgical devices such as cupolas, reverberator furnaces, sintering machines, roasters, or foundry furnaces; titanium dioxide chloride process oxidation reactors; methane reforming furnaces; pulping recovery furnaces; combustion devices used in the recovery of sulfur values from spent sulfuric acid; and other devices the commission may list.

(49) Industrial solid waste--Solid waste resulting from, or incidental to, any process of industry or manufacturing, or mining or agricultural operations, classified as follows.

(A) Class 1 industrial solid waste or Class 1 waste is any industrial solid waste designated as Class 1 by the executive director as any industrial solid waste or mixture of industrial solid wastes that 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, and may pose a substantial present or potential danger to human health or the environment when improperly processed, stored, transported, or otherwise managed, including hazardous industrial waste, as defined in §335.1 and §335.505 of this title (relating to Definitions and Class 1 Waste Determination).

(B) Class 2 industrial solid waste is any individual solid waste or combination of industrial solid wastes that cannot be described as Class 1 or Class 3, as defined in §335.506 of this title (relating to Class 2 Waste Determination).

(C) Class 3 industrial solid waste is any inert and essentially insoluble industrial solid waste, including materials such as rock, brick, glass, dirt, and certain plastics and rubber, etc., that are not readily decomposable as defined in §335.507 of this title (relating to Class 3 Waste Determination).

(50) Internal floating cover--A cover or floating roof in a fixed roof tank that rests upon or is floated upon the liquid being con-

tained, and is equipped with a closure seal or seals to close the space between the cover edge and tank shell.

(51) Leak--A volatile organic compound concentration greater than 10,000 parts per million by volume or the amount specified by applicable rule, whichever is lower; or the dripping or exuding of process fluid based on sight, smell, or sound.

(52) Liquid fuel--A liquid combustible mixture, not derived from hazardous waste, with a heating value of at least 5,000 British thermal units per pound.

(53) Liquid-mounted seal--A primary seal mounted in continuous contact with the liquid between the tank wall and the floating roof around the circumference of the tank.

(54) Maintenance area--A geographic region of the state previously designated nonattainment under the Federal Clean Air Act Amendments of 1990 and subsequently redesignated to attainment subject to the requirement to develop a maintenance plan under 42 United States Code, §7505a. The following are the maintenance areas within the state:

(A) Victoria Ozone Maintenance Area 60 (*Federal Register* (FR) 12453) - Victoria County; and

(B) Collin County Lead Maintenance Area (64 FR 55421) - Portion of Collin County. Eastside: Starting at the intersection of South Fifth Street and the fence line approximately 1,000 feet south of the Exide property line going north to the intersection of South Fifth Street and Eubanks Street; Northside: Proceeding west on Eubanks to the Burlington Railroad tracks; Westside: Along the Burlington Railroad tracks to the fence line approximately 1,000 feet south of the Exide property line; Southside: Fence line approximately 1,000 feet south of the Exide property line.

(55) Maintenance plan--A revision to the applicable state implementation plan, meeting the requirements of 42 United States Code, §7505a.

(56) Marine vessel--Any watercraft used, or capable of being used, as a means of transportation on water, and that is constructed or adapted to carry, or that carries, oil, gasoline, or other volatile organic liquid in bulk as a cargo or cargo residue.

(57) Mechanical shoe seal--A metal sheet that is held vertically against the storage tank wall by springs or weighted levers and is connected by braces to the floating roof. A flexible coated fabric (envelope) spans the annular space between the metal sheet and the floating roof.

(58) Medical waste--Waste materials identified by the Department of State Health Services as "special waste from health care-related facilities" and those waste materials commingled and discarded with special waste from health care-related facilities.

(59) Metropolitan Planning Organization--That organization designated as being responsible, together with the state, for conducting the continuing, cooperative, and comprehensive planning process under 23 United States Code (USC), §134 and 49 USC, §1607.

(60) Mobile emissions reduction credit--The credit obtained from an enforceable, permanent, quantifiable, and surplus (to other federal and state rules) emissions reduction generated by a mobile source as set forth in Chapter 114, Subchapter F of this title (relating to Vehicle Retirement and Mobile Emission Reduction Credits), and that has been banked in accordance with Subchapter H, Division 1 of this chapter.

(61) Motor vehicle--A self-propelled vehicle designed for transporting persons or property on a street or highway.

(62) Motor vehicle fuel dispensing facility--Any site where gasoline is dispensed to motor vehicle fuel tanks from stationary storage tanks.

(63) 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 except industrial solid waste.

(64) Municipal solid waste facility--All contiguous land, structures, other appurtenances, and improvements on the land used for processing, storing, or disposing of solid waste. A facility may be publicly or privately owned and may consist of several processing, storage, or disposal operational units, e.g., one or more landfills, surface impoundments, or combinations of them.

(65) Municipal solid waste landfill--A discrete area of land or an excavation that receives household waste and that is not a land application unit, surface impoundment, injection well, or waste pile, as those terms are defined under 40 Code of Federal Regulations §257.2. A municipal solid waste landfill (MSWLF) unit also may receive other types of Resource Conservation and Recovery Act Subtitle D wastes, such as commercial solid waste, nonhazardous sludge, conditionally exempt small-quantity generator waste, and industrial solid waste. Such a landfill may be publicly or privately owned. An MSWLF unit may be a new MSWLF unit, an existing MSWLF unit, or a lateral expansion.

(66) National ambient air quality standard--Those standards established under 42 United States Code, §7409, including standards for carbon monoxide, lead, nitrogen dioxide, ozone, inhalable particulate matter, and sulfur dioxide.

(67) Net ground-level concentration--The concentration of an air contaminant as measured at or beyond the property boundary minus the representative concentration flowing onto a property as measured at any point. Where there is no expected influence of the air contaminant flowing onto a property from other sources, the net ground level concentration may be determined by a measurement at or beyond the property boundary.

(68) New source--Any stationary source, the construction or modification of which was commenced after March 5, 1972.

(69) Nitrogen oxides (NO_x)--The sum of the nitric oxide and nitrogen dioxide in the flue gas or emission point, collectively expressed as nitrogen dioxide.

(70) Nonattainment area--A defined region within the state that is designated by the United States Environmental Protection Agency (EPA) as failing to meet the national ambient air quality standard for a pollutant for which a standard exists. The EPA will designate the area as nonattainment under the provisions of 42 United States Code, §7407(d). For the official list and boundaries of nonattainment areas, see 40 Code of Federal Regulations Part 81 and pertinent *Federal Register* (FR) notices. The following areas comprise the nonattainment areas within the state for all national ambient air quality standards (NAAQS). EPA has indicated that it will revoke the one-hour ozone standard in full, including the associated designations and classifications, on June 15, 2005, which is one year following the effective date of the designations for the eight-hour NAAQS of June 15, 2004.

(A) Carbon monoxide (CO). El Paso CO nonattainment area (56 FR 56694)--Classified as a Moderate CO nonattainment area with a design value less than or equal to 12.7 parts per million. Portion of El Paso County. Portion of the city limits of El Paso: That portion of the City of El Paso bounded on the north by Highway 10 from Porfirio

Diaz Street to Raynolds Street, Raynolds Street from Highway 10 to the Southern Pacific Railroad lines, the Southern Pacific Railroad lines from Raynolds Street to Highway 62, Highway 62 from the Southern Pacific Railroad lines to Highway 20, and Highway 20 from Highway 62 to Polo Inn Road. Bounded on the east by Polo Inn Road from Highway 20 to the Texas-Mexico border. Bounded on the south by the Texas-Mexico border from Polo Inn Road to Porfirio Diaz Street. Bounded on the west by Porfirio Diaz Street from the Texas-Mexico border to Highway 10.

(B) Inhalable particulate matter (PM_{10}). El Paso PM_{10} nonattainment area (56 FR 56694)--Classified as a Moderate PM_{10} nonattainment area. Portion of El Paso County that comprises the El Paso city limit boundaries as they existed on November 15, 1990.

(C) Lead. No designated nonattainment areas.

(D) Nitrogen dioxide. No designated nonattainment areas.

(E) Ozone (one-hour).

(i) Houston-Galveston-Brazoria (HGB) one-hour ozone nonattainment area (56 FR 56694) - Classified as a Severe-17 ozone nonattainment area. Consists of Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties.

(ii) El Paso one-hour ozone nonattainment area (56 FR 56694) - Classified as a Serious ozone nonattainment area. Consists of El Paso County.

(iii) Beaumont-Port Arthur (BPA) one-hour ozone nonattainment area (69 FR 16483) - Classified as a Serious ozone nonattainment area. Consists of Hardin, Jefferson, and Orange Counties.

(iv) Dallas-Fort Worth one-hour ozone nonattainment area (63 FR 8128) - Classified as a Serious ozone nonattainment area. Consists of Collin, Dallas, Denton, and Tarrant Counties.

(F) Ozone (eight-hour).

(i) HGB eight-hour ozone nonattainment area (69 FR 23936) - Classified as a Moderate ozone nonattainment area. Consists of Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties.

(ii) BPA eight-hour ozone nonattainment area (69 FR 23936) - Classified as a Marginal ozone nonattainment area. Consists of Hardin, Jefferson, and Orange Counties.

(iii) Dallas-Fort Worth eight-hour ozone nonattainment area (69 FR 23936) - Classified as a Moderate ozone nonattainment area. Consists of Collin, Dallas, Denton, Ellis, Johnson, Kaufman, Parker, Rockwall, and Tarrant Counties.

(iv) San Antonio eight-hour ozone nonattainment area (69 FR 23936) - Classified under the Federal Clean Air Act, Title I, Part D, Subpart 1 (42 United States Code, §7502), nonattainment deferred to September 30, 2005, or as extended by EPA.

(G) Sulfur dioxide. No designated nonattainment areas.

(71) Non-reportable emissions event--Any emissions event that in any 24-hour period does not result in an unauthorized emission from any emissions point equal to or in excess of the reportable quantity as defined in this section.

(72) Opacity--The degree to which an emission of air contaminants obstructs the transmission of light expressed as the percentage of light obstructed as measured by an optical instrument or trained observer.

(73) Open-top vapor degreasing--A batch solvent cleaning process that is open to the air and that uses boiling solvent to create solvent vapor used to clean or dry parts through condensation of the hot solvent vapors on the parts.

(74) Outdoor burning--Any fire or smoke-producing process that is not conducted in a combustion unit.

(75) Particulate matter--Any material, except uncombined water, that exists as a solid or liquid in the atmosphere or in a gas stream at standard conditions.

(76) Particulate matter emissions--All finely-divided solid or liquid material, other than uncombined water, emitted to the ambient air as measured by United States Environmental Protection Agency Reference Method 5, as specified at 40 Code of Federal Regulations (CFR) Part 60, Appendix A, modified to include particulate caught by an impinger train; by an equivalent or alternative method, as specified at 40 CFR Part 51; or by a test method specified in an approved state implementation plan.

(77) Petroleum refinery--Any facility engaged in producing gasoline, kerosene, distillate fuel oils, residual fuel oils, lubricants, or other products through distillation of crude oil, or through the redistillation, cracking, extraction, reforming, or other processing of unfinished petroleum derivatives.

(78) PM_{10}--Particulate matter with an aerodynamic diameter less than or equal to a nominal ten micrometers as measured by a reference method based on 40 Code of Federal Regulations (CFR) Part 50, Appendix J, and designated in accordance with 40 CFR Part 53, or by an equivalent method designated with that Part 53.

(79) PM_{10} emissions--Finely-divided solid or liquid material with an aerodynamic diameter less than or equal to a nominal ten micrometers emitted to the ambient air as measured by an applicable reference method, or an equivalent or alternative method specified in 40 Code of Federal Regulations Part 51, or by a test method specified in an approved state implementation plan.

(80) Polychlorinated biphenyl compound--A compound subject to 40 Code of Federal Regulations Part 761.

(81) Process or processes--Any action, operation, or treatment embracing chemical, commercial, industrial, or manufacturing factors such as combustion units, kilns, stills, dryers, roasters, and equipment used in connection therewith, and all other methods or forms of manufacturing or processing that may emit smoke, particulate matter, gaseous matter, or visible emissions.

(82) Process weight per hour--"Process weight" is the total weight of all materials introduced or recirculated into any specific process that may cause any discharge of air contaminants into the atmosphere. Solid fuels charged into the process will be considered as part of the process weight, but liquid and gaseous fuels and combustion air will not. The "process weight per hour" will be derived by dividing the total process weight by the number of hours in one complete operation from the beginning of any given process to the completion thereof, excluding any time during that the equipment used to conduct the process is idle. For continuous operation, the "process weight per hour" will be derived by dividing the total process weight for a 24-hour period by 24.

(83) Property--All land under common control or ownership coupled with all improvements on such land, and all fixed or movable objects on such land, or any vessel on the waters of this state.

(84) Reasonable further progress--Annual incremental reductions in emissions of the applicable air contaminant that are sufficient to provide for attainment of the applicable national ambient air

quality standard in the designated nonattainment areas by the date required in the state implementation plan.

(85) Regulated entity--All regulated units, facilities, equipment, structures, or sources at one street address or location that are owned or operated by the same person. The term includes any property under common ownership or control identified in a permit or used in conjunction with the regulated activity at the same street address or location. Owners or operators of pipelines, gathering lines, and flowlines under common ownership or control in a particular county may be treated as a single regulated entity for purposes of assessment and regulation of emissions events.

(86) Remote reservoir cold solvent cleaning--Any cold solvent cleaning operation in which liquid solvent is pumped to a sink-like work area that drains solvent back into an enclosed container while parts are being cleaned, allowing no solvent to pool in the work area.

(87) Reportable emissions event--Any emissions event that in any 24-hour period, results in an unauthorized emission from any emissions point equal to or in excess of the reportable quantity as defined in this section.

(88) Reportable quantity (RQ)--Is as follows:

(A) for individual air contaminant compounds and specifically listed mixtures by name or Chemical Abstracts Service (CAS) number, either:

(i) the lowest of the quantities:

(I) listed in 40 Code of Federal Regulations (CFR) Part 302, Table 302.4, the column "final RQ";

(II) listed in 40 CFR Part 355, Appendix A, the column "Reportable Quantity"; or

(III) listed as follows:

(-a-) acetaldehyde - 1,000 pounds, except in the Houston-Galveston-Brazoria (HGB) and Beaumont-Port Arthur (BPA) ozone nonattainment areas as defined in paragraph (70)(E)(i) and (iii) of this section, where the RQ must be 100 pounds;

(-b-) butanes (any isomer) - 5,000 pounds;

(-c-) butenes (any isomer, except 1,3-butadiene) - 5,000 pounds, except in the HGB and BPA ozone nonattainment areas as defined in paragraph (70)(E)(i) and (iii) of this section, where the RQ must be 100 pounds;

(-d-) carbon monoxide - 5,000 pounds;

(-e-) 1-chloro-1,1-difluoroethane (HCFC-142b) - 5,000 pounds;

(-f-) chlorodifluoromethane (HCFC-22) - 5,000 pounds;

(-g-) 1-chloro-1-fluoroethane (HCFC-151a) - 5,000 pounds;

(-h-) chlorofluoromethane (HCFC-31) - 5,000 pounds;

(-i-) chloropentafluoroethane (CFC-115) - 5,000 pounds;

(-j-) 2-chloro-1,1,1,2-tetrafluoroethane (HCFC-124) - 5,000 pounds;

(-k-) 1-chloro-1,1,2,2 tetrafluoroethane (HCFC-124a) - 5,000 pounds;

(-l-) 1,1,1,2,3,4,4,5,5,5-decafluoropentane (HFC 43-10mee) - 5,000 pounds;

(-m-) decanes (any isomer) - 5,000 pounds;

(-n-) 1,1-dichloro-1-fluoroethane (HCFC-141b) - 5,000 pounds;

(-o-) 3,3-dichloro-1,1,2,2-pentafluoropropane (HCFC-225ca) - 5,000 pounds;

(-p-) 1,3-dichloro-1,1,2,2,3-pentafluoropropane (HCFC-225cb) - 5,000 pounds;

(-q-) 1,2-dichloro-1,1,2,2-tetrafluoroethane (CFR-114) - 5,000 pounds;

(-r-) 1,1-dichlorotetrafluoroethane (CFC-114a) - 5,000 pounds;

(-s-) 1,2-dichloro-1,1,2-trifluoroethane (HCFC-123a) - 5,000 pounds;

(-t-) 1,1-difluoroethane (HFC-152a) - 5,000 pounds;

(-u-) difluoromethane (HFC-32) - 5,000 pounds;

(-v-) ethanol - 5,000 pounds;

(-w-) ethylene - 5,000 pounds, except in the HGB and BPA ozone nonattainment areas as defined in paragraph (70)(E)(i) and (iii) of this section, where the RQ must be 100 pounds;

(-x-) ethylfluoride (HFC-161) - 5,000 pounds;

(-y-) 1,1,1,2,3,3,3-heptafluoropropane (HFC-227ea) - 5,000 pounds;

(-z-) 1,1,1,3,3,3-hexafluoropropane (HFC-236fa) - 5,000 pounds;

(-aa-) 1,1,1,2,3,3-hexafluoropropane (HFC-236ea) - 5,000 pounds;

(-bb-) hexanes (any isomer) - 5,000 pounds;

(-cc-) isopropyl alcohol - 5,000 pounds;

(-dd-) mineral spirits - 5,000 pounds;

(-ee-) octanes (any isomer) - 5,000 pounds;

(-ff-) oxides of nitrogen - 200 pounds in ozone nonattainment, ozone maintenance, early action compact areas, Nueces County, and San Patricio County, and 5,000 pounds in all other areas of the state, which should be used instead of the RQs for nitrogen oxide and nitrogen dioxide provided in 40 CFR Part 302, Table 302.4, the column "final RQ";

(-gg-) pentachlorofluoroethane (CFR-111) - 5,000 pounds;

(-hh-) 1,1,1,3,3-pentafluorobutane (HFC-365mfc) - 5,000 pounds;

(-ii-) pentafluoroethane (HFC-125) - 5,000 pounds;

(-jj-) 1,1,2,2,3-pentafluoropropane (HFC-245ca) - 5,000 pounds;

(-kk-) 1,1,2,3,3-pentafluoropropane (HFC-245ea) - 5,000 pounds;

(-ll-) 1,1,1,2,3-pentafluoropropane (HFC-245eb) - 5,000 pounds;

(-mm-) 1,1,1,3,3-pentafluoropropane (HFC-245fa) - 5,000 pounds;

(-nn-) pentanes (any isomer) - 5,000 pounds;

(-oo-) propane - 5,000 pounds;

(-pp-) propylene - 5,000 pounds, except in the HGB and BPA ozone nonattainment areas as defined in paragraph (70)(E)(i) and (iii) of this section, where the RQ must be 100 pounds;

(-qq-) 1,1,2,2-terachlorodifluoroethane (CFR-112) - 5,000 pounds;

(-rr-) 1,1,1,2-tetrachlorodifluoroethane (CFC-112a) - 5,000 pounds;

(-ss-) 1,1,2,2-tetrafluoroethane (HFC-134) - 5,000 pounds;

(-tt-) 1,1,1,2-tetrafluoroethane (HFC-134a) - 5,000 pounds;

(-uu-) 1,1,2-trichloro-1,2,2-trifluoroethane (CFR-113) - 5,000 pounds;

(-vv-) 1,1,1-trichloro-2,2,2-trilfloroethane (CFC-113a) - 5,000 pounds;

(-ww-) 1,1,1-trifluoro-2,2-dichloroethane (HCFC-123) - 5,000 pounds;

(-xx-) 1,1,1-trifluoroethane (HFC-143a) - 5,000 pounds;

(-yy-) trifluoromethane (HFC-23) - 5,000 pounds; or

(-zz-) toluene - 1,000 pounds, except in the HGB and BPA ozone nonattainment areas as defined in paragraph (70)(E)(i) and (iii) of this section, where the RQ must be 100 pounds;

(ii) if not listed in clause (i) of this subparagraph, 100 pounds;

(B) for mixtures of air contaminant compounds:

(i) where the relative amount of individual air contaminant compounds is known through common process knowledge or prior engineering analysis or testing, any amount of an individual air contaminant compound that equals or exceeds the amount specified in subparagraph (A) of this paragraph;

(ii) where the relative amount of individual air contaminant compounds in subparagraph (A)(i) of this paragraph is not known, any amount of the mixture that equals or exceeds the amount for any single air contaminant compound that is present in the mixture and listed in subparagraph (A)(i) of this paragraph;

(iii) where each of the individual air contaminant compounds listed in subparagraph (A)(i) of this paragraph are known to be less than 0.02% by weight of the mixture, and each of the other individual air contaminant compounds covered by subparagraph (A)(ii) of this paragraph are known to be less than 2.0% by weight of the mixture, any total amount of the mixture of air contaminant compounds greater than or equal to 5,000 pounds; or

(iv) where natural gas excluding carbon dioxide, water, nitrogen, methane, ethane, noble gases, hydrogen, and oxygen or air emissions from crude oil are known to be in an amount greater than or equal to 5,000 pounds or the associated hydrogen sulfide and mercaptans in a total amount greater than 100 pounds, whichever occurs first;

(C) for opacity from boilers and combustion turbines as defined in this section fueled by natural gas, coal, lignite, wood, fuel oil containing hazardous air pollutants at a concentration of less than 0.02% by weight, opacity that is equal to or exceeds 15 additional percentage points above the applicable limit, averaged over a six-minute period. Opacity is the only RQ applicable to boilers and combustion turbines described in this paragraph; or

(D) for facilities where air contaminant compounds are measured directly by a continuous emission monitoring system providing updated readings at a minimum 15-minute interval an amount, approved by the executive director based on any relevant conditions and a screening model, that would be reported prior to ground level concentrations reaching at any distance beyond the closest regulated entity property line:

(i) less than one-half of any applicable ambient air standards; and

(ii) less than two times the concentration of applicable air emission limitations.

(89) Rubbish--Nonputrescible solid waste, consisting of both combustible and noncombustible waste materials. Combustible rubbish includes paper, rags, cartons, wood, excelsior, furniture, rubber, plastics, yard trimmings, leaves, and similar materials. Noncombustible rubbish includes glass, crockery, tin cans, aluminum cans, metal furniture, and like materials that will not burn at ordinary incinerator temperatures (1,600 degrees Fahrenheit to 1,800 degrees Fahrenheit).

(90) Scheduled maintenance, startup, or shutdown activity--For activities with unauthorized emissions that are expected to exceed a reportable quantity (RQ), a scheduled maintenance, startup, or shutdown activity is an activity that the owner or operator of the regulated entity whether performing or otherwise affected by the activity, provides prior notice and a final report as required by §101.211 of this title (relating to Scheduled Maintenance, Startup, and Shutdown Reporting and Recordkeeping Requirements); the notice or final report includes the information required in §101.211 of this title; and the actual unauthorized emissions from the activity do not exceed the emissions estimates submitted in the initial notification by more than an RQ. For activities with unauthorized emissions that are not expected to, and do not, exceed an RQ, a scheduled maintenance, startup, or shutdown activity is one that is recorded as required by §101.211 of this title. Expected excess opacity events as described in §101.201(e) of this title (relating to Emissions Event Reporting and Recordkeeping Requirements) resulting from scheduled maintenance, startup, or shutdown activities are those that provide prior notice (if required), and are recorded and reported as required by §101.211 of this title.

(91) Sludge--Any solid or semi-solid, or liquid waste generated from a municipal, commercial, or industrial wastewater treatment plant; water supply treatment plant, exclusive of the treated effluent from a wastewater treatment plant; or air pollution control equipment.

(92) Smoke--Small gas-born particles resulting from incomplete combustion consisting predominately of carbon and other combustible material and present in sufficient quantity to be visible.

(93) Solid waste--Garbage, rubbish, refuse, sludge from a waste water treatment plant, water supply treatment plant, or air pollution control equipment, and other discarded material, including solid, liquid, semisolid, or containerized gaseous material resulting from industrial, municipal, commercial, mining, and agricultural operations and from community and institutional activities. The term does not include:

(A) 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 under the Texas Water Code, Chapter 26;

(B) 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; or

(C) waste materials that result from activities associated with the exploration, development, or production of oil or gas, or geothermal resources, and other substance or material regulated by the Railroad Commission of Texas under Natural Resources Code, §91.101, unless the waste, substance, or material results from activities associated with gasoline plants, natural gas liquids processing plants, pressure maintenance plants, or repressurizing plants and is hazardous waste as defined by the administrator of the United States Environmental Protection Agency under the federal Solid Waste Disposal Act, as amended by Resource Conservation and Recovery Act, as amended (42 United States Code, §§6901 *et seq*.).

(94) Sour crude--A crude oil that will emit a sour gas when in equilibrium at atmospheric pressure.

(95) Sour gas--Any natural gas containing more than 1.5 grains of hydrogen sulfide per 100 cubic feet, or more than 30 grains of total sulfur per 100 cubic feet.

(96) Source--A point of origin of air contaminants, whether privately or publicly owned or operated. Upon request of a source owner, the executive director shall determine whether multiple processes emitting air contaminants from a single point of emission will be treated as a single source or as multiple sources.

(97) Special waste from health care-related facilities--A solid waste that if improperly treated or handled, may serve to transmit infectious disease(s) and that is comprised of the following: animal waste, bulk blood and blood products, microbiological waste, pathological waste, and sharps.

(98) Standard conditions--A condition at a temperature of 68 degrees Fahrenheit (20 degrees Centigrade) and a pressure of 14.7 pounds per square inch absolute (101.3 kiloPascals).

(99) Standard metropolitan statistical area--An area consisting of a county or one or more contiguous counties that is officially so designated by the United States Bureau of the Budget.

(100) Submerged fill pipe--A fill pipe that extends from the top of a tank to have a maximum clearance of six inches (15.2 centimeters) from the bottom or, when applied to a tank that is loaded from the side, that has a discharge opening entirely submerged when the pipe used to withdraw liquid from the tank can no longer withdraw liquid in normal operation.

(101) Sulfur compounds--All inorganic or organic chemicals having an atom or atoms of sulfur in their chemical structure.

(102) Sulfuric acid mist/sulfuric acid--Emissions of sulfuric acid mist and sulfuric acid are considered to be the same air contaminant calculated as $H_2 SO_4$ and must include sulfuric acid liquid mist, sulfur trioxide, and sulfuric acid vapor as measured by Test Method 8 in 40 Code of Federal Regulations Part 60, Appendix A.

(103) Sweet crude oil and gas--Those crude petroleum hydrocarbons that are not "sour" as defined in this section.

(104) Total suspended particulate--Particulate matter as measured by the method described in 40 Code of Federal Regulations Part 50, Appendix B.

(105) Transfer efficiency--The amount of coating solids deposited onto the surface or a part of product divided by the total amount of coating solids delivered to the coating application system.

(106) True vapor pressure--The absolute aggregate partial vapor pressure, measured in pounds per square inch absolute, of all volatile organic compounds at the temperature of storage, handling, or processing.

(107) Unauthorized emissions--Emissions of any air contaminant except carbon dioxide, water, nitrogen, methane, ethane, noble gases, hydrogen, and oxygen that exceed any air emission limitation in a permit, rule, or order of the commission or as authorized by Texas Clean Air Act, §382.0518(g).

(108) Unplanned maintenance, startup, or shutdown activity--For activities with unauthorized emissions that are expected to exceed a reportable quantity or with excess opacity, an unplanned maintenance, startup, or shutdown activity is:

(A) a startup or shutdown that was not part of normal or routine facility operations, is unpredictable as to timing, and is not the type of event normally authorized by permit; or

(B) a maintenance activity that arises from sudden and unforeseeable events beyond the control of the operator that requires the immediate corrective action to minimize or avoid an upset or malfunction.

(109) Upset event--An unplanned and unavoidable breakdown or excursion of a process or operation that results in unauthorized emissions. A maintenance, startup, or shutdown activity that was reported under §101.211 of this title (relating to Scheduled Maintenance, Startup, and Shutdown Reporting and Recordkeeping Requirements), but had emissions that exceeded the reported amount by more than a reportable quantity due to an unplanned and unavoidable breakdown or excursion of a process or operation is an upset event.

(110) Utility boiler--A boiler used to produce electric power, steam, or heated or cooled air, or other gases or fluids for sale.

(111) Vapor combustor--A partially enclosed combustion device used to destroy volatile organic compounds by smokeless combustion without extracting energy in the form of process heat or steam. The combustion flame may be partially visible, but at no time does the device operate with an uncontrolled flame. Auxiliary fuel and/or a flame air control damping system that can operate at all times to control the air/fuel mixture to the combustor's flame zone, may be required to ensure smokeless combustion during operation.

(112) Vapor-mounted seal--A primary seal mounted so there is an annular space underneath the seal. The annular vapor space is bounded by the bottom of the primary seal, the tank wall, the liquid surface, and the floating roof or cover.

(113) Vent--Any duct, stack, chimney, flue, conduit, or other device used to conduct air contaminants into the atmosphere.

(114) Visible emissions--Particulate or gaseous matter that can be detected by the human eye. The radiant energy from an open flame is not considered a visible emission under this definition.

(115) Volatile organic compound--As defined in 40 Code of Federal Regulations §51.100(s), except §51.100(s)(2) - (4), as amended on January 21, 2009 (74 FR 3441) [~~November 29, 2004 (69 FR 69290)~~].

(116) Volatile organic compound (VOC) water separator--Any tank, box, sump, or other container in which any VOC, floating on or contained in water entering such tank, box, sump, or other container, is physically separated and removed from such water prior to outfall, drainage, or recovery of such water.

This 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 September 25, 2009.

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Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
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For further information, please call: (512) 239-6090

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SUBCHAPTER H. EMISSIONS BANKING AND TRADING

DIVISION 6. HIGHLY-REACTIVE VOLATILE ORGANIC COMPOUND EMISSIONS CAP AND TRADE PROGRAM

30 TAC §§101.390 - 101.394, 101.396, 101.399 - 101.401

STATUTORY AUTHORITY

The amendments are proposed under Texas Water Code (TWC), §5.102, concerning General Powers, that provides the commission with the general powers to carry out its duties under the Texas Water Code; TWC, §5.103, concerning Rules, that authorizes the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code; TWC, §5.105, concerning General Policy, that authorizes the commission by rule to establish and approve all general policy of the commission; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, that authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amendments are also proposed under THSC, §382.002, concerning Policy and Purpose, that establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, that authorizes the commission to control the quality of the state's air; and §382.012, concerning State Air Control Plan, that authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air. The amendments are also proposed under THSC, §382.016, concerning Monitoring Requirements; Examination of Records, that authorizes the commission to prescribe reasonable requirements for the measuring and monitoring of air contaminant emissions. The amendments are also proposed under Federal Clean Air Act (FCAA), 42 United States Code (USC), §§7401, *et seq.,* which requires states to submit state implementation plan (SIP) revisions that specify the manner in which the National Ambient Air Quality Standard (NAAQS) will be achieved and maintained within each air quality control region of the state.

The proposed amendments implement THSC, §§382.002, 382.011, 382.012, 382.016, and 382.017 and FCAA, 42 USC, §§7401 *et seq.*

§101.390. Definitions.

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

(1) Allowance--The authorization to emit one ton of highly-reactive volatile organic compounds, expressed in tenths of a ton, during a control period.

(2) Authorized account representative--The responsible person who is authorized in writing to transfer and otherwise manage allowances for the site.

(3) Banked allowance--An allowance that is not used to reconcile emissions in the designated year of allocation, but is carried forward for up to one year and noted as banked in the compliance account or broker account.

(4) Baseline emissions period--Any two consecutive calendar-year control periods from 2006 - 2009 designated by a site for the purpose of establishing baseline emissions used for the allocation of allowances, except as allowed under §101.394(a)(1)(C) and (D) of this title (relating to Allocation of Allowances).

(5) [~~(4)~~] Broker--A person that is not required to participate in the requirements of this division, but that opens an account under this division for the purpose of banking and trading allowances.

(6) [~~(5)~~] Broker account--The account where allowances held by a broker are recorded. Allowances held in a broker account may not be used to satisfy compliance requirements for this division.

(7) [~~(6)~~] Compliance account--The account in which allowances held by a site are recorded for the purposes of meeting the requirements of this division.

(8) [~~(7)~~] Level of activity--The amount of highly-reactive volatile organic compounds, as defined in §115.10 of this title (relating to Definitions), in pounds produced as an intermediate, by-product, or final product or used by a process unit during a given period of time, but excluding any recycled highly-reactive volatile organic compounds internal to the process unit.

(9) Uncontrolled emissions--The total emissions calculated by dividing actual average emissions over the baseline emissions period for each facility by one minus the average percent control efficiency specifications in §115.725(d) of this title (relating to Control of Air Pollution from Volatile Organic Compounds). For heaters, boilers, and furnaces combusting highly-reactive volatile organic compound streams, the uncontrolled emissions shall be calculated by dividing actual average emissions over the baseline emissions period for each facility by one minus 99%. The control efficiency for all other non-flare facilities is equal to zero; therefore, the uncontrolled emissions will be equal to the actual emissions.

§101.391. Applicability.

This division applies to each site, as defined in §122.10 of this title (relating to General Definitions), in the Houston-Galveston-Brazoria [~~Houston/Galveston/Brazoria~~] ozone nonattainment area, as defined in §115.10 of this title (relating to Definitions), that is subject to Chapter 115, Subchapter H, Division 1 of this title [~~(relating to Vent Gas Control)~~] or Division 2 of this title (relating to Cooling Tower Heat Exchange Systems). Applicable [~~Covered~~] facilities include vent gas streams, flares, and cooling tower heat exchange systems that emit highly-reactive volatile organic compounds, as defined in §115.10 of this title (relating to Definitions), and that are located at a site subject to Chapter 115, Subchapter H of this title (relating to Highly-Reactive Volatile Organic Compounds). For the purpose of compliance with Chapter 115, Subchapter H, Division 1 or Division 2 of this title, each site that meets the applicability requirements of this section will[~~, or elects to opt-in to this division under §101.392(b) of this title (relating to Exemptions), shall~~] always be subject to this division.

§101.392. Exemptions.

(a) Sites in the Houston-Galveston-Brazoria [~~Houston/Galveston/Brazoria~~] ozone nonattainment area that have the potential to emit, as defined in §116.12 of this title (relating to Nonattainment Review Definitions), ten tons per year or less of highly-reactive volatile organic compounds from all applicable [~~covered~~] facilities at the site are exempt from the requirements of this division.

[~~(b) Sites exempt from this division under subsection (a) of this section may elect to opt-in to the requirements of this division by notifying the executive director in writing by April 30, 2005.~~]

(b) [~~(c)~~] All sites in the Houston-Galveston-Brazoria [~~Houston/Galveston/Brazoria~~] ozone nonattainment area, excluding Harris County, are exempt from the requirements of this division except for §101.401 of this title (relating to Level of Activity Certification). The commission may revoke this exemption upon public notice of this revocation. If the exemption is revoked, sites subject to this division

located in the Houston-Galveston-Brazoria [~~Houston/Galveston/Brazoria~~] ozone nonattainment area, excluding Harris County, will [~~must~~] comply by January 1, 2007, or within 180 days of public notice, whichever is later.

§101.393. General Provisions.

(a) Allowances may be used only for the purposes described in this division and may not be used to meet or exceed the emission limitations authorized under Chapter 116, Subchapter B of this title (relating to New Source Review Permits), or any other applicable rule or law.

(b) The initial control period is January 1, 2007, through December 31, 2007. Each control period after December 31, 2007, shall begin January 1 and end December 31 of each year. No later than March 1 after each control period, a site subject to this division must hold a quantity of allowances in its compliance account that is equal to or greater than the total highly-reactive volatile organic compound emissions from the applicable [~~covered~~] facilities located at the site during the control period.

(c) Allowances may not be used to satisfy netting requirements under Chapter 116, Subchapter B, Divisions 5 and 6 of this title (relating to Nonattainment Review; and Prevention of Significant Deterioration Review).

(d) Allowances may be used simultaneously to satisfy the requirements of this division and the one-to-one portion of the offset requirements for new or modified covered facilities, subject to federal nonattainment new source review requirements as provided in Chapter 116, Subchapter B, Division 7 of this title (relating to Emission Reductions: Offsets).

(e) An allowance does not constitute a security or a property right.

(f) All allowances will be allocated, transferred, deducted, or used in tenths of tons. The number of allowances will be rounded down to the nearest tenth of a ton when determining excess allowances and rounded up to the nearest tenth of a ton when determining allowances used.

(g) Each site shall have only one compliance account.

(h) The commission will maintain a registry of compliance accounts and broker accounts. The registry will not contain proprietary information.

§101.394. Allocation of Allowances.

(a) On January 1, 2007, the executive director will deposit allowances into compliance accounts as follows.

(1) For sites located in Harris County [~~that are not eligible to receive allowances under subsection (c) of this section~~], allowances for the emissions of one or more of the highly-reactive volatile organic compounds (HRVOC) as defined in §115.10 of this title (relating to Definitions), will be determined using the equations [~~equation~~] in subparagraphs (A) and (B) of this paragraph [~~the following figure~~].
[~~Figure: 30 TAC §101.394(a)(1)~~]

(A) For calendar-year control periods 2007 - 2010, the following equation will be used to determine the allocation for each site:
Figure: 30 TAC §101.394(a)(1)(A)

(B) For calendar-year control periods 2011 and later the following allocation methodology will apply:
Figure: 30 TAC §101.394(a)(1)(B)

(C) Sites not in operation during the baseline emissions period due to the construction of an authorized modification that resulted in an HRVOC emission reduction may request from the executive director the use of the allocation methodology provided under subparagraph (A) of this paragraph in lieu of the allocation provided under subparagraph (B) of this paragraph, according to the following:

(i) this allocation is less than the HRVOC permit allowable limit;

(ii) the baseline emissions period for any site under this subparagraph will be any two consecutive calendar-year control periods from 2010 - 2012; and

(iii) beginning with the 2014 calendar-year control period, all sites will receive an allocation in accordance with the methodology under subparagraph (B) of this paragraph.

(D) A site meeting the following conditions may request to use an alternative baseline emissions period consisting of the two consecutive calendar-year control periods immediately preceding the baseline emissions period defined under §101.390(4) of this title (relating to Definitions):

(i) the site used continuous flow rate monitoring and speciation of HRVOC to determine HRVOC emissions during the alternative baseline period;

(ii) the site had permanent, voluntary, and quantifiable HRVOC emission reductions in an amount equal to or greater than 50% of the site's total annual HRVOC emissions subject to this program, or a site-wide reduction in HRVOC emissions subject to this program of 50 tons or greater, as calculated by comparing the average HRVOC emissions from the alternate baseline period to the baseline emissions period defined under §101.390(4) of this title;

(iii) qualifying HRVOC emission reductions must have been made enforceable by a permit application submitted under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification) or other submittal to the executive director no later than April 1, 2010; and

(iv) a request for an alternative baseline period must be received by the executive director no later than July 1, 2010.

(2) For sites located in Brazoria, Chambers, Fort Bend, Galveston, Liberty, Montgomery, and Waller Counties [~~that are not eligible to receive allowances under subsection (c) of this section~~], allowances for emissions of ethylene and propylene for each site will be determined using the equation in the following figure.
Figure: 30 TAC §101.394(a)(2) (No change.)

(b) The level of activity of a site will [~~shall~~] be determined by summing the levels of activity from the chosen 12 consecutive month period for each process unit, as defined in §115.10 of this title, located at the site that produce one or more HRVOCs as an intermediate, by-product, or final product or that use one or more HRVOCs as a raw material or intermediate to produce a product.

[~~(c) The owner or operator of a site that is subject to this division, but that does not include a process unit that produces or uses an HRVOC, shall apply by January 30, 2005, to the executive director for an allocation based on HRVOC throughput or storage capacity for any 12 consecutive months during the period of 2000 through 2004.~~]

[~~(1) The executive director may equitably allocate up to 10% of the total HRVOC allocations for Harris County to all such sites located in Harris County:~~]

[~~(2) For sites located in Brazoria, Chambers, Fort Bend, Galveston, Liberty, Montgomery, and Waller Counties, the executive director may allocate up to 10% of the total HRVOC emissions allo-~~

cated for those counties to all such sites located in Brazoria, Chambers, Fort Bend, Galveston, Liberty, Montgomery, and Waller Counties.]

[(3) The executive director shall distribute all allowances not allocated under this subsection proportionally to those sites receiving allocations under subsections (a) and (b) of this section.]

(c) [(d)] Sites subject to the requirements of this division or electing to opt-in to the requirements of this division that receive an HRVOC allocation of less than 5.0 tons based on the allocation methodologies under subsection (a)(1)(A) [subsection (a) or (c)] of this section will [shall] be eligible to receive a minimum allocation of 5.0 tons of HRVOC allowances per year.

(d) Sites subject to the requirements of this division that receive an HRVOC allocation of less than 10.0 tons based on the allocation methodologies under subsection (a)(1)(B) of this section will be eligible to receive a minimum allocation of 10.0 tons of HRVOC allowances per calendar-year control period.

(e) If the total actual HRVOC emissions from the covered facilities at a site during a control period exceed the amount of allowances in the compliance account for the site on March 1 following the control period, allowances for the next control period will [shall] be reduced by an amount equal to the emissions exceeding the allowances in the compliance account plus 10% of the exceedance. This allocation reduction does not preclude the executive director from initiating an enforcement action. If a compliance account does not hold sufficient allowances to accommodate the reduction, the executive director may issue a notice of deficiency to the owner or operator. The owner or operator will [shall] purchase or transfer allowances sufficient to accommodate the reduction within 30 days of issuance of the notice of deficiency from the executive director.

(f) Allowances will be allocated by the executive director, who will deposit allowances into each compliance account:

(1) initially, by January 1, 2007; and

(2) subsequently, by January 1 of each following year.

(g) The executive director may adjust the deposits for any control period to reflect new or existing state implementation plan requirements.

(h) The executive director may add or deduct allowances from compliance accounts based on the review of reports required under §101.400 of this title (relating to Reporting).

§101.396. Allowance Deductions.

(a) On March 31 of each year after a control period, allowances representing the total highly-reactive volatile organic compounds (HRVOC) emissions from the applicable [covered] facilities at a site during the previous control period will be deducted from the compliance account for the site. The amount of HRVOC emissions will be based upon the monitoring and testing protocols established in §115.725 and §115.764 of this title (relating to Monitoring and Testing Requirements), as appropriate.

(b) The amount of HRVOC emissions from applicable [covered] facilities will [shall] be calculated for each hour of the year and summed to determine the annual emissions for compliance. For [emissions from emissions events subject to the requirements of §101.201 of this title (relating to Emissions Event Reporting and Recordkeeping Requirements) or] emissions from scheduled maintenance, startup, or shutdown activities subject to the requirements of §101.211 of this title (relating to Scheduled Maintenance, Startup, and Shutdown Reporting and Recordkeeping Requirements),[;] the hourly emissions to be included in the summation shall not exceed the short-term limit of §115.722(c) and §115.761(c) of this title (relating to Site-wide Cap and Control Requirements; and Site-wide Cap.

(c) As of January 1, 2011, HRVOC emissions, up to a total of 250 tons from all applicable facilities in Harris County, that are attributed to emissions events subject to the requirements of §101.201 of this title (relating to Emissions Event Reporting and Recordkeeping Requirements) will be excluded from determining annual compliance for each calendar-year control period. Emissions from emissions events at each individual site will be applied against the emissions event set-aside in the chronological order reported to the State of Texas Environmental Electronic Reporting System, as a final record, under §101.201(b). Emissions from non-reportable emission events will be applied against the emissions event set-aside on March 31 of each year after the control period in the order of actual occurrence reported on Form ECT-1H, Highly-Reactive Volatile Organic Compound (HRVOC) Emissions Cap and Trade Annual Compliance Report, as required under §101.400(a)(4) of this title (relating to Reporting).

(d) If the total HRVOC emissions from all applicable facilities in Harris County that are attributable to emission events subject to the requirements of §101.201 of this title exceed the 250 ton emissions event set-aside in any calendar-year control period, allowances equivalent to the emissions from those emissions events occurring after the emissions event set-aside limit has been reached will be deducted from a site's compliance account no later than March 31 of the year following the applicable calendar-year control period.

(e) [(c)] If the monitoring and testing data referenced in subsection (a) of this section does not exist or is unavailable, the site may determine its HRVOC emissions for that period of time using the following methods and in the following order: continuous monitoring data; periodic monitoring data; testing data; data from manufacturers; and engineering calculations. When determining the amount of HRVOC emissions under this subsection, the site will [shall] include a justification for using the substitute method or methods in lieu of the methods referenced in subsection (a) of this section.

(f) [(d)] When deducting allowances from the compliance account of a site for a control period, the executive director will deduct the allowances beginning with the most recently allocated allowances before deducting banked vintage allowances.

§101.399. Allowance Banking and Trading.

(a) Allowances allocated for a control period that are not used for compliance in that control period may be banked for use in demonstrating compliance for the next control period or transferred.

(b) Allowances that have not expired or been used may be transferred at any time during a control period, except as provided in this section.

(1) The person desiring to transfer the allowances shall apply for approval of the transaction to the executive director by submitting a completed Form ECT-2, Application for Transfer of Allowances.

(2) The ECT-2 form must include the purchase price per allowance proposed to be paid, except for transactions between sites under common ownership or control.

(3) All information regarding the quantity and purchase price of the allowances will be immediately made available to the public.

(4) If the executive director approves the application, the executive director will send a letter to the seller and purchaser reflecting the transaction. The transaction is final upon issuance of the letter.

(c) A person receiving allowances on an annual basis may permanently transfer ownership of current and future allowances to any person in accordance with the following requirements.

(1) The person desiring to transfer the allowances shall apply for approval of the transaction to the executive director by submitting a completed Form ECT-4, Application for Permanent Transfer of Allowance Ownership.

(2) The ECT-4 form must include the purchase price per allowance proposed to be paid, except for transactions between sites under common ownership or control.

(3) All information regarding the quantity and purchase price of the allowances will be immediately made available to the public.

(4) If the executive director approves the application, the executive director will send a letter to the seller and purchaser reflecting the transaction. The transaction is final upon issuance of the letter.

(d) A person may transfer allowances that are scheduled to be allocated in a future control period but have not yet been deposited into an account.

(1) The person desiring to transfer the allowances shall apply for approval of the transaction to the executive director by submitting a completed Form ECT-5, Application for Transfer of Individual Future Year Allowances.

(2) The ECT-5 form must include the purchase price per allowance proposed to be paid, except for transactions between sites under common ownership or control.

(3) All information regarding the quantity and purchase price of the allowances will be immediately made available to the public.

(4) If the executive director approves the application, the executive director will send a letter to the seller and purchaser reflecting the transaction. The transaction is final upon issuance of the letter.

(e) Allowances that were provided under §101.394(a)(1)(C) of this title (relating to Allocation of Allowances) are not eligible for transfer under subsections (b), (c), or (d) of this section.

(f) [~~(e)~~] Allowances generated from sites located in counties other than Harris County may not be used at sites located in Harris County. Allowances generated from sites located in Harris County may not be used at sites located in counties other than Harris County.

(g) [~~(f)~~] Only authorized account representatives may transfer allowances.

(h) [~~(g)~~] Allowances subject to an approved transaction will be deposited into the purchaser's broker or compliance account within 30 days of receipt of a completed transfer application.

(i) [~~(h)~~] Volatile organic compound emission reduction credits (ERC) certified in accordance with Division 1 of this subchapter (relating to Emission Credit Banking and Trading) may be converted to a yearly highly-reactive volatile organic compound (HRVOC) allocation.

(1) Qualified volatile organic compound (VOC) ERCs must be generated:

(A) from a reduction at a site located in the Houston/Galveston/Brazoria nonattainment area;

(B) from a reduction strategy implemented after December 31, 2004; and

(C) from a reduction in VOC species other than those defined as HRVOCs under §115.10 of this title (relating to Definitions).

(2) VOC reductions due to the installation of best available control technology do not qualify for conversion under this subsection.

(3) In addition to the requirements of Division 1 of this subchapter, a qualified VOC ERC must meet the following requirements:

(A) the ERC must be quantifiable, real, surplus, enforceable, and permanent as required in §101.302 of this title (relating to General Provisions) at the time the ERC is converted;

(B) the baseline emissions to which the VOC reduction is compared must consist of the average actual emissions for any two consecutive calendar years preceding the emission reduction strategy and that include or follow the most recent year of emission inventory used in the state implementation plan;

(C) the quantification of VOC reductions must be performed using the monitoring and testing methods required under §115.725 or §115.764 of this title (relating to Monitoring and Testing Requirements) and subject to the recordkeeping and reporting requirements under §115.726 and §115.766 of this title (relating to Recordkeeping and Reporting Requirements);

(D) the ERC must not have expired; and

(E) the owner of the ERC shall have prior approval from the executive director to convert the ERC to an HRVOC allocation.

(4) VOC ERCs must be converted to HRVOC allowances at a ratio calculated using the equation in the following figure.
Figure: 30 TAC §101.399(i)(4)
[~~Figure:~~ ~~30 TAC §101.399(h)(4)~~]

(5) For each site eligible to receive allowances under §101.394(a) [~~or (c)~~] of this title [~~(relating to Allocation of Allowances)~~], additional HRVOC allowances received from the conversion of VOC ERCs under this subsection must be limited to a quantity not to exceed more than 5% of the site's initial HRVOC allocation.

(6) In addition to paragraph (5) of this subsection, sites subject to this division may receive an HRVOC allocation from the conversion of VOC ERCs under this subsection equivalent to any HRVOC emissions increases from new or modified covered facilities not in operation prior to January 2, 2004, and that were included in an application for a permit under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification) that was deemed administratively complete by the executive director within one year of the effective date of this rule.

§101.400. Reporting.

(a) No later than March 31 after each control period, each site will [~~shall~~] submit a completed Form ECT-1H, Highly-Reactive Volatile Organic Compound (HRVOC) Emissions Cap and Trade Annual Compliance Report, to the executive director, which will [~~shall~~] include the following:

(1) the total amount of actual HRVOC emissions from applicable [~~covered~~] facilities at the site during the preceding control period;

(2) the method or methods used to determine the actual HRVOC emissions, including, but not limited to, monitoring protocol and results, calculation methodologies, and emission factors; [~~and~~]

(3) a summary of all final transactions for the preceding control period; and[~~.~~]

(4) the total amount and respective dates of HRVOC emissions from emissions events subject to the requirements of §101.201 of this title (relating to Emissions Event Reporting and Recordkeeping Requirements).

(b) For sites failing to submit an ECT-1H form by the required deadline in subsection (a) of this section, the executive director may withhold approval of any proposed trades from that site involving allowances allocated for the control period for which the ECT-1H form is due or to be allocated in subsequent control periods.

§101.401. Level of Activity Certification.

(a) No later than April 30, 2005, the owner or operator of each site subject to this division will [~~shall~~] submit to the executive director a completed Form ECT-3H, Highly-Reactive Volatile Organic Compound Emissions Cap and Trade Level of Activity Certification Form.

(b) For each process unit subject to this division, the owner or operator will [~~shall~~] certify in the ECT-3H form the level of activity for the selected 12 consecutive months during the period of 2000 through 2004.

(c) The owner or operator will [~~shall~~] attach to the ECT-3H form information and documentation necessary to support the proposed level of activity baseline.

(d) The owner or operator of the site may mark any portion of the ECT-3H form, or supporting information and documentation, as confidential under Texas Health and Safety Code, §382.041.

(e) In conjunction with submission of the ECT-3H form, the owner or operator of the site subject to this division will [~~shall~~] provide enforceable documentation of the maximum allowable emission rate of highly-reactive volatile organic compounds from facilities located at that site.

(f) No later than April 30, 2010, the owner or operator of each site subject to this division will submit to the executive director a completed Form ECT-6H, Highly Reactive Volatile Organic Compound Emissions Cap and Trade Baseline Emissions Certification Form.

(g) For each site subject to this division, the owner or operator will certify in the ECT-6H form two consecutive calendar-year control periods selected from the period of 2006 - 2009 to establish the baseline emissions period.

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

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Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
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For further information, please call: (512) 239-6090

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SUBCHAPTER H. EMISSIONS BANKING AND TRADING
DIVISION 3. MASS EMISSIONS CAP AND TRADE PROGRAM

30 TAC §§101.350, 101.351, 101.353

The Texas Commission on Environmental Quality (commission or agency) proposes amendments to §§101.350, 101.351, and 101.353.

The amended sections will be submitted to the United States Environmental Protection Agency (EPA) as a revision to the state implementation plan (SIP).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

The purpose of the proposed amendments to Subchapter H, Division 3, Mass Emissions Cap and Trade Program, is to maintain the integrity of the nitrogen oxides (NO_x) cap in the Houston-Galveston-Brazoria (HGB) ozone nonattainment area and minimize increases in the NO_x cap. The proposal would discontinue the acceptance of late ECT-3 forms, Level of Activity Certification, submitted in accordance with §101.360(a) after March 30, 2010, from sites defined on or before December 31, 2000, as major sources of NO_x, as defined in 30 TAC §117.10. Also, the proposed rulemaking would amend the definition of "Uncontrolled design capacity" to provide additional flexibility for certain stationary diesel engines and clarify both site and facility applicability.

The Mass Emissions Cap and Trade (MECT) program is a market-based component of the SIP that provides stationary sources of NO_x compliance flexibility for the emission specifications under 30 TAC Chapter 117, while establishing a mandatory cap for total NO_x emissions from affected source categories in the HGB ozone nonattainment area. The MECT program was adopted as a primary control measure of the HGB attainment demonstration for the one-hour ozone National Ambient Air Quality Standard (NAAQS). The MECT program NO_x cap is a product of the emission specifications of Chapter 117 and the submitted levels of activity from applicable facilities. The proposed rulemaking would not affect the submittal of ECT-3 forms from minor sources of NO_x.

In accordance with §101.360(a), to receive an allocation of allowances (one allowance equals one ton of NO_x), sites were required to submit an ECT-3 form with the levels of activity from their applicable facilities by June 30, 2001. Applicable facilities with historical actual emission data were allocated allowances based on actual levels of activity while other applicable facilities without historical actual emission data were allocated allowances based on permitted allowable emissions. Representatives of facilities with allocations based on permitted emissions are required to submit a second ECT-3 form once a historical emissions baseline is established to convert their permit-based allocation to a historical level of activity based allocation in accordance with §101.360(b)(1). The current rule doesn't address late submittals of ECT-3 forms. Therefore, a site that has never complied with the MECT program could submit a late ECT-3 form in accordance with §101.360(a) and receive an allocation of allowances, thus, potentially increasing the NO_x cap. To maintain the integrity and minimize increases in the NO_x cap, the proposed rulemaking would discontinue the acceptance of late ECT-3 forms from sites defined on or before December 31, 2000, as major sources of NO_x if submitted in accordance with §101.360(a) after March 30, 2010. These applicable facilities would have to obtain allowances from the market instead of receiving an allocation of allowances.

Informal comments from industry were received regarding clarification on "air pollution control equipment" in the definition of "Uncontrolled design capacity." Therefore, the proposed rulemaking

would clarify the definition of "Uncontrolled design capacity" by amending this definition to "Uncontrolled design capacity to emit" as the maximum capacity of a facility to emit NO_x without consideration for post-combustion control equipment, enforceable limitations, or operational limitations. The addition of "post-combustion control equipment" to the proposed definition would account for any equipment that can be removed without preventing the facility from operating. NO_x control equipment that is not considered post-combustion control equipment, such as low-NO_x burners, would be considered when calculating the uncontrolled design capacity to emit.

In 2008, Hurricane Ike increased awareness of the need for backup generators during extended power outages for activities such as maintaining water pressure at water treatment plants. To provide additional flexibility to sites that would potentially become subject to the MECT program because of a backup generator, the new sentence to §101.350(14) proposes a new option for calculating the uncontrolled design capacity to emit from applicable diesel engines operating less than 100 hours per year in non-emergency situations and not meeting the applicable EPA Tier standards. Under this proposed rulemaking, a minor source of NO_x with an applicable diesel engine would, depending on the site's collective uncontrolled design capacity to emit, meet the emission specification listed in §117.2010 either by participating in the MECT program and acquiring allowances or not participating in the MECT program and acquiring emission reduction credits or discrete emission reduction credits.

To clarify site and facility applicability, the proposed rulemaking would restructure §101.351 to explain that sites must determine their status as a minor or major source of NO_x in Chapter 117 before determining applicability of their facilities in the MECT program. Along with the restructuring of §101.351, proposed subsection (c) would clarify a site's duration in the MECT program.

SECTION BY SECTION DISCUSSION

SUBCHAPTER H: EMISSIONS BANKING AND TRADING

DIVISION 3: MASS EMISSIONS CAP AND TRADE PROGRAM

In addition to the proposed amendments to §§101.350, 101.351, and 101.353 discussed elsewhere in this preamble, the commission also proposes to make various stylistic non-substantive changes to update rule language to current *Texas Register* style and format requirements, as well as establish more consistency in the rules. Such changes include appropriate and consistent use of acronyms, punctuation, section references, and certain terms such as "must" and "shall." These changes are non-substantive and generally are not specifically discussed in this preamble.

§101.350. Definitions.

The proposed amendment to §101.350(14) would revise the definition of "Uncontrolled design capacity" to "Uncontrolled design capacity to emit" as the maximum capacity of a facility to emit NO_x without consideration for post-combustion control equipment (e.g., a selective catalytic reduction system), enforceable limitations (e.g., permit restrictions, such as a restriction on operating hours per year), or operational limitations (e.g., using a number lower than the maximum rated capacity). The addition of "post-combustion control equipment" to the proposed definition would account for any equipment that can be removed without preventing the facility from operating. NO_x control equipment that is not considered post-combustion control equipment, such as low-NO_x burners, would be considered when calculating the uncontrolled design capacity to emit.

The proposed amendment to §101.350(14) would allow flexibility for calculating the uncontrolled design capacity to emit for stationary diesel engines that are modified, reconstructed, or relocated, operate less than 100 hours per year (based on a rolling 12-month average) in non-emergency situations, and do not meet the applicable EPA Tier standards. In conjunction with proposed §101.351(c), proposed §101.350(14) would allow minor sources of NO_x not subject to the MECT program the option to calculate the uncontrolled design capacity to emit for an applicable stationary diesel engine using the lower of 876 hours or a federally enforceable limitation on total hours of operation. From the proposed new language, an applicable site with an applicable stationary diesel engine could meet the emission specification listed in §117.2010 either by participating in the MECT program and obtaining allowances or not participating in the MECT program and obtaining emission credits or discrete emission credits, depending on the site's collective uncontrolled design capacity to emit.

For example, on July 21, 2010, a municipal utility district (MUD) installs a stationary diesel engine for use as a backup generator to maintain water pressure during power outages. In this example, the MUD does not have any other applicable facilities subject to §117.2010 and is not subject to the MECT program prior to the installation of this engine. The diesel engine is rated at 150 horsepower, has an emission factor of 7.0 grams of NO_x per horsepower-hour, and is permitted to operate at most 876 hours per year. The engine must comply with the emission specifications listed in §117.2010 since this engine does not meet the criteria necessary to be considered exempt under §117.2003. Therefore, the installation of the backup generator requires recalculation of the site's collective uncontrolled design capacity to emit to determine applicability in the MECT program. Proposed §101.350(14) would allow using 876 hours when calculating the uncontrolled design capacity to emit for the diesel engine, therefore equaling 1.01 tons of NO_x per year. The MUD in this example could also use the conventional method for calculating the uncontrolled design capacity to emit using 8,760 hours, therefore equaling 10.14 tons per year. The MUD is subject to the MECT program if the collective uncontrolled design capacity to emit is ten tons or more per year of NO_x. Since the MUD has the option of having a collective uncontrolled design capacity to emit above or below ten tons per year, the MUD could either participate in the MECT program and obtain allowances to cover the actual emissions of NO_x from the diesel engine or obtain emission credits or discrete emission credits for the diesel engine to meet the emission specifications listed in §117.2010. Under proposed §101.351(c), if this MUD participates in the MECT program, then this site would remain subject to the MECT program until permanently shut down.

§101.351. Applicability.

The proposed amendment to §101.351(a) would require a site first to determine its status as a minor or major source of NO_x in Chapter 117. If the site is a major source of NO_x, the facilities with emission specifications listed in §117.310 or §117.1210 are applicable to the MECT program. If the site is a minor source of NO_x, the collective uncontrolled design capacity to emit is calculated from the facilities with emission specifications in §117.2010. If the collective uncontrolled design capacity to emit is ten tons or more per year of NO_x, then the site is subject to the MECT program.

Proposed §101.351(c) states that once a site becomes subject to the MECT program, the site will remain subject to the MECT program until permanently shut down. Proposed subsection (c) would clarify that a site's collective uncontrolled design capacity to emit will not affect the site's applicability once subject to the MECT program. In addition, proposed subsection (c) would also clarify that once a minor source of NO_x is subject to the MECT program, any of the facilities at the site subject to the emission specifications in §117.2010 are subject to the MECT program until the site is permanently shut down.

§101.353. Allocation of Allowances.

The proposed amendment to §101.353(b) would require sites defined on or before December 31, 2000, as major sources of NO_x with facilities that meet the requirements to receive allowances in accordance with §101.360(a), but have not submitted an ECT-3 form by March 30, 2010, to obtain allowance for these facilities from the market. Under the existing rule, ECT-3 forms were considered late if submitted in accordance with §101.360(a) after June 30, 2001, however, the forms were accepted. Under the proposed amendment, if an ECT-3 form is submitted in accordance with §101.360(a) and is received after March 30, 2010, from a site defined on or before December 31, 2000, as a major source of NO_x, then the ECT-3 form would not be accepted and the facilities listed on the ECT-3 form would be required to obtain allowances from the market instead of receiving an allocation of allowances based on historical actual emission data or an allocation of allowances based on permitted allowable emissions.

The existing rule language regarding the 90-day submittal deadline for an ECT-3 form from newly applicable sites or facilities would not be affected by the proposed rulemaking. Also, the proposed rulemaking would not affect ECT-3 forms submitted in accordance with §101.360(a) after March 30, 2010, from minor sources of NO_x.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Nina Chamness, Analyst, Strategic Planning and Assessment, has determined that, for the first five-year period the proposed rules are in effect, no significant fiscal implications are anticipated for the agency or other units of state or local governments as a result of administration or enforcement of the proposed rules. The proposed rules clarify certain provisions of the MECT program.

The proposed rules amend Chapter 101 provisions pertaining to the MECT program. The proposed rules will: eliminate the allocation of allowances to major sources of NO_x in the HGB ozone nonattainment area that have not submitted proper certification regarding their level of activity by March 30, 2010; revise a definition for calculating "Uncontrolled design capacity" to allow minor sources of NO_x not in the MECT program the option to use emission credits, discrete emission credits, or MECT allowances for modified, reconstructed, or relocated stationary diesel engines operating less than 100 hours per year in non-emergency situations and not meeting the emission standards for that EPA Tier; and clarify the policy that once a minor or major source of NO_x participates in the MECT program, its participation is permanent until it is permanently shut down.

In general, the proposed rules are not expected to have a significant fiscal impact on local governments in the HGB ozone nonattainment area. Local governments are not typically major sources of NO_x emissions and eliminating the allocation of emission allowances after March 30, 2010, should not impact them. However, due to recent legislative changes, some water systems and wastewater systems in the HGB ozone nonattainment area may be affected. Those water and wastewater systems that install diesel engines to ensure emergency operations during extended power outages and are minor sources of NO_x not in the MECT program would benefit from the additional flexibility for calculating the uncontrolled design capacity to emit for a stationary diesel engine that is not exempt from the provisions of §117.2003(a)(2)(I) because it does not meet the EPA Tier standard. If the proposed new calculation methodology is chosen and the site has a collective uncontrolled design capacity to emit less than 10 tons of NO_x per year, the water or wastewater system would have the option to obtain emission credits or discrete emission credits to meet emission specifications. If the existing calculation methodology is chosen and the site has a collective uncontrolled design capacity to emit 10 tons or more of NO_x per year, then the site must participate in the MECT program and obtain allowances. Market prices of MECT allowances, emission credits, and discrete emission credits vary according to market conditions. The Figure in this preamble estimates the costs of the allowances and credits according to current market prices.

Figure: 30 TAC Chapter 101--Preamble

Staff estimates that there may be as many as 3,000 public water systems and wastewater systems in the HGB ozone nonattainment area.

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 a restriction on potential increases to the NO_x cap in the HGB ozone nonattainment area and continued protection of public health and the environment in that area.

Staff estimates that there are 350 sites in the MECT program. If a major source of NO_x does not submit the proper certification regarding their level of activity by March 30, 2010, they will be required to obtain MECT allowances. Minor sources of NO_x not in the MECT program would benefit from the additional flexibility for calculating the uncontrolled design capacity to emit for a stationary diesel engine that is not exempt from the provisions of §117.2003(a)(2)(I) because it does not meet the EPA Tier standard. If the proposed new calculation methodology is chosen and the site has a collective uncontrolled design capacity to emit less than 10 tons of NO_x per year, the site would have the option to obtain emission credits or discrete emission credits to meet emission specifications. If the existing calculation methodology is chosen and the site has a collective uncontrolled design capacity to emit 10 tons or more of NO_x per year, then the site must participate in the MECT program and obtain allowances. Market prices of MECT allowances, emission credits, and discrete emission credits vary according to market conditions. The Figure in this preamble estimates the costs of the allowances and credits according to current market prices.

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 do not typically participate in activities that would qualify as a major source of NO_x. Small businesses that might be classified as a minor source of NO_x in the HGB ozone nonattainment area will see the same flexibility as other minor sources of NO_x if they

choose to install a stationary diesel engine that does not meet the EPA Tier standards.

SMALL BUSINESS REGULATORY FLEXIBILITY ANALYSIS

The commission has reviewed the proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the emissions banking and trading program is a component of the state's plan to protect the environment and reduce risks to human health from environmental exposure to air pollutants, and the proposed rules do not adversely affect a small or micro-business in a material way for the first five years that the proposed rules are in effect.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission has reviewed the 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 action in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the action is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute. A "major environmental rule" is a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The amendments to Chapter 101 are not specifically intended to protect the environment or reduce risks to human health from environmental exposure to air pollutants; although, the underlying emissions banking and trading program is intended to achieve these goals. The primary purpose of this rulemaking action is to maintain the integrity of the NO_x cap in the HGB ozone nonattainment area by minimizing potential increases in the cap, to amend the definition of "Uncontrolled design capacity" to "Uncontrolled design capacity to emit" for additional clarity and to provide additional flexibility for certain diesel engines, and to clarify site and facility applicability.

None of these amendments place additional financial burdens on the regulated community. The first purpose of this proposed rulemaking is to maintain the integrity of the NO_x cap and minimize cap increases, by discontinuing the acceptance of late ECT-3 forms submitted in accordance with §101.360(a) after March 30, 2010, from sites defined on or before December 31, 2000, as major sources of NO_x. Although a major source of NO_x that has not submitted its ECT-3 form by March 30, 2010, would have to purchase MECT allowances, the commission has not received any late ECT-3 forms since before 2003 from a major source of NO_x; therefore, it is unlikely that anyone who needs to submit ECT-3 forms has not done so. The other purpose of this proposed rulemaking is to provide additional flexibility to sites that would enter the MECT program because of a backup generator, by proposing a new option for calculating the uncontrolled design capacity to emit from applicable diesel engines that operate less than 100 hours per year in non-emergency situations and do not meet the applicable EPA Tier standards. This proposed change would offer additional flexibility for potential applicability of the MECT program to a wider range of sources and would give potentially affected sources additional options, instead of requiring them to participate in the MECT program. Thus, the rulemaking action does not 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.

As defined in the Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: exceed a standard set by federal law, unless the rule is specifically required by state law; exceed an express requirement of state law, unless the rule is specifically required by federal law; exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking action does not meet any of these four applicability requirements of a "major environmental rule." Specifically, the proposed amendments to the MECT program in this rulemaking action were developed to provide flexibility in meeting the ozone NAAQS set by the EPA under 42 United States Code (USC), §7409, and therefore meet a federal requirement. This rulemaking action does not exceed an express requirement of state law or a requirement of a delegation agreement, was not developed solely under the general powers of the agency, but was specifically developed to meet the NAAQS established under federal law and authorized under Texas Health and Safety Code (THSC), §§382.011, 382.012, and 382.017, as well as under 42 USC, §7410(a)(2)(A).

The commission invites public comment regarding the draft regulatory impact analysis determination during the public comment period.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the proposed rulemaking and performed an assessment of whether Texas Government Code, Chapter 2007, is applicable. The proposed amendments to the MECT program would provide additional flexibility for certain sites in meeting the ozone NAAQS set by the EPA under 42 USC, §7409, and also limit increases in the NO_x cap. Promulgation and enforcement of the amendments will not burden private real property. The proposed amendments do not affect private property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of a governmental action. Additionally, the credits and allowances that would be affected by these proposed amendments are not property rights. Consequently, this rulemaking action does not meet the definition of a taking under Texas Government Code, §2007.002(5). Although the proposed amendments do not directly prevent a nuisance or prevent an immediate threat to life or property, they do prevent a real and substantial threat to public health and safety, and partially fulfill a federal mandate under 42 USC, §7410. Specifically, the emission limitations and control requirements within these rules were developed in order to meet the one-hour ozone NAAQS set by the EPA under 42 USC, §7409. States are primarily responsible to ensure attainment and maintenance of the NAAQS once the EPA has established them. Under 42 USC, §7410 and related provisions, states must submit, for approval by the EPA, SIPs that provide for the attainment and maintenance of NAAQS through control programs directed to sources of the pollutants involved. Therefore, the purpose of this proposed rulemaking action is to minimize increases in the NO_x cap and to provide additional flexibility for certain sites to meet the ozone NAAQS set by the EPA under 42 USC, §7409. Consequently, the exemption that applies to these proposed amendments is that of an action reasonably taken to fulfill an obligation mandated by federal

law. Therefore, this rulemaking action will not constitute a taking under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined that this rulemaking action relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 *et seq*.), and the commission rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the Texas Coastal Management Program. As required by §281.45(a)(3) and 31 TAC §505.11(b)(2), relating to Actions and Rules Subject to the Coastal Management Program, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission reviewed this action for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Council and determined that the action is consistent with the applicable CMP goals and policies. The CMP goal applicable to this rulemaking action is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(l)). The proposed amendments update a definition and maintain the integrity of the NO_x cap. No new sources of air contaminants will be authorized and the revisions will maintain the same level of emissions control as previous rules. The CMP policy applicable to this rulemaking action is the policy that commission rules comply with federal regulations in 40 Code of Federal Regulations (CFR), to protect and enhance air quality in the coastal areas (31 TAC §501.14(q)). This rulemaking action complies with 40 CFR Part 51, Requirements for Preparation, Adoption, and Submittal of Implementation Plans. Therefore, in accordance with 31 TAC §505.22(e), the commission affirms that this rulemaking action is consistent with CMP goals and policies.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMITS PROGRAM

These amendments will not require any changes to outstanding federal operating permits.

ANNOUNCEMENT OF HEARINGS

The commission will hold public hearings on this proposal in conjunction with the HGB 1997 Eight-Hour Ozone Standard Attainment Demonstration and HGB 1997 Eight-Hour Ozone Reasonable Further Progress SIP revisions, Control Techniques Guidelines rulemaking, and the Highly Reactive Volatile Organic Compound Emissions Cap and Trade Program revisions in Houston on October 28, 2009, at 2:00 p.m. and 6:00 p.m. in Conference Room A at the Houston-Galveston Area Council, located at 3555 Timmons Lane, and in Austin on October 29, 2009, at 3:00 p.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Charlotte Horn, Office of Legal Services at (512) 239-0779. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Comments may be submitted to Jessica Rawlings, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: *http://www5.tceq.state.tx.us/rules/ecomments/*. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2009-019-101-EN. The comment period closes November 9, 2009. Copies of the proposed rulemaking can be obtained from the commission's Web site at *http://www.tceq.state.tx.us/nav/rules/propose_adopt.html*. For further information, please contact Brandon Greulich, Air Quality Planning Section, (512) 239-4904.

STATUTORY AUTHORITY

The amendments are proposed under Texas Water Code (TWC), §5.102, concerning General Powers, that provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, that authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; TWC, §5.105, concerning General Policy, that authorizes the commission by rule to establish and approve all general policy of the commission; and under THSC, §382.017, concerning Rules, that authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amendments are also proposed under THSC, §382.002, concerning Policy and Purpose, that establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, that authorizes the commission to control the quality of the state's air; and §382.012, concerning State Air Control Plan, that authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air. The amendments are also proposed under THSC, §382.016, concerning Monitoring Requirements; Examination of Records, that authorizes the commission to prescribe reasonable requirements for the measuring and monitoring of air contaminant emissions. The amendments are also proposed under Federal Clean Air Act (FCAA), 42 USC, §§7401 *et seq*., which requires states to submit SIP revisions that specify the manner the NAAQS will be achieved and maintained within each air quality control region of the state.

The amended sections implement THSC, §§382.002, 382.011, 382.012, 382.016, and 382.017, and FCAA, 42 USC, §§7401 *et seq*.

§101.350. Definitions.

The following words and terms, when used in this division (relating to Mass Emissions Cap and Trade Program), will [~~, shall~~] have the following meanings, unless the context clearly indicates otherwise.

(1) Adjustment period--A period of time, beginning on the first day of operation of a facility and ending no more than 180 consecutive days later, used to make corrections and adjustments to achieve normal technical operating characteristics of the facility.

(2) Allowance--The authorization to emit one ton of nitrogen oxides, expressed in tenths of a ton, during a control period.

(3) Authorized account representative--The responsible person who is authorized, in writing, to transfer and otherwise manage allowances.

(4) Banked allowance--An allowance that [~~which~~] is not used to reconcile emissions in the designated year of allocation, but that [~~which~~] is carried forward for up to one year and noted in the compliance or broker account as "banked."

(5) Broker--A person not required to participate in the requirements of this division (relating to Mass Emissions Cap and Trade Program) who opens an account under this division for the purpose of banking and trading allowances.

(6) Broker account--The account where allowances held by a broker are recorded. Allowances held in a broker account may not be used to satisfy compliance requirements for this division (relating to Mass Emissions Cap and Trade Program).

(7) Compliance account--The account where allowances held by a facility or multiple facilities at a single site are recorded for the purposes of meeting the requirements of this division (relating to Mass Emissions Cap and Trade Program).

(8) Control period--The 12-month period beginning January 1 and ending December 31 of each year. The initial control period begins January 1, 2002.

(9) Existing Facility--A new or modified facility that either has submitted an application for a permit under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification) that [~~which~~] the executive director has determined to be administratively complete before January 2, 2001, or has qualified for a permit by rule under Chapter 106 of this title (relating to Permits by Rule) and commenced construction before January 2, 2001.

(10) Houston-Galveston-Brazoria (HGB) ozone nonattainment area--As defined in §101.1 of this title (relating to Definitions).

(11) Level of activity--The amount of activity at a facility measured in terms of production, fuel use, raw materials input, or other similar units.

(12) Person--For the purpose of issuance of allowances under this division (relating to Mass Emissions Cap and Trade Program), a person includes an individual, a partnership of two or more persons having a joint or common interest, a mutual or cooperative association, or a corporation.

(13) Site--As defined in §122.10 of this title (relating to General Definitions).

(14) Uncontrolled design capacity to emit--The maximum capacity of a facility to emit nitrogen oxides without consideration for post-combustion pollution control equipment, enforceable limitations, or operational limitations. The owner or operator of a stationary diesel engine may use the lower of 876 hours or a federally enforceable limitation on total hours of operation to calculate uncontrolled design capacity to emit if the engine would otherwise be exempt from Chapter 117, Subchapter D, Division 1 of this title (relating to Houston-Galveston-Brazoria Ozone Nonattainment Area Minor Sources) under §117.2003(a)(2)(I) of this title (relating to Exemptions) except that the engine does not meet the emission standard requirements of §117.2003(a)(2)(I)(ii) of this title.

[~~(14) Uncontrolled design capacity--The maximum capacity of a facility to emit a pollutant without regard to any enforceable or physical operational limitations including air pollution control equipment.~~]

§101.351. Applicability.

(a) This division applies to sites [~~all facilities which emit nitrogen oxides (NO_x)~~] in the Houston-Galveston-Brazoria ozone nonattainment area that: [~~, as defined in §101.1 of this title (relating to Definitions) which are subject to the emission specifications under §§117.310, 117.1210, or 117.2010 of this title (relating to Emission Specifications for Attainment Demonstration and Emission Specifications) and which are:~~]

(1) meet [~~located at a site which meets~~] the definition of a major source of nitrogen oxides (NO_x), as defined in §117.10 of this title (relating to Definitions), with facilities subject to §117.310 or §117.1210 of this title (relating to Emission Specifications for Attainment Demonstration); or

(2) do not meet the definition of a major source of NO_x, as defined in §117.10 of this title, and have facilities subject to §117.2010 of this title (relating to Emission Specifications) with a collective uncontrolled design capacity to emit from these facilities of [~~located at a site where they collectively have an uncontrolled design capacity to emit~~] ten tons or more per year of NO_x.

(b) A site that [~~which~~] met the definition of major source as of December 31, 2000, must [~~shall~~] always be classified as a major source for purposes of this chapter. A site that [~~which~~] did not meet the definition of major source (i.e., was a minor source, or did not yet exist) on December 31, 2000, but that [~~which~~] at any time after December 31, 2000, becomes a major source, must [~~shall~~] from that time forward always be classified as a major source for purposes of this chapter.

(c) Once a site becomes subject to the requirements of this division, the site will remain subject to this division until the site has been permanently shut down.

§101.353. Allocation of Allowances.

(a) Allowances will be deposited into compliance accounts according to the following equation except as provided in subsection (b) or (h) of this section.
Figure: 30 TAC §101.353(a) (No change.)

(b) The owner or operator of the following facilities shall acquire allowances for each control period or the annual allocation rights from facilities already participating under this division in accordance with §101.356 of this title (relating to Allowance Banking and Trading):

(1) new and/or modified facilities that have submitted, under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification), an application that the executive director has not determined to be administratively complete before January 2, 2001;

(2) new and/or modified facilities that qualified for a permit by rule under Chapter 106 of this title (relating to Permits by Rule) and have not commenced construction before January 2, 2001;

(3) facilities in operation prior to January 1, 1997, located at a site defined on or before December 31, 2000, as a major source of nitrogen oxides (NO_x), as defined in §117.10 of this title (relating to Definitions), that have not submitted a ECT-3 Form, Level of Activity Certification, in accordance to §101.360(a)(1) of this title (relating to Level of Activity Certification) by March 30, 2010;

(4) new and/or modified facilities located at a site defined on or before December 31, 2000, as a major source of NO_x, as defined in §117.10 of this title, that submitted a permit application that was determined administratively complete before January 2, 2001, but have not submitted an ECT-3 Form in accordance to §101.360(a)(2) of this title by March 30, 2010; and

(5) new and/or modified facilities located at a site defined on or before December 31, 2000, as a major source of NO_x, as defined in §117.10 of this title, that qualified for a permit by rule and commenced construction before January 2, 2001, but have not submitted an ECT-3 Form in accordance to §101.360(a)(2) of this title by March 30, 2010.

~~[(b) For a new and/or modified facility that has submitted, under Chapter 116 of this title (relating to Control of Air Pollution by Permit for New Construction of Modification), an application which the executive director has not determined to be administratively complete before January 2, 2001, or has qualified for a permit by rule under Chapter 106 of this title (relating to Permits by Rule) and has not commenced construction before January 2, 2001, allowances for each control period or the annual allocation rights shall be acquired from facilities already participating under this division, or in accordance with §101.356(g) of this title (relating to Allowance Banking and Trading).]~~

(c) If actual emissions of NO_x [~~nitrogen oxides~~] during a control period exceed the amount of allowances held in a compliance account on March 1 following the control period, allowances for the next control period will be reduced by an amount equal to the emissions exceeding the allowances in the compliance account plus an additional 10%. This does not preclude additional enforcement action by the executive director.

(d) Allowances will be allocated by the executive director, who will deposit allowances into each compliance account:

(1) initially, by January 1, 2002; and

(2) subsequently, by January 1 of each following year.

(e) The annual deposit for any control period may be adjusted by the executive director to reflect new or existing state implementation plan requirements.

(f) Allowances may be added or deducted by the executive director from compliance accounts following the review of reports required under §101.359 of this title (relating to Reporting).

(g) The owner or operator of a facility may, due to extenuating circumstances, request a baseline period more representative of normal operation as determined by the executive director. Applications for extenuating circumstances must be submitted by the owner or operator of the facility to the executive director:

(1) no later than June 30, 2001, to request an alternative three consecutive calendar year period for facilities in operation prior to January 1, 1997;

(2) no later than 90 days after completion of the baseline period to request up to two additional calendar years to establish a baseline period for facilities whose baseline as described by variable (2)(C) listed in the figure contained in subsection (a) of this section is not complete by June 30, 2001; or

(3) at any time as authorized by the executive director.

(h) Allowances calculated under subsection (a) of this section will continue to be based on historical activity levels, despite subsequent reductions in activity levels. If allowances are being allocated based on allowables and the facility does not achieve two complete consecutive calendar years of actual level of activity data, then allowances will not continue to be allocated if the facility ceases operation or is not built.

This 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 September 25, 2009.

TRD-200904266
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: November 8, 2009
For further information, please call: (512) 239-0177

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CHAPTER 115. CONTROL OF AIR POLLUTION FROM VOLATILE ORGANIC COMPOUNDS

SUBCHAPTER E. SOLVENT-USING PROCESSES

DIVISION 4. OFFSET LITHOGRAPHIC PRINTING

30 TAC §§115.440 - 115.443, 115.445, 115.446, 115.449

The Texas Commission on Environmental Quality (commission or agency) proposes amendments to §§115.440, 115.442, 115.443, 115.445, 115.446, and 115.449; and proposes new §115.441.

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

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

The 1990 Federal Clean Air Act (FCAA) Amendments (42 United States Code (USC), §§7401 *et seq.)* require the EPA to establish primary National Ambient Air Quality Standards (NAAQS) that protect public health and to designate areas exceeding the NAAQS as nonattainment areas. For each designated nonattainment area, the state is required to submit a SIP revision to the EPA that provides for attainment and maintenance of the NAAQS.

FCAA, §172(c)(1) requires that the SIP incorporate all reasonably available control measures, including reasonably available control technology (RACT), for sources of relevant pollutants. The EPA defines RACT as the lowest emission limitation that a particular source is capable of meeting by the application of control technology that is reasonably available considering technological and economic feasibility (44 *Federal Register* 53761, September 17, 1979). For nonattainment areas classified as moderate and above, FCAA, §182(b)(2) requires the state to submit a SIP revision that implements RACT for volatile organic compound (VOC) emission sources addressed in a control techniques guidelines (CTG) document issued between November 15, 1990, and the area's attainment date.

CTG documents provide information to assist states and local air pollution control authorities in determining RACT for specific emission sources. CTG documents describe the EPA's evaluation of available information, including emission control options and associated costs, and provide the EPA's RACT recommendations for controlling emissions from these sources. CTG documents do not impose any legally binding regulations or change any applicable regulations. EPA guidance on RACT indicates

that states can choose to implement the CTG recommendations, implement an alternative approach, or demonstrate that additional control for the CTG emission source category is not technologically nor economically feasible in the area.

FCAA, §183(e) directs the EPA to regulate VOC emissions from certain consumer and commercial product categories by issuing national regulations or by issuing CTG documents in lieu of regulations. On October 5, 2006, the EPA published a CTG document in lieu of national regulations for VOC emissions from Offset Lithographic Printing and Letterpress Printing (71 *Federal Register* 58745).

Lithography is a plane-o-graphic printing process where both the image and non-image areas are on the same surface plane of the lithographic plate. The image and non-image areas of the plate are chemically differentiated by rendering the non-image area receptive to water and the image area receptive to oil. The offset lithographic printing process indirectly transfers, or offsets, the inked image from the lithographic plate to a rubber blanket and then to the printing substrate. Products typically printed using offset lithography include books, newspapers, periodicals, advertising flyers, brochures, greeting cards, packaging, and reproductions.

Offset lithographic printing is often characterized by the type of press and the type of ink used in the printing process. Offset lithographic printing presses can be either sheet-fed or web. Sheet-fed presses feed individual sheets of substrate to the press and are typically used for shorter printing runs. Web presses feed continuous rolls of substrate to the press and are typically used for longer printing runs. Offset lithographic printing can use either heatset inks, which require heat to set the ink, or non-heatset inks, which dry by absorption, evaporation, or oxidative polymerization. Web presses can use heatset or non-heatset inks but sheet-fed presses can only use non-heatset ink.

In offset lithographic printing, VOC emissions result from the evaporation of components of the ink, fountain solution, and cleaning solution.

Offset lithographic printing processes use paste inks that contain pigments for color, binders to fix the pigment to the substrate, and oils to carry the pigment and binders. Heatset inks have higher emissions because heatset inks typically have 20% ink oil retention so the remaining 80% of the ink oil is volatilized in and exhausted from the dryer. Non-heatset inks have much lower emissions because these inks typically have 95% ink oil retention so only 5% of the ink oil evaporates.

Water-based fountain solution adheres to the hydrophilic non-image areas of the lithographic plate and helps keep the oil-based ink in the image areas of the plate. Fountain solutions contain water, nonvolatile printing chemicals, and a dampening agent that reduces the surface tension of the water so the fountain solution easily spreads across the lithographic printing plate. The most common dampening agent is isopropyl alcohol, but nonalcohol dampening agents, like glycol ether or ethylene glycol, are also used.

Cleaning solutions containing organic solvents are used to remove excess printing ink oils or unwanted debris from the offset lithographic press equipment. Cleaning can be performed manually by hand-wiping the press surface with a solvent-coated cloth or mechanically using an automatic blanket wash system to clean the internal parts of the press.

Under the 1997 eight-hour ozone NAAQS, the Dallas-Fort Worth eight-hour ozone nonattainment area (DFW area) is currently classified as a moderate nonattainment area and the Houston-Galveston-Brazoria eight-hour ozone nonattainment area (HGB area) is currently classified as a severe nonattainment area. The purpose of the proposed rulemaking is to implement RACT for offset lithographic printing lines in the DFW and HGB areas as required by FCAA, §172(c)(1) and §182(b)(2).

The proposed rules would reduce the VOC content limits on fountain solutions used by offset lithographic printing operations currently subject to the Chapter 115, Subchapter E, Division 4 regulations. The proposed rules would also limit the VOC content of fountain and cleaning solutions used by offset lithographic printing operations that are exempt under current rules. Existing Chapter 115 rules limit the content of fountain and cleaning solutions used by offset lithographic printing lines in the DFW area with combined VOC emissions of at least 50 tons per calendar year (tpy) when uncontrolled and in the HGB area with combined VOC emissions of at least 25 tpy when uncontrolled. The proposed rules would expand requirements in the DFW and HGB areas beginning March 1, 2011, to limit the content of fountain and cleaning solutions used by offset lithographic printing lines located on a property with combined VOC emissions of at least 3.0 tpy when uncontrolled.

The proposed rules implement the EPA's RACT recommendations in the 2006 Offset Lithographic and Letterpress Printing CTG except as specifically discussed in this preamble. The commission is requesting comment on the technological and economic feasibility of the proposed rules.

Letterpresses

In the 2006 CTG, the EPA recommends controlling VOC emissions from letterpress printing. No rules are being proposed for letterpress printing sources because review of the point source emissions inventory, Title V permits, and central registry databases did not identify any letterpresses that would be subject to the CTG recommended controls.

Heatset Offset Lithographic Presses

In the 2006 CTG, the EPA recommends requiring an add-on air pollution control device on each individual heatset web offset lithographic press with the uncontrolled potential to emit at least 25 tpy of VOC from the dryer. The EPA recommends different control efficiencies for devices installed before and after the effective date of the rule implementing these CTG recommendations; EPA recommends requiring a 90% overall control efficiency for control devices installed before the rule effective date and a 95% overall control efficiency for control devices installed after the rule effective date. The commission is not proposing any rule amendments or new rules to implement EPA's recommendations for these sources.

In the HGB area, the existing Chapter 115 rules require control devices with an efficiency of at least 90% to be installed on all heatset offset lithographic presses located on a property with combined VOC emissions of at least 25 tpy when uncontrolled. The existing Chapter 115 rules are at least equivalent to the EPA's recommendations for control devices installed before the rule effective date. The existing Chapter 115 rules are potentially more stringent than EPA's recommendations for control devices installed before the rule effective date if the site has multiple presses since the rules would require control devices on individual presses with uncontrolled emissions less than 25 tpy. Since the Chapter 115 rules either meet or exceed EPA's

recommendations for control devices installed before the effective date of the rule, the commission is not proposing any new rules or rule revisions for control devices on heatset presses in the HGB area.

In the DFW area, the existing Chapter 115 rules require control devices with an efficiency of at least 90% to be installed on heatset offset lithographic presses located on a property with combined VOC emissions of at least 50 tpy. The existing Chapter 115 requirement may not be as stringent as the EPA's recommendations for control devices installed before the rule effective date in all instances since an individual press with uncontrolled emissions greater than 25 tpy could be located on a site with total emissions less than 50 tpy when uncontrolled. However, staff reviewed the point source emissions inventory, Title V permits, and central registry databases to identify the heatset presses in the DFW area that are potentially subject to EPA's CTG recommendations and determined that the heatset presses identified have control devices with a minimum efficiency of 90% to comply with either Chapter 115 rules or as part of their permit authorization. Since the level of control on heatset presses identified in the DFW area either meets or exceeds the EPA's recommendations for control devices installed before the effective date of the rule, the commission is not proposing any new rules or rule revisions for control devices on heatset presses in the DFW area.

EPA also recommends requiring a 95% overall efficiency for control devices installed after the rule effective date on individual heatset web offset lithographic presses with the uncontrolled potential to emit at least 25 tpy of VOC. The commission does not agree that applying RACT standards to future equipment installations is necessary to meet the mandates of FCAA, §172(c)(1) and §182(b)(2) and (f). Additionally, control devices installed after the rule effective date will be required to meet best available control technology standards of at least 95% control efficiency as part of their permit authorization. Therefore, the commission is not proposing any new rules or rule revisions for control devices installed on heatset presses after the effective date of the rule.

Fountain Solution

EPA's 2006 CTG recommends limiting the fountain solution content to 5.0% alcohol substitutes or less by weight and no alcohol in the fountain solution. However, the existing Chapter 115 rules limit the fountain solution content to 3.0% alcohol substitutes or less by weight and no alcohol in the fountain solution. Since the existing rules are incorporated into an EPA-approved SIP, proposing the CTG recommended 5% limit for sources currently complying with the Chapter 115 rules would be backsliding; therefore, the proposed rules retain the 3% limit for these sources. The proposed rules would also require newly affected sources to comply with the more stringent 3% limit in existing Chapter 115 rules because the technological and economic feasibility of the 3% limit is already demonstrated.

Cleaning Solution

The 2006 CTG also recommends including limiting the VOC content of cleaning solutions used in offset lithographic printing operations to 70.0% VOC by weight in conjunction with work practice standards. However, the proposed rules retain the more stringent existing Chapter 115 cleaning solution content limit of 70% VOC by volume in conjunction with work practice standards. In addition, the proposed rules retain the existing Chapter 115 option to limit the cleaning solution content to 50% VOC by volume. The commission proposes to include this option to retain the flexibility afforded to owners and operators subject to the current rules. EPA's 2006 CTG also recommends specific work practices for cleaning solutions used by offset lithographic printing lines with the uncontrolled potential to emit at least 3.0 tpy of VOC. The commission expects that most facilities are probably voluntarily following similar practices for safety reasons or have required work practices as part of their permit authorization. The commission does not consider it reasonable to impose additional general housekeeping requirements when there is no apparent need or quantifiable benefit.

SECTION BY SECTION DISCUSSION

In addition to the proposed amendments to implement RACT for offset lithographic printing press, the commission proposes grammatical, stylistic, and various other non-substantive changes to update the rule in accordance with current Texas Register style and format requirements, improve readability, establish consistency in the rules, and conform to the standards in the *Texas Legislative Council Drafting Manual,* September 2008. Such changes include appropriate and consistent use of acronyms, punctuation, section references, and certain terminology like *that, which, shall,* and *must.* References to the *Dallas/Fort Worth area* and the *Houston/Galveston area* have been updated to the *Dallas-Fort Worth area* and the *Houston-Galveston-Brazoria area,* respectively, to be consistent with current terminology for the region. These non-substantive changes are not intended to alter the existing rule requirements in any way and are not specifically discussed in this preamble. The commission is requesting comment on any instance where these proposed technical corrections would inadvertently change the existing rule requirements.

Section 115.440, Applicability and Definitions

The commission proposes changing the title of §115.440 from *Offset Printing Definitions* to *Applicability and Definitions* to reflect the proposed changes to the content of this section to include the rule applicability.

The commission proposes §115.440(a) to specify that the provisions in this division apply to offset lithographic printing lines located in the DFW, El Paso, and HGB areas. Proposed new subsection (a) establishes consistency and improves the readability of the rule by first describing the units affected by the subsequent requirements.

To accommodate proposed new subsection (a), the commission also proposes the offset lithographic definitions currently located in §115.440(1) - (10) be re-lettered as proposed §115.440(b)(1) - (10), respectively. Except as specifically discussed in this preamble, proposed §115.440(b)(1) - (10) re-letters the definitions in existing §115.440(1) - (10) with only non-substantive changes necessary to comply with current rule formatting standards.

Proposed subsection (b) indicates that unless the context clearly indicates otherwise or unless specifically defined in the Texas Clean Air Act (Texas Health and Safety Code, Chapter 382), in 30 TAC §§3.2, 101.1, 115.10, or 115.440(b)(1) - (10), the terms used in this division have the meanings commonly used in the field of air pollution control.

Proposed §115.440(b)(1), (2), (4), (8), and (9) incorporates the corresponding definitions in existing §115.440(1), (2), (4), (8), and (9), respectively, with only non-substantive changes necessary to comply with current rule formatting standards.

Proposed §115.440(b)(3) amends the definition of *Batch* in existing §115.440(3) to apply to cleaning solution as well as foun-

tain solution. Proposed §115.440(b)(3) defines *Batch* as a supply of fountain solution or cleaning solution that is prepared and used without alteration until completely used or removed from the printing process. The proposed change is necessary to clarify proposed new requirements and is not expected or intended to alter any existing requirements that use this term.

Proposed §115.440(b)(5) amends the definition of *Fountain Solution* in existing §115.440(5) to remove the statement that isopropyl alcohol is the most common additive used to reduce the surface tension of the fountain solution. The proposed change removes superfluous information and is not intended to alter any existing requirements.

Proposed §115.440(b)(6) amends the definition of *Heatset* in existing §115.440(6) to remove the statement that hot air dryers are used to deliver the heat. The proposed change removes superfluous information and is not intended to alter any existing requirements.

Proposed §115.440(b)(7) replaces the definition of *Lithography* in existing §115.440(7) to appropriately describe this printing process. The proposed change clarifies the definition but is not intended to alter any existing requirements that use this term. Proposed §115.440(b)(7) defines *Lithography* as a plane-o-graphic printing process where the image and non-image areas are on the same plane of the printing plate. Proposed §115.440(b)(7) also states that the image and non-image areas are chemically differentiated so the image area is oil receptive and the non-image area is water receptive.

Proposed §115.440(b)(10) re-letters the definition of *Volatile organic compound composite partial pressure* in existing §115.440(10) with non-substantive technical corrections necessary to comply with current rule formatting standards. Proposed §115.440(b)(10) re-letters the associated figure with non-substantive technical corrections necessary to comply with current rule formatting standards.

Section 115.441, Exemptions

The commission proposes new §115.441, *Exemptions,* to list the existing exemptions and the proposed new exemptions recommended in EPA's 2006 Offset Lithographic and Letterpress Printing CTG. Proposed new §115.441 establishes consistency with other Chapter 115 rules and makes the rule easier to read by clearly identifying the offset lithographic printing lines that are exempt from the rule requirements. The commission seeks comment on appropriate exemptions for offset lithographic printing lines in the DFW and HGB areas.

Proposed new §115.441(a) provides an exemption from the proposed new control requirements in §115.442(b) in the DFW and HGB areas for the owner or operator of all offset lithographic printing lines on a property with combined VOC emissions less than 3.0 tpy when uncontrolled. The proposed new exemption is provided because controlling these small sources is not economically feasible and therefore not considered RACT. When determining if a source qualifies for this exemption, or any other exemption that refers to uncontrolled VOC emissions, the combined VOC emissions would be calculated without considering the emission reductions achieved through the use of any add-on controls or other operational changes.

Proposed new §115.441(b)(1) - (5) lists the exemptions in the DFW area for the owner or operator of all offset lithographic printing lines on a property with combined VOC emissions less than 50 tpy when uncontrolled. Proposed new §115.441(b)(1) exempts the owner or operator of these sources from all requirements in this division until March 1, 2011, to clarify that these currently exempt sources would remain exempt from this division until the compliance date of the proposed new rules. Proposed new §115.441(b)(2) exempts the owner or operator of these sources from the control requirements in proposed §115.442(a)(2) because requiring the installation of add-on emission control devices on small heatset presses is not economically feasible and therefore not considered RACT. This exemption is based on the existing Chapter 115 rules and not on EPA's 2006 CTG recommendations. For reasons discussed elsewhere in this preamble, the commission does not consider EPA's recommendations for add-on emission control devices on small heatset presses to be RACT. Proposed new §115.441(b)(3) allows the owner or operator of these sources to exempt any sheet-fed press with a maximum sheet size of 11.0 inches by 17.0 inches or less from the fountain solution content limits in proposed new §115.442(b)(1) - (3) because controlling emissions from these small presses is not economically feasible and therefore not considered RACT. Proposed new §115.441(b)(4) allows the owner or operator of these sources to exempt any press with a total fountain solution reservoir of less than 1.0 gallons from the fountain solution content limits in proposed §115.442(b)(1) - (3) because controlling emissions from these small presses is not economically feasible and therefore not considered RACT. Proposed new §115.441(b)(5) allows the owner or operator of these sources to exempt up to 110 gallons of cleaning solution from the content limits in proposed §115.442(b)(4) because there are some cleaning tasks that cannot be carried out using solutions that meet the proposed new content limits.

Proposed new §115.441(c)(1) - (5) lists the exemptions in the HGB area for the owner or operator of all offset lithographic printing lines on a property with combined VOC emissions less than 25 tpy when uncontrolled. Proposed new §115.441(c)(1) exempts the owner or operator of these sources from all requirements in this division until March 1, 2011, to clarify that these currently exempt sources would remain exempt from this division until the compliance date of the proposed new rules. Proposed new §115.441(c)(2) exempts the owner or operator of these sources from the control requirements in proposed §115.442(a)(2) because requiring the installation of add-on emission control devices on small heatset presses is not economically feasible and therefore not considered RACT. This exemption is based on the existing Chapter 115 rules and not on EPA's 2006 CTG recommendations. For reasons discussed elsewhere in this preamble, the commission does not consider EPA's recommendations for add-on emission control devices on small heatset presses to be RACT. Proposed new §115.441(c)(3) allows the owner or operator of these sources to exempt any sheet-fed press with a maximum sheet size of 11.0 inches by 17.0 inches or less from the fountain solution content limits in proposed §115.442(b)(1) - (3) because controlling emissions from these small presses is not economically feasible and therefore not considered RACT.

Proposed new §115.441(c)(4) allows the owner or operator of these sources to exempt any press with a total fountain solution reservoir of less than 1.0 gallons from the fountain solution content limits in proposed §115.442(b)(1) - (3) because controlling emissions from these small presses is not economically feasible and therefore not considered RACT. Proposed new §115.441(c)(5) allows the owner or operator of these sources to exempt up to 110 gallons of cleaning solution from the content

limits in proposed §115.442(b)(4) because there are some cleaning tasks that cannot be carried out using solutions that meet the proposed new content limits.

Because the exemptions in proposed §115.440(b)(3) - (5) and (c)(3) - (5) are not included in the existing rule requirements, the commission is only proposing these exemptions for sources that would be newly affected by the proposed rule revisions. However, EPA's 2006 CTG recommends these exemptions for all sources and the commission requests comment on whether providing these exemptions for all sources would be appropriate.

Proposed new §115.441(d) exempts all offset lithographic printing lines in the DFW and HGB areas from the control requirements of §115.442(a)(1) beginning March 1, 2011, to clarify that affected sources would only be required to comply with the existing rule requirements until the compliance date for the proposed new rule requirements.

Section 115.442, Control Requirements

To accommodate proposed new control requirements, the commission proposes the control requirements currently located in existing §115.442(1) and (2) be re-lettered as proposed §115.442(a)(1) and (2), respectively. Except as specifically discussed in this preamble, proposed §115.442(a)(1) and (2) re-letters the control requirements in existing §115.442(1) and (2) with only non-substantive changes necessary to comply with current rule formatting standards. The proposed formatting change is not intended to alter any existing rule requirements.

Proposed §115.442(a) re-letters existing §115.442 with non-substantive changes necessary to comply with current rule formatting standards. In addition, proposed §115.442(a) indicates that beginning March 1, 2011, affected sources in the DFW and HGB areas would no longer be required to comply with §115.442(a)(1). The proposed addition is necessary to clarify that affected sources would only be required to comply with the existing rule requirements until the compliance date for the proposed new rule requirements.

Proposed §115.442(a)(2) re-letters existing §115.442(2) with non-substantive technical corrections necessary to comply with current rule formatting standards. In addition, proposed §115.442(a)(2) requires the owner or operator of a heatset offset lithographic printing press to maintain the dryer pressure lower than the press room air pressure such that air flows into the dryer at all times when the press is operating. This proposed requirement is currently included in existing §115.446(3) and the proposed change is not expected nor intended to impose any new requirements on units currently subject to this division. The commission proposes only to add the requirement in existing §115.446(3) to the proposed §115.442(a)(2) to more appropriately indicate that this is a control requirement and not a monitoring or recordkeeping requirement.

The commission proposes §115.442(b) to incorporate RACT requirements for affected offset lithographic printing lines in the DFW and HGB areas. Except as specifically discussed elsewhere in this preamble, proposed subsection (b) implements the EPA's RACT recommendations in the 2006 Offset Lithographic and Letterpress Printing CTG. Proposed §115.442(b) also indicates the control requirements in this subsection will apply in the DFW and HGB areas beginning March 1, 2011.

Proposed §115.442(b)(1) requires the owner or operator of an affected non-heatset web offset lithographic printing press to limit the VOC content of the as-applied fountain solution to 3.0% alcohol substitutes or less by weight and no alcohol in the fountain solution. The proposed requirement is based on the existing Chapter 115 rules not EPA's 2006 CTG recommendations. The EPA recommended limiting the fountain solution content to 5.0% alcohol substitutes or less by weight and no alcohol in the fountain solution. However, the existing Chapter 115 rules limit the fountain solution content to 3.0% alcohol substitutes or less by weight and no alcohol in the fountain solution. Since the existing rules are incorporated into an EPA-approved SIP, proposing the CTG recommended 5.0% limit for sources currently complying with the Chapter 115 rules would be backsliding; therefore, the proposed rules retain the 3.0% limit for these sources. The proposed rules would also require newly affected sources to comply with the more stringent 3.0% limit in existing Chapter 115 rules because sources currently complying with the Chapter 115 rules have demonstrated that compliant fountain solutions are reasonably available.

Proposed §115.442(b)(2) requires the owner or operator of a heatset web offset lithographic printing press to limit the VOC content of the as-applied fountain solution by complying with one of the options in subparagraphs (A), (B), or (C). These options are provided to give affected owners or operators the flexibility to choose the appropriate option for their facility. Proposed subparagraph (A) limits the fountain solution content to 1.6% alcohol or less by weight. Proposed subparagraph (B) limits the fountain solution content to 3.0% alcohol or less by weight if the fountain solution is refrigerated below 60 degrees Fahrenheit. Proposed subparagraph (C) limits the fountain solution content to 3.0% alcohol substitutes or less by weight and no alcohol in the fountain solution. For reasons discussed elsewhere in this preamble, proposed subparagraph (C) requires the more stringent 3.0% limit in existing Chapter 115 rules instead of the 5.0% limit recommended by EPA in the 2006 CTG.

Proposed §115.442(b)(3) requires the owner or operator of a sheet-fed offset lithographic printing press to limit the VOC content of the as-applied fountain solution by complying with one of the options in subparagraphs (A), (B), or (C). These options are provided to give affected owners or operators the flexibility to choose the appropriate option for their facility. Proposed subparagraph (A) limits the fountain solution content to 5.0% alcohol or less by weight. Proposed subparagraph (B) limits the fountain solution content to 8.5% alcohol or less by weight if the fountain solution is refrigerated below 60 degrees Fahrenheit. Proposed subparagraph (C) limits the fountain solution content to 3.0% alcohol substitutes or less by weight and no alcohol in the fountain solution. For reasons discussed elsewhere in this preamble, proposed subparagraph (C) requires the more stringent 3% limit in existing Chapter 115 rules instead of the 5% limit recommended by EPA in the 2006 CTG.

Proposed §115.442(b)(4) requires the owner or operator of an offset lithographic printing press to limit the VOC content of the as-applied cleaning solution by complying with one of the options in subparagraphs (A), (B), or (C). These options are provided to give affected owners or operators the flexibility to choose the appropriate option for their facility. Proposed subparagraph (A) limits the cleaning solution content to 50% VOC or less by volume. Proposed subparagraph (A) is based on existing §115.442(1)(F) and was not included in EPA's 2006 CTG recommendations. The commission proposes this option to retain the flexibility afforded to affected owners and operators in the current rules. Proposed subparagraph (B) limits the cleaning solution content to 70.0% VOC or less by volume and requires incorporating a towel handling program that ensures all waste ink, solvents, and

cleanup rags are stored in closed containers until removed from the site by a licensed disposal/cleaning service. The 2006 CTG recommends limiting the VOC content of cleaning solutions to 70.0% VOC by weight in conjunction with work practice standards. However, the proposed rules retain the more stringent existing Chapter 115 cleaning solution content limit of 70% VOC by volume in conjunction with work practice standards. Proposed subparagraph (C) limits the cleaning solution VOC composite partial vapor pressure to 10.0 millimeters of mercury or less at 68 degrees Fahrenheit.

Section 115.443, Alternative Control Requirements

The commission proposes non-substantive changes to §115.443 necessary to comply with current rule formatting standards.

Section 115.445, Approved Test Methods

The commission proposes non-substantive changes to §115.445(1) - (6) necessary to comply with current rule formatting standards.

The commission also proposes §115.445(7) allowing minor modifications to the test methods listed in this section if the modifications are approved by the executive director. Proposed new paragraph (7) establishes consistency in the rules by providing the owner or operator of an affected offset lithographic printing line with the same flexibility afforded to the owner or operator of other units regulated in Chapter 115.

The commission proposes §115.445(8) allowing the use of test methods not listed in this section if the methods are validated by Title 40 Code of Federal Regulations Part 63, Appendix A, Test Method 301 (effective December 29, 1992). Proposed paragraph (8) establishes consistency in the rules by providing the owner or operator of an affected offset lithographic printing line with the same flexibility afforded to the owner or operator of other units regulated in Chapter 115.

Section 115.446, Monitoring and Recordkeeping Requirements

To accommodate proposed subsection (b), the commission proposes the requirements currently located in §115.446(1) - (8) be re-lettered as proposed §115.446(a)(1) - (8), respectively. Proposed §115.446(a)(1) - (8) re-letters the requirements currently located in existing §115.446(1) - (8) with non-substantive technical corrections necessary to comply with current rule formatting standards. This proposed formatting change is not intended to alter any existing rule requirements. In addition, proposed §115.446(a) clarifies that the requirements in this subsection would not apply to sources in the DFW and HGB areas beginning on the March 1, 2011, compliance date of the proposed rule requirements.

The commission proposes §115.446(b) to list the monitoring and testing requirements for affected offset lithographic printing presses in the DFW and HGB areas beginning March 1, 2011. Proposed subsection (b) improves the readability of the rule by locating all of the monitoring and recordkeeping requirements for the DFW and HGB areas in the same subsection.

Proposed §115.446(b)(1) requires an owner or operator claiming an exemption in §115.441 to maintain records sufficient to demonstrate continuous compliance with the applicable exemption criteria.

Proposed §115.446(b)(2) provides the monitoring and recordkeeping requirements for the owner or operator of heatset web offset lithographic presses with add-on control devices. Proposed subsection (b)(2) imposes the same requirements in existing §115.446(1) - (3) with non-substantive changes necessary to comply with current rule formatting standards. Proposed §115.446(b)(2) is not intended to alter any existing rule requirements or impose any new requirements; the proposed new paragraph is only provided to improve the readability of the rule by locating all of the monitoring and recordkeeping requirements for the DFW and HGB areas in the same subsection.

Proposed §115.446(b)(3) requires the owner or operator of an offset lithographic printing press to use one of the options in subparagraphs (A) or (B) to demonstrate compliance with the fountain solution content limits in proposed §115.442(b)(1) - (3). These options are provided to give affected owners or operators the flexibility to choose the appropriate option for their facility.

Proposed §115.446(b)(3)(A) requires the alcohol concentration of each batch of fountain solution to be monitored using a refractometer or a hydrometer that is corrected for temperature; requires the refractometer or hydrometer to have a visual, analog, or digital readout with an accuracy of 0.5% VOC; and requires standard solution to be used to calibrate the refractometer for the type of alcohol used in the fountain solution. Proposed §115.446(b)(3)(A) provides an option for the VOC content of the fountain solution to be monitored with a conductivity meter if a refractometer or hydrometer cannot be used for the type of VOC in the fountain solution and requires the conductivity meter reading to be referenced to the conductivity of the incoming water. Proposed §115.446(b)(3)(A) requires records to be sufficient to demonstrate continuous compliance with the fountain solution content limits in §115.442(b)(1) - (3). Proposed new §115.446(b)(3)(A) imposes the same requirements in existing §115.446(4) except that the option to monitor the fountain solution alcohol concentration once per eight-hour shift has been eliminated because this option could prevent the continuous demonstration of compliance with content limits in proposed §115.442(b)(1) - (3). The commission is requesting comment on this change.

Proposed §115.446(b)(3)(B) requires the VOC concentration of each batch fountain solution to be determined using analytical data from the material safety data sheet (MSDS) or equivalent information from the supplier that was derived using the approved test methods in §115.445. Proposed §115.446(b)(3)(B) requires the concentration of all alcohols or alcohol substitutes used to prepare the batch and, if diluted prior to use, the proportions that each of these materials is used to be recorded for each batch of fountain solution. Proposed §115.446(b)(3)(B) also requires records to be sufficient to demonstrate continuous compliance with the fountain solution content limits in §115.442(b)(1) - (3). This option is expected to be sufficient to ensure continuous compliance with the control requirements in §115.442(b)(1) - (3). The commission proposes this option to reduce the compliance burden for affected sources. The commission is requesting comment on the adequacy of this new option.

Proposed §115.446(b)(4) requires the owner or operator of an offset lithographic printing press using refrigeration equipment on the fountain solution reservoir to monitor and record the fountain solution temperature at least once per hour. Proposed §115.446(b)(4) requires temperature monitoring devices to be installed, maintained, and operated according to the manufacturer's specifications. Proposed §115.446(b)(4) requires records to be sufficient to demonstrate continuous compliance with the fountain solution content limits in §115.442(b)(2) - (3) of this title.

Proposed §115.446(b)(5) requires the owner or operator of an offset lithographic printing press to use one of the options in subparagraphs (A) or (B) to demonstrate compliance with the cleaning solution content limits in proposed §115.442(b)(4). These options are provided to give affected owners or operators the flexibility to choose the appropriate option for their facility.

Proposed §115.446(b)(5)(A) requires the VOC concentration of each batch of cleaning solution to be monitored using flow meters to monitor the water and cleaning solution flow rates on a press with automatic cleaning equipment. Proposed §115.446(b)(5)(A) requires the flow meters to be installed, maintained, and operated according to the manufacturer's instructions and requires the flow meters to be calibrated so that the VOC concentration of the cleaning solution complies with the content limits in §115.442(b)(4). Proposed §115.446(b)(5)(A) requires records to be sufficient to demonstrate continuous compliance with the cleaning solution content limits in §115.442(b)(4). Proposed §115.446(b)(5)(A) imposes the same requirements in existing §115.446(6) with non-substantive changes necessary to comply with current rule formatting standards.

Proposed §115.446(b)(5)(B) requires the VOC concentration of each batch of cleaning solution to be determined using analytical data from the MSDS or equivalent information from the supplier that was derived using the approved test methods in §115.445. Proposed §115.446(b)(5)(B) requires the concentration of all VOC used to prepare the batch and, if diluted prior to use, the proportions that each of these materials is used to be recorded for each batch of cleaning solution. Proposed §115.446(b)(5)(B) also requires records to be sufficient to demonstrate continuous compliance with the cleaning solution content limits in §115.442(b)(4). This option is expected to be sufficient to ensure continuous compliance with the control requirements in §115.442(b)(4). The commission proposes this option to reduce the compliance burden for affected sources. The commission is requesting comment on the adequacy of this new option.

The commission proposes §115.446(b)(6) to require an affected owner or operator to maintain records of any tests conducted using the approved test methods in §115.445. Proposed §115.446(b)(6) imposes the same requirements in existing §115.446(7) with non-substantive technical corrections necessary to comply with current rule formatting standards.

The commission proposes §115.446(b)(7) to require all records to be maintained for at least two years and to make those records available upon request. Proposed §115.446(b)(7) imposes the same requirements in existing §115.446(8) except that proposed §115.446(b)(7) does not require the records to be maintained on site. The commission proposes this change to reduce the compliance burden for affected sources. The commission is requesting comment on this requirement.

Section 115.449, Compliance Schedules

The commission proposes changing the title of §115.449 from *Counties and Compliance Schedules* to *Compliance Schedules* to establish consistency in rules by listing the compliance schedule for affected units by nonattainment areas instead of by individual counties within each nonattainment area.

The commission proposes amending §115.449(b) to indicate that requirements in existing §115.442 are proposed to be re-lettered as §115.442(a) and to indicate that requirements in existing §115.446 are proposed to be re-lettered as §115.446(a).

The commission proposes to delete §115.449(c) because the proposed new rule requirements affect the sources currently exempted in this subsection.

The commission proposes to re-letter existing §115.449(d) as proposed §115.449(c) and proposes amending the subsection to indicate that requirements in existing §115.442 are proposed to be re-lettered as §115.442(a) and to indicate that requirements in existing §115.446 are proposed to be re-lettered as §115.446(a).

The commission proposes to delete §115.449(e) because the proposed new rule requirements affect the sources currently exempted in this subsection.

The commission proposes to re-letter existing §115.449(f) as proposed §115.449(d) with amendments to clarify proposed §115.442(a) contains the control requirements in existing §115.442 and proposed §115.446(a) contains the monitoring and recordkeeping requirements in existing §115.446.

The commission proposes subsection (e) requiring the owner or operator of an offset lithographic printing line in the DFW or HGB areas to comply with the requirements in this division no later than March 1, 2011, except as specified in subsection (b) and proposed subsections (c) and (d). The March 1, 2011, compliance date provides affected owners and operators approximately one year to make any necessary changes and ensures that any VOC reductions achieved by the proposed rules will occur prior to the ozone season in the DFW area. The commission is requesting comment on appropriate compliance dates for the proposed new requirements.

The commission also proposes subsection (f) to require the owner or operator of an offset lithographic printing line in the DFW or HGB areas that becomes subject to the requirements of this division on or after March 1, 2011, to comply with the requirements of this division no later than 60 days after becoming subject. The commission is requesting comment on the adequacy of the time provided for newly affected facilities to comply with the proposed new requirements.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Nina Chamness, Analyst, Strategic Planning and Assessment, has determined that, for the first five-year period the proposed rules are in effect, no significant fiscal implications are anticipated for the agency or other units of state or local governments as a result of administration or enforcement of the proposed rules. The agency will use existing resources to implement the proposed rules.

FCAA, §182(b)(2) requires states to revise their SIP to include RACT for sources of VOC emissions covered by a CTG document. States can adopt and implement the CTG recommendations or adopt alternative approaches, but in either event the RACT rules must be submitted to the EPA for review and approval as part of the SIP process. On October 5, 2006, the EPA issued a CTG document for Offset Lithographic and Letterpress Printing. The purpose of the proposed rule revisions is to implement RACT rules for offset lithographic printing facilities in the DFW and HGB areas as required by the FCAA.

The proposed rules amend Chapter 115, Subchapter E, Division 4 to reduce the VOC content limits on fountain solutions used by offset lithographic printing facilities and expand RACT requirements to limit VOC content of fountain and cleaning solutions used by facilities that are exempt under current rules. Current rules already regulate offset lithographic printing operations in

the DFW area that emit at least 50 tpy of VOC when uncontrolled and in the HGB area that emit at least 25 tpy of VOC when uncontrolled. The proposed rules would expand RACT requirements in the DFW and HGB areas beginning March 1, 2011, to all offset lithographic printing lines located on a property with combined VOC emissions of at least 3.0 tpy when uncontrolled unless certain exemption criteria are met.

The proposed rules provide options for controlling and monitoring VOC emissions, and affected owners or operators are expected to choose the options that are the most cost effective for their operation. Fiscal impacts of the proposed rules will vary depending on the compliance and monitoring options chosen. Fiscal impacts will also depend on site specific variables like types of solution used and methods of operation. Therefore, fiscal impacts, if any, of the proposed rules are not expected to be the same for each affected offset lithographic printing line.

No units of state or local government have been identified that own or operate an offset lithographic printing line in the DFW and HGB areas. Units of state or local government that may own or operate an offset lithographic printing line subject to the proposed rules will be afforded the same options for compliance and monitoring as those afforded to businesses, and they will be subject to the same recordkeeping requirements. Costs to comply with the proposed rules are not expected to be significant, and details of any fiscal impact can be found in the SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT section of this fiscal note.

PUBLIC BENEFITS AND COSTS

Nina Chamness also determined that for each year of the first five years the proposed new rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be improved air quality in the DFW and HGB areas.

Based on information in the emissions inventory and central registry databases, there are 45 offset lithographic printing operations in the DFW and HGB areas that may be affected by the proposed rules; 13 of the 45 operations identified are small or micro-businesses. In addition, staff anticipates the proposed rules will affect offset lithographic printing operations in the DFW and HGB areas that are not currently required to register with the commission. Information from the 1999 TCEQ report *Emissions Inventory for Texas Graphic Arts Area Sources* indicates that as much as 97% of those currently unregistered facilities will probably be small or micro-businesses. If a large business owns or operates an offset lithographic printing line, it would experience the same fiscal impacts as those experienced by a small business.

Businesses subject to the current rules will not incur additional monitoring, testing, or recordkeeping costs as a result of the proposed rules because they are already required to perform these activities under the current rules. Current rules also require compliance with VOC limits on cleaning solutions. Any fiscal impacts for these businesses from the proposed rules will result from compliance with reducing the VOC content of fountain solutions.

Businesses emitting at least 3.0 tpy of VOC but less than 50 tpy in the DFW area and less than 25 tpy in the HGB area will incur compliance costs, monitoring costs, and recordkeeping costs as a result of the proposed rules to control VOC emissions from both fountain and cleaning solutions.

Details of the fiscal impact of the proposed rules can be found in the SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT section of this fiscal note.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

Adverse fiscal implications are anticipated for small or micro-businesses owning offset lithographic printing operations as a result of the proposed rules although the magnitude of cost increases will vary depending on the compliance and monitoring options chosen. Recordkeeping costs are expected to be insignificant. The cost estimates that follow are based on technical reports, EPA's CTG documents, and reports from various Air Quality Management Districts in California.

Fountain Solution Costs

Cost increases may be experienced by businesses required to reduce the alcohol content in fountain solutions, but the proposed rules afford several compliance options, and each business is expected to choose the option that is most cost effective for their operations. Options to reduce the VOC emissions from fountain solutions are: use alcohol substitutes instead of alcohol in the fountain solution; reduce the alcohol content of a fountain solution; or use a refrigeration unit to lower VOC emissions from an alcohol based fountain solution. Businesses are not expected to incur additional costs to substitute a compliant material, but as a conservative estimate, this fiscal note assumes that there could be a 6% price increase for such materials. The average cost of a gallon of fountain solution is $15.50, and a 6% increase could raise the price to $16.43 per gallon. Reducing the amount of alcohol in the fountain solution could result in cost savings, but the amount of such savings will depend on a variety of operational factors for each line where this strategy is used. The proposed rules allow a higher fountain solution alcohol concentration if refrigeration is used to cool the solution below 60 degrees Fahrenheit. A small refrigeration unit capable of servicing two to three presses could cost as much as $27,847 with annual operating costs of $1,876.

The proposed rules would require offset lithographic printing operations emitting at least 3.0 tpy of VOC but less than 50 tpy in the DFW area and less than 25 tpy in the HGB area to monitor the fountain solution concentration. If these entities choose to use analytical data supplied by manufacturers regarding VOC content, the proposed rules are not expected to increase costs. If the operation decides to directly monitor the fountain solution concentration, they may be required to purchase a refractometer, hydrometer, or conductivity meter. A handheld refractometer is estimated to cost $200 to $300; hydrometers are estimated to cost $50 to $100; and a portable conductivity meter can cost $300 to $1,100. The proposed rules require offset lithographic printing operations using refrigeration equipment to monitor the fountain solution temperature. A digital temperature recorder to monitor refrigerated fountain solution is estimated to cost $150 to $400.

Cleaning Solution Costs

Offset lithographic printing operations emitting at least 3.0 tpy of VOC but less than 50 tpy in the DFW area and less than 25 tpy in the HGB area when uncontrolled will be required limit VOC emissions from cleaning solutions. These operations are expected to choose the most cost effective option in the proposed rules to do so. Businesses are not expected to incur additional costs to substitute a compliant material, but as a conservative estimate, this fiscal note assumes that there could be a 6% price increase for such materials. The average cost of a gallon of cleaning solu-

tion is $15 and a 6% increase could raise the price to $15.90 per gallon. Affected operations can choose to monitor VOC emissions of cleaning solutions indirectly under the proposed rules. If this option is chosen, the proposed rules are not expected to increase costs since data supplied from manufacturers can be used to estimate VOC emissions. If direct monitoring is chosen for presses with automatic cleaning equipment, the affected operations may be required to install a flow meter, which could cost $200 to $1,000.

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 comply with federal regulations and are necessary to protect the health, safety, and environmental welfare of the state. The agency has attempted to include flexible options in the proposed rules to mitigate the fiscal impact on small businesses. Small businesses that have total uncontrolled VOC emissions of less than 3.0 tpy are exempt from the proposed rules.

LOCAL EMPLOYMENT IMPACT STATEMENT

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

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

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

The proposed rules implement the EPA's RACT recommendations in the 2006 Offset Lithographic and Letterpress Printing CTG (71 *Federal Register* 58745, October 5, 2006) that the commission has determined to represent RACT for the DFW and HGB areas. FCAA, §172(c)(1) requires the SIP for nonattainment areas to include reasonably available control measures, including RACT, for sources of pollutants identified by the EPA as required by FCAA, §183(e). FCAA, §182(b)(2) provides that for certain nonattainment areas, states must revise their SIP to include RACT for sources of VOC emissions covered by a CTG document issued after November 15, 1990, and prior to the area's date of attainment. The proposed rule revisions implement RACT for offset lithographic printing lines in the DFW and HGB areas, as required by the FCAA, §172(c)(1). Specifically, the proposed rules limit the VOC content of solvents used by affected offset lithographic printing facilities in the DFW and HGB areas.

The proposed rulemaking implements requirements of 42 USC, §7410, which requires states to adopt a SIP that provides for the implementation, maintenance, and enforcement of the NAAQS in each air quality control region of the state. While 42 USC, §7410 generally does not require specific programs, methods, or reductions in order to meet the standard, the SIP must include enforceable emission limitations and other control measures, means or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance as may be necessary or appropriate to meet the applicable requirements of this chapter (42 USC, Chapter 85, Air Pollution Prevention and Control). The provisions of the FCAA recognize that states are in the best position to determine what programs and controls are necessary or appropriate in order to meet the NAAQS. This flexibility allows states, affected industry, and the public, to collaborate on the best methods for attaining the NAAQS for the specific regions in the state. Even though the FCAA allows states to develop their own programs, this flexibility does not relieve a state from developing a program that meets the requirements of 42 USC, §7410. States are not free to ignore the requirements of 42 USC, §7410, and must develop programs to assure that their contributions to nonattainment areas are reduced so that these areas can be brought into attainment on schedule. Additionally, states have further obligations under FCAA, §172(c)(1) and §182(b)(2) to provide for RACT in nonattainment areas, such as HGB and DFW. The proposed rulemaking will implement RACT for offset lithographic printing facilities in the DFW and HGB areas. Implementation of RACT is a necessary and required component of developing the SIP for nonattainment areas as required by 42 USC, §7410.

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

As discussed elsewhere in this preamble, the FCAA does not always require specific programs, methods, or reductions in order to meet the NAAQS; thus, states must develop programs for each area contributing to nonattainment to help ensure that those areas will meet the attainment deadlines. Because of the ongoing need to address nonattainment issues, and to meet the requirements of 42 USC, §7410, the commission routinely proposes and adopts SIP rules. The legislature is presumed to un-

derstand this federal scheme. If each rule proposed for inclusion in the SIP was considered to be a major environmental rule that exceeds federal law, then every SIP rule would require the full regulatory impact analysis contemplated by SB 633. This conclusion is inconsistent with the conclusions reached by the commission in its cost estimate and by the Legislative Budget Board (LBB) in its fiscal notes. Since the legislature is presumed to understand the fiscal impacts of the bills it passes, and that presumption is based on information provided by state agencies and the LBB, the commission believes that the intent of SB 633 was only to require the full regulatory impact analysis for rules that are extraordinary in nature. While the SIP rules will have a broad impact, the impact is no greater than is necessary or appropriate to meet the requirements of the FCAA. For these reasons, rules adopted for inclusion in the SIP fall under the exception in Texas Government Code, §2001.0225(a), because they are required by federal law.

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

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

The specific intent of the proposed rulemaking is to protect the environment and to reduce risks to human health by requiring control measures for offset lithographic printing presses that have been determined by the commission to be RACT for the DFW and HGB areas. The proposed rulemaking does not exceed a standard set by federal law or exceed an express requirement of state law. No contract or delegation agreement covers the topic that is the subject of this proposed rulemaking. Therefore, this proposed rulemaking is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b), because although the proposed rulemaking meets the definition of a "major environmental rule", it does not meet any of the four applicability criteria for a major environmental rule.

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

TAKINGS IMPACT ASSESSMENT

The commission evaluated the proposed rulemaking and performed an assessment of whether Texas Government Code, Chapter 2007, is applicable. The specific purpose of the proposed rulemaking is to implement RACT for the offset lithographic printing lines in the DFW and HGB areas. FCAA, §182(b)(2) provides that for certain nonattainment areas, states must revise their SIP to include RACT for sources of VOC emissions covered by a CTG document issued after November 15, 1990, and prior to the area's date of attainment. In 2006 the EPA published a CTG for Offset Lithographic and Letterpress Printing. Texas Government Code, §2007.003(b)(4), provides that Texas Government Code, Chapter 2007 does not apply to this proposed rulemaking because it is an action reasonably taken to fulfill an obligation mandated by federal law.

In addition, the commission's assessment indicates that Texas Government Code, Chapter 2007 does not apply to these proposed rules because this is an action that is taken in response to a real and substantial threat to public health and safety; that is designed to significantly advance the health and safety purpose; and that does not impose a greater burden than is necessary to achieve the health and safety purpose. Thus, this action is exempt under Texas Government Code, §2007.003(b)(13). The proposed rules fulfill the FCAA requirement to implement RACT in nonattainment areas. These revisions will result in VOC emission reductions in ozone nonattainment areas which may contribute to the timely attainment of the ozone standard and reduced public exposure to VOC. Consequently, the proposed rulemaking meets the exemption criteria in Texas Government Code, §2007.003(b)(4) and (13). For these reasons, Texas Government Code, Chapter 2007 does not apply to this proposed rulemaking.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rulemaking and found the proposal is a rulemaking identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(4), relating to rules subject to the Texas Coastal Management Program (CMP) and will therefore require that goals and policies of the CMP be considered during the rulemaking process. The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Council and determined that the rulemaking will not affect any coastal natural resource areas because the rules only affect counties outside the CMP area and is therefore consistent with CMP goals and policies.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMITS PROGRAM

Chapter 115 is an applicable requirement under 30 TAC Chapter 122, Federal Operating Permits Program. If the amendments to Chapter 115 are adopted, owners or operators subject to the federal operating permit program must, consistent with the revision process in Chapter 122, upon the effective date of the rulemaking, revise their operating permit to include the new Chapter 115 requirements.

ANNOUNCEMENT OF HEARINGS

The commission will hold public hearings on this proposal in Houston on October 28, 2009, at 2:00 p.m. and 6:00 p.m. at the Houston-Galveston Area Council, Conference Room A, 3555 Timmons Lane, Houston, TX 77027; in Austin on October 29, 2009, at 1:00 p.m. and 3:00 p.m. at the Texas Commission on Environmental Quality, Building E, Room 201S, 12100 Park 35 Circle, Austin, TX 78753; and in Fort Worth on November 2, 2009, at 2:00 p.m. at the Texas Commission on Environmental Quality, Region 4 Office, DFW Public Meeting Room, 2309 Gravel Road, Fort Worth, TX 76118. The hearings are structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearings; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearings.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Charlotte Horn, Office of Legal Services at (512) 239-0779. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Written comments may be submitted to Michael Parrish, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: *http://www5.tceq.state.tx.us/rules/ecomments/.* File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2008-019-115-EN. The comment period closes November 9, 2009. Copies of the proposed rulemaking can be obtained from the commission's Web site at *http://www.tceq.state.tx.us/nav/rules/propose_adopt.html.* For further information, please contact Lindley Anderson, Air Quality Planning Section, at (512) 239-0003.

STATUTORY AUTHORITY

The new and amended sections are proposed under Texas Water Code (TWC), §5.102, concerning General Powers, that provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, that authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; TWC, §5.105, concerning General Policy, that authorizes the commission by rule to establish and approve all general policy of the commission; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, that authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The new and amended sections are also proposed under THSC, §382.002, concerning Policy and Purpose, that establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, that authorizes the commission to control the quality of the state's air; and §382.012, concerning State Air Control Plan, that authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air. The new and amended sections are also proposed under THSC, §382.016, concerning Monitoring Requirements; Examination of Records, that authorizes the commission to prescribe reasonable requirements for the measuring and monitoring of air contaminant emissions and §382.021, concerning Sampling Methods and Procedures, that authorizes the commission to prescribe the sampling methods and procedures to determine compliance with its rules. The new and amended sections are also proposed under Federal Clean Air Act (FCAA), 42 USC, §§7401, *et seq.,* which requires states to submit SIP revisions that specify the manner in which the NAAQS will be achieved and maintained within each air quality control region of the state.

The new and amended sections implement THSC, §§382.002, 382.011, 382.012, 382.016, and 382.017, and FCAA, 42 USC, §§7401 *et seq.*

§115.440. Applicability and Definitions [~~Offset Printing Definitions~~].

(a) Applicability. The provisions in this division apply to offset lithographic printing lines located in the Dallas-Fort Worth, El Paso, and Houston-Galveston-Brazoria areas, as defined in §115.10 of this title (relating to Definitions).

(b) Definitions. Unless specifically defined in the Texas Clean Air Act (Texas Health and Safety Code, Chapter 382) or in §§3.2, 101.1, and 115.10 of this title (relating to Definitions), the terms in this division have the meanings commonly used in the field of air pollution control. In addition, the following meanings apply unless the context clearly indicates otherwise. [~~The following terms, when used in this division (relating to Offset Lithographic Printing), shall have the following meanings, unless the context clearly indicates otherwise. Additional definitions for terms used in this division are found in §§115.10, 101.1, and 3.2 of this title (relating to Definitions).~~]

(1) Alcohol--Any [~~An alcohol is any~~] of the hydroxyl-containing organic compounds with a molecular weight equal to or less than 74.12, which includes methanol, ethanol, propanol, and butanol. [~~(which includes methanol, ethanol, propanol, and butanol).~~]

(2) Alcohol substitutes--Nonalcohol additives that contain volatile organic compounds [~~(VOC)~~] and are used in the fountain solution to reduce the surface tension of water or prevent ink piling. [~~Some additives are used to reduce the surface tension of water; others (especially in the newspaper industry) are added to prevent piling (ink build-up).~~]

(3) Batch--A supply of fountain solution or cleaning solution that is prepared and used without alteration until completely used or removed from the printing process.

(4) Cleaning solution--Liquids used to remove ink and debris from the operating surfaces of the printing press and its parts.

(5) Fountain solution--A mixture of water, nonvolatile printing chemicals, and a liquid additive [~~an additive (liquid)~~] that reduces the surface tension of the water so that it spreads easily across the printing plate surface. The fountain solution wets the non-image [~~nonimage~~] areas so that the ink is maintained within the image areas. [~~Isopropyl alcohol, a VOC, is the most common additive used to reduce the surface tension of the fountain solution.~~]

(6) Heatset--Any operation where heat is required to evaporate ink oil from the printing ink. [~~Hot air dryers are used to deliver the heat.~~]

(7) Lithography--A plane-o-graphic printing process where the image and non-image areas are on the same plane of the printing plate. The image and non-image areas are chemically differentiated so the image area is oil receptive and the non-image area is water receptive. [~~A printing process where the image and nonimage areas are chemically differentiated, the image area is oil receptive, and the nonimage area is water receptive. This method differs from other printing methods, where the image is a raised or recessed surface.~~]

(8) Non-heatset--Any operation where the printing inks are set without the use of heat. For the purposes of this division, ultraviolet-cured and electron beam-cured inks are considered non-heatset.

(9) Offset lithography--A printing process that transfers the ink film from the lithographic plate to an intermediary surface (blanket) that [which], in turn, transfers the ink film to the substrate.

(10) Volatile organic compound (VOC) [VOC] composite partial pressure--The sum of the partial pressures of the compounds that [which] meet the definition of VOC [volatile organic compound (VOC)] in §101.1 of this title (relating to Definitions). The VOC composite partial pressure is calculated as follows.
Figure: 30 TAC §115.440(b)(10)
[Figure: 30 TAC §115.440(10)]

§115.441. Exemptions.

(a) In the Dallas-Fort Worth and Houston-Galveston-Brazoria areas, as defined in §115.10 of this title (relating to Definitions), the owner or operator of all offset lithographic printing lines located on a property with combined volatile organic compound (VOC) emissions less than 3.0 tons per calendar year (tpy) when uncontrolled, is exempt from the control requirements in §115.442 of this title (relating to Control Requirements).

(b) In the Dallas-Fort Worth area, the owner or operator of all offset lithographic printing lines located on a property with combined VOC emissions less than 50 tpy when uncontrolled:

(1) is exempt from the requirements in this division until March 1, 2011;

(2) is exempt from the control requirements in §115.442(a)(2) of this title;

(3) may exempt any sheet-fed press with a maximum sheet size of 11.0 inches by 17.0 inches or less from the fountain solution content limits in §115.442(b)(1) - (3) of this title;

(4) may exempt any press with a total fountain solution reservoir less than 1.0 gallons from the fountain solution content limits in §115.442(b)(1) - (3) of this title; and

(5) may exempt up to 110 gallons of cleaning solution per calendar year from the content limits in §115.442(b)(4) of this title.

(c) In the Houston-Galveston-Brazoria area, the owner or operator of all offset lithographic printing lines located on a property with combined VOC emissions less than 25 tpy when uncontrolled:

(1) is exempt from the requirements in this division until March 1, 2011;

(2) is exempt from the requirements in §115.442(a)(2) of this title;

(3) may exempt any sheet-fed press with a maximum sheet size of 11.0 inches by 17.0 inches or less from the fountain solution content limits in §115.442(b)(1) - (3) of this title;

(4) may exempt any press with a total fountain solution reservoir less than 1.0 gallons from the fountain solution content limits in §115.442(b)(1) - (3) of this title; and

(5) may exempt up to 110 gallons of cleaning solution per calendar year from the content limits in §115.442(b)(4) of this title.

(d) Beginning March 1, 2011, the requirements in §115.442(a)(1) of this title and §115.446(a) of this title (relating to Monitoring and Recordkeeping Requirements) no longer apply in the Dallas-Fort Worth and Houston-Galveston-Brazoria areas.

§115.442. Control Requirements.

(a) In the Dallas-Fort Worth, [For the Dallas/Fort Worth,] El Paso, and Houston-Galveston-Brazoria areas, [Houston/Galveston areas] as defined in §115.10 of this title (relating to Definitions), the following control requirements [shall] apply. Beginning March 1, 2011, paragraph (1) of this subsection no longer applies in the Dallas-Fort Worth and Houston-Galveston-Brazoria areas.

(1) The owner or operator [No person shall operate or allow the operation] of an offset lithographic printing line that uses solvent-containing ink shall limit [, unless] volatile organic compound (VOC) emissions as follows. [are limited by the following.]

(A) The owner or operator of [Any person who owns or operates] a heatset web offset lithographic printing press that uses alcohol in the fountain solution shall maintain total fountain solution alcohol to 5.0% or less (by volume). Alternatively, a standard of 10.0% or less (by volume) alcohol may be used if the fountain solution containing alcohol is refrigerated to less than 60 degrees Fahrenheit (15.5 degrees Celsius).

(B) The owner or operator of a non-heatset [Any person who owns or operates a nonheatset] web offset lithographic printing press that [which] prints newspaper and that uses alcohol in the fountain solution shall eliminate the use of alcohol in the fountain solution. Nonalcohol [Non-alcohol] additives or alcohol substitutes can be used to accomplish the total elimination of alcohol use.

(C) The owner or operator of a non-heatset [Any person who owns or operates a nonheatset] web offset lithographic printing press that [which] does not print newspaper and that uses alcohol in the fountain solution shall maintain the use of alcohol at 5.0% or less (by volume). Alternatively, a standard of 10.0% or less (by volume) alcohol may be used if the fountain solution is refrigerated to less than 60 degrees Fahrenheit (15.5 degrees Celsius).

(D) The owner or operator of a sheet-fed [Any person who owns or operates a sheetfed] offset lithographic printing press shall maintain the use of alcohol at 10.0% or less (by volume). Alternatively, a standard of 12.0% or less (by volume) alcohol may be used if the fountain solution is refrigerated to less than 60 degrees Fahrenheit (15.5 degrees Celsius).

(E) The owner or operator of [Any person who owns or operates] any type of offset lithographic printing press shall be considered in compliance with the fountain solution limitations of this paragraph if the only VOC [VOCs] in the fountain solution are in nonalcohol additives or alcohol substitutes, so that the concentration of VOC [VOCs] in the fountain solution is 3.0% or less (by weight). The fountain solution must [shall] not contain any isopropyl alcohol.

(F) The owner or operator of [Any person who owns or operates] an offset lithographic printing press shall reduce VOC emissions from cleaning solutions by one of the following methods:

(i) using cleaning solutions with a VOC content of 50% or less (by volume, as used);

(ii) using cleaning solutions with a VOC content of 70% or less (by volume, as used) and incorporating a towel handling program that [which] ensures that all waste ink, solvents, and cleanup rags are [shall be] stored in closed containers until removed from the site by a licensed disposal/cleaning service; or

(iii) using cleaning solutions with a VOC composite partial vapor pressure less than or equal to 10 [ten] millimeters of mercury [(mm Hg)] at 68 degrees Fahrenheit (20 degrees Celsius). [20 degrees Celsius (68 degrees Fahrenheit).]

(2) The owner or operator [No person shall operate or allow the operation] of a heatset offset lithographic printing press shall operate a control device to reduce [unless] VOC emissions from the press dryer exhaust vent by [are reduced] 90% by weight or maintain a maximum dryer exhaust outlet VOC concentration of 20 parts per

million by volume [~~(ppmv) is maintained~~], whichever is less stringent when the press is in operation. The dryer air pressure must be lower than the pressroom air pressure at all times when the press is operating to ensure the dryer has a capture efficiency of 100%.

(b) In the Dallas-Fort Worth and Houston-Galveston-Brazoria areas, the following control requirements apply beginning March 1, 2011.

(1) The owner or operator of a non-heatset web offset lithographic printing press shall limit the VOC content of the as-applied fountain solution to 3.0% alcohol substitutes or less by weight and no alcohol in the fountain solution.

(2) The owner or operator of a heatset web offset lithographic printing press shall limit the VOC content of the as-applied fountain solution to:

(A) 1.6% alcohol or less by weight;

(B) 3.0% alcohol or less by weight if the fountain solution is refrigerated below 60 degrees Fahrenheit (15.5 degrees Celsius); or

(C) 3.0% alcohol substitutes or less by weight and no alcohol in the fountain solution.

(3) The owner or operator of a sheet-fed offset lithographic printing press shall limit the VOC content of the as-applied fountain solution to:

(A) 5.0% alcohol or less by weight;

(B) 8.5% alcohol or less by weight if the fountain solution is refrigerated below 60 degrees Fahrenheit (15.5 degrees Celsius); or

(C) 3.0% alcohol substitutes or less by weight and no alcohol in the fountain solution.

(4) The owner or operator of an offset lithographic printing press shall limit the VOC content of the as-applied cleaning solution to:

(A) 50% VOC or less by volume;

(B) 70.0% VOC or less by volume if incorporating a towel handling program that ensures all waste ink, solvents, and cleanup rags are stored in closed containers until removed from the site by a licensed disposal/cleaning service; or

(C) a VOC composite partial vapor pressure less than or equal to 10.0 millimeters of mercury at 68 degrees Fahrenheit (20 degrees Celsius).

§115.443. Alternate Control Requirements.

In the Dallas-Fort Worth, [~~For all affected persons in the Dallas/Fort Worth,~~] El Paso, and Houston-Galveston-Brazoria [~~Houston/Galveston~~] areas, as defined in §115.10 of this title (relating to Definitions), alternate methods of demonstrating and documenting continuous compliance with the applicable control requirements or exemption criteria in this division may be approved by the executive director in accordance with §115.910 of this title (relating to Availability of Alternate Means of Control) if emission reductions are demonstrated to be substantially equivalent.

§115.445. Approved Test Methods.

In the Dallas-Fort Worth, [~~For the Dallas/Fort Worth,~~] El Paso, and Houston-Galveston-Brazoria areas, [~~Houston/Galveston areas~~] as defined in §115.10 of this title (relating to Definitions), compliance with the requirements in this division must [~~shall~~] be determined by applying the following test methods, as appropriate:

(1) Test Methods 1-4 (40 Code of Federal Regulations (CFR) Part 60, Appendix A) for determining flow rates;

(2) Test Method 24 (40 CFR Part 60, Appendix A) for determining the volatile organic compound content and density of printing inks and related coatings;

(3) Test Method 25 (40 CFR Part 60, Appendix A) for determining total gaseous nonmethane organic emissions as carbon with the modification that [~~. To prevent condensation,~~] the probe and filter should be heated to the gas stream temperature, typically closer to 350 degrees Fahrenheit (177 degrees Celsius) to prevent condensation;

(4) Test Methods 25A or 25B (40 CFR Part 60, Appendix A) for determining total gaseous organic concentrations using flame ionization or nondispersive infrared analysis;

(5) the United States Environmental Protection Agency [~~EPA~~] guidelines series document "Procedures for Certifying Quantity of Volatile Organic Compounds Emitted by Paint, Ink, and Other Coatings[~~,~~]" (EPA-450/3-84-019, effective December 1984); [~~EPA-450/3-84-019, as in effect December 1984; or~~]

(6) additional performance test procedures described in 40 CFR §60.444 (effective October 18, 1983); [~~.~~]

(7) minor modifications to these test methods if approved by the executive director; and

(8) test methods other than those specified in this section if validated by 40 CFR Part 63, Appendix A, Test Method 301 (effective December 29, 1992).

§115.446. Monitoring and Recordkeeping Requirements.

(a) In the Dallas-Fort Worth, [~~For the Dallas/Fort Worth,~~] El Paso, and Houston-Galveston-Brazoria areas, [~~Houston/Galveston areas~~] as defined in §115.10 of this title (relating to Definitions), the following monitoring and recordkeeping requirements [~~shall~~] apply. Beginning March 1, 2011, this subsection no longer applies in the Dallas-Fort Worth and Houston-Galveston-Brazoria areas.

(1) The owner or operator of a heatset offset lithographic printing press shall install, calibrate, maintain, and operate a temperature monitoring device, according to the manufacturer's instructions, at the outlet of the control device. The temperature monitoring device must [~~shall~~] be equipped with a continuous recorder and must [~~shall~~] have an accuracy of ±0.5 degrees Fahrenheit, or alternatively ±1.0% of the temperature being monitored.

(2) The owner or operator of any offset lithographic printing press shall install and maintain monitors to continuously measure and record operational parameters of any emission control device installed to meet applicable control requirements on a regular basis. Such records must be sufficient to demonstrate proper functioning of those devices to design specifications, including:

(A) the exhaust gas temperature of direct-flame incinerators or [~~and/or~~] the gas temperature immediately upstream and downstream of any catalyst bed;

(B) the total amount of volatile organic compounds [~~compound~~] (VOC) recovered by a carbon adsorption or other solvent recovery system during a calendar month; and

(C) the exhaust gas VOC concentration of any carbon adsorption system, as defined in §115.10 of this title, to determine if breakthrough has occurred.

(3) The dryer pressure must [~~shall~~] be maintained lower than the press room air pressure such that air flows into the dryer at all times when the offset lithographic printing press is operating. A 100%

emissions capture efficiency for the dryer must [~~shall~~] be demonstrated using an air flow direction measuring device.

(4) The owner or operator of any offset lithographic printing press shall monitor fountain solution alcohol concentration with a refractometer or a hydrometer that is corrected for temperature at least once per eight-hour shift or once per batch, whichever is longer. The refractometer or hydrometer must [~~shall~~] have a visual, analog, or digital readout with an accuracy of 0.5% VOC. A standard solution must [~~shall~~] be used to calibrate the refractometer for the type of alcohol used in the fountain. The VOC content of the fountain solution may be monitored with a conductivity meter if it is determined that a refractometer or hydrometer cannot be used for the type of VOC [~~VOCs~~] in the fountain solution. The conductivity meter reading for the fountain solution must [~~shall~~] be referenced to the conductivity of the incoming water.

(5) The owner or operator of any offset lithographic printing press using refrigeration equipment on the fountain solution in order to comply with §115.442(a)(1)(A), (C), or (D) [~~§115.442(1)(A), (C), or (D)~~] of this title (relating to Control Requirements) shall monitor the temperature of the fountain solution reservoir at least once per hour. Alternatively, the owner or operator of any offset lithographic printing press using refrigeration equipment on the fountain solution shall install, maintain, and continuously operate a temperature monitor of the fountain solution reservoir. The temperature monitor must [~~shall~~] be attached to a continuous recording device such as a strip chart, recorder, or computer.

(6) For any offset lithographic printing press with automatic cleaning equipment, flow meters are required to monitor water and cleaning solution flow rates. The flow meters must [~~shall~~] be calibrated so that the VOC content of the mixed solution complies with the requirements of §115.442(a)(1) [~~§115.442~~] of this title.

(7) The owner or operator of any offset lithographic printing press shall maintain the results of any testing conducted at an affected facility in accordance with the provisions specified in §115.445 of this title (relating to Approved Test Methods).

(8) The owner or operator of any offset lithographic printing press shall maintain all records at the affected facility for at least two years and make such records available upon request to authorizedrepresentatives of the executive director, the United States Environmental Protection Agency, [~~EPA,~~] or any local air pollution agency with jurisdiction. [~~having jurisdiction in the area.~~]

(b) In the Dallas-Fort Worth and Houston-Galveston-Brazoria areas, the following monitoring and recordkeeping requirements apply beginning March 1, 2011.

(1) The owner or operator of an offset lithographic printing press claiming an exemption in §115.441 of this title (relating to Exemptions) shall maintain records sufficient to demonstrate continuous compliance with the applicable exemption criteria.

(2) The owner or operator of a heatset web offset lithographic printing press shall comply with the following monitoring and recordkeeping requirements to demonstrate continuous compliance with the control requirements in §115.442(a)(2) of this title.

(A) Operational parameters of any emission control device installed to comply with the requirements in §115.442(a)(2) of this title must be continuously measured and recorded. Monitors must be installed, calibrated, maintained, and operated according to the manufacturer's instructions. Temperature monitors must be equipped with a continuous recorder and have an accuracy of ±0.5 degrees Fahrenheit or ±1.0% of the temperature being monitored. Records must be sufficient to demonstrate proper functioning of the device to design specifications and must include:

(i) the exhaust gas temperature of direct-flame incinerators and/or the gas temperature immediately upstream and downstream of any catalyst bed;

(ii) the total amount of VOC recovered by a carbon adsorption system or other solvent recovery system per calendar month; and

(iii) the exhaust gas VOC concentration of any carbon adsorption system to determine if breakthrough has occurred.

(B) An air flow direction measuring device must be used to demonstrate the dryer meets the 100% capture efficiency required in §115.442(a)(2) of this title.

(3) The owner or operator of an offset lithographic printing press shall use one of the following options to demonstrate compliance with the fountain solution content limits in §115.442(b)(1) - (3) of this title.

(A) The VOC concentration of each batch of fountain solution must be monitored using a refractometer or a hydrometer that is corrected for temperature. The refractometer or hydrometer must have a visual, analog, or digital readout with an accuracy of 0.5% VOC. A standard solution must be used to calibrate the refractometer for the type of alcohol used in the fountain solution. The VOC content of the fountain solution may be monitored with a conductivity meter if it is determined that a refractometer or hydrometer cannot be used for the type of VOC in the fountain solution. The conductivity meter reading for the fountain solution must be referenced to the conductivity of the incoming water. Records must be sufficient to demonstrate continuous compliance with the fountain solution content limits in §115.442(b)(1) - (3) of this title.

(B) The VOC concentration of each batch fountain solution must be determined using analytical data from the material safety data sheet (MSDS) or equivalent information from the supplier that was derived using the approved test methods in §115.445 of this title. The concentration of all alcohols or alcohol substitutes used to prepare the batch and, if diluted prior to use, the proportions that each of these materials is used must be recorded for each batch of fountain solution. Records must be sufficient to demonstrate continuous compliance with the fountain solution content limits in §115.442(b)(1) - (3) of this title.

(4) The owner or operator of an offset lithographic printing press using refrigeration equipment on the fountain solution reservoir shall monitor and record the fountain solution temperature at least once per hour. Temperature monitoring devices must be installed, maintained, and operated according to the manufacturer's specifications. Records must be sufficient to demonstrate continuous compliance with the fountain solution content limits in §115.442(b)(2) - (3) of this title.

(5) The owner or operator of an offset lithographic printing press shall use one of the following options to demonstrate compliance with the cleaning solution content limits in §115.442(b)(4) of this title.

(A) Flow meters must be used to monitor the water and cleaning solution flow rates on a press with automatic cleaning equipment. The flow meters must be installed, maintained, and operated according to the manufacturer's instructions. The flow meters must be calibrated so that the VOC concentration of the cleaning solution complies with the requirements of §115.442(b)(4) of this title. Records must be sufficient to demonstrate continuous compliance with the cleaning solution content limits in §115.442(b)(4) of this title.

(B) The VOC concentration of each batch of cleaning solution must be determined using analytical data derived from the

MSDS or equivalent information from the supplier that was derived using the approved test methods in §115.445 of this title. The concentration of all VOC used to prepare the batch and, if diluted prior to use, the proportions that each of these materials is used must be recorded for each batch of cleaning solution. Records must be sufficient to demonstrate continuous compliance with the cleaning solution content limits in §115.442(b)(4) of this title.

(6) The owner or operator of an offset lithographic printing press shall maintain the results of any tests conducted using the approved test methods in §115.445 of this title.

(7) The owner or operator of an offset lithographic printing press shall maintain all records for at least two years and make such records available upon request to authorized representatives of the executive director, the United States Environmental Protection Agency, or any local air pollution agency with jurisdiction.

§115.449. Compliance Schedules [~~Counties and Compliance Schedules~~].

(a) In El Paso County, all offset lithographic printing presses must be in compliance with §§115.442, 115.443, 115.445, and 115.446 of this title (relating to Control Requirements; Alternate Control Requirements; Approved Test Methods; and Monitoring and Recordkeeping Requirements) as soon as practicable, but no later than November 15, 1996.

(b) In Collin, Dallas, Denton, and Tarrant Counties, all offset lithographic printing presses on a property that, when uncontrolled, emit a combined weight of volatile organic compounds [~~compound~~] (VOC) equal to or greater than 50 tons per calendar year, must be in compliance with §§115.442(a),[~~115.442,~~] 115.443, 115.445, and 115.446(a) [~~115.446~~] of this title as soon as practicable, but no later than December 31, 2000.

[~~(c) In Collin, Dallas, Denton, and Tarrant Counties, all offset lithographic printing presses on a property that, when uncontrolled, emit a combined weight of VOC less than 50 tons per calendar year, must be in compliance with §§115.442, 115.443, 115.445, and 115.446 of this title as soon as practicable, but no later than one year, after the commission publishes notification in the Texas Register of its determination that this contingency rule is necessary as a result of failure to attain the national ambient air quality standard (NAAQS) for ozone by the attainment deadline or failure to demonstrate reasonable further progress as set forth in the 1990 Amendments to the Federal Clean Air Act (FCAA), §172(c)(9).~~]

(c) [~~(d)~~] In Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties, all offset lithographic printing presses on a property that, when uncontrolled, emit a combined weight of VOC equal to or greater than 25 tons per calendar year, must be in compliance with §§115.442(a), [~~115.442,~~] 115.443, 115.445, and 115.446(a) [~~115.446~~] of this title as soon as practicable, but no later than December 31, 2002.

[~~(e) In Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties, all offset lithographic printing presses on a property that, when uncontrolled, emit a combined weight of VOC less than 25 tons per calendar year, must be in compliance with §§115.442, 115.443, 115.445, and 115.446 of this title as soon as practicable, but no later than one year, after the commission publishes notification in the Texas Register of its determination that this contingency rule is necessary as a result of failure to attain the NAAQS for ozone by the attainment deadline or failure to demonstrate reasonable further progress as set forth in the FCAA, §172(c)(9).~~]

(d) [~~(f)~~] In Ellis, Johnson, Kaufman, Parker, and Rockwall Counties, the owner or operator of all offset lithographic printing presses on a property that, when uncontrolled, emit a combined weight of VOC equal to or greater than 50 tons per calendar year, shall comply with §§115.442(a), [~~115.442,~~] 115.443, 115.445, and 115.446(a) [~~115.446~~] of this title as soon as practicable, but no later than March 1, 2009.

(e) The owner or operator of an offset lithographic printing line in the Dallas-Fort Worth or Houston-Galveston-Brazoria areas, as defined in §115.10 of this title (relating to Definitions), shall comply with the requirements in this division no later than March 1, 2011, except as specified in subsections (b), (c), and (d) of this section.

(f) The owner or operator of an offset lithographic printing line in the Dallas-Fort Worth or Houston-Galveston-Brazoria areas that becomes subject to this division on or after March 1, 2011, shall comply with the requirements in this division no later than 60 days after becoming subject.

This 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 September 25, 2009.

TRD-200904264
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: November 8, 2009
For further information, please call: (512) 239-2548

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TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 1. GENERAL LAND OFFICE

CHAPTER 15. COASTAL AREA PLANNING
SUBCHAPTER B. COASTAL EROSION PLANNING AND RESPONSE

31 TAC §15.42

The Texas General Land Office (Land Office) proposes to amend 31 TAC Chapter 15, relating to Coastal Area Planning, §15.42, relating to Funding Projects From the Coastal Erosion Response Account.

BACKGROUND

The amendments are proposed pursuant to the Coastal Erosion Planning and Response Act (CEPRA), Texas Natural Resources Code, Chapter 33, Subchapter H, §§33.601 - 33.612. The CEPRA requires the Land Office to implement a program of coastal erosion avoidance, remediation, and planning. House Bill (H.B.) 2387, 81st Legislature, Regular Session amended §33.603(b), Texas Natural Resources Code, to add new §33.603(b)(12) to allow the use of CEPRA funds for buyouts of property on a public beach. Section 33.603(b)(13), Texas Natural Resources Code was also added to allow the use of CEPRA funds for reimbursement of the cost of acquisition of property necessary for the construction, reconstruction, maintenance, widening, or extension of an erosion response project. House Bill 2387 also amended §33.603(h), Texas Natural Resources Code, to allow the Commissioner of the GLO to determine the

percentage of the shared project cost a qualified project partner must pay for a project undertaken pursuant to §33.603(b)(11), Texas Natural Resources Code for removal of debris, as well as removal and relocation of structures from the public beach pursuant to §33.603(b)(12), Texas Natural Resources Code and for projects that include the purchase of property necessary for an erosion response project pursuant to §33.603(b)(13), Texas Natural Resources Code. House Bill 2387 also amended §33.603(f), Texas Natural Resources Code, to allow the Commissioner of the GLO to undertake at least one erosion response project without requiring a qualified project partner to pay a portion of the shared project costs, provided that the total cost of the projects that do not have a cost share requirement does not exceed one-half of the amount appropriated to the GLO for coastal erosion planning and response. The amendments to §15.42 are proposed to implement CEPRA as amended by H.B. 2387.

SECTION BY SECTION ANALYSIS

The amendments to §15.42 adding a new subsection (e) allow the Commissioner to undertake projects without a cost share requirement pursuant to Texas Natural Resources Code §33.603(f) as amended by H.B. 2387, if the total cost of such projects does not exceed one-half of the amount appropriated to the GLO for coastal erosion planning and response. Prior to the amendment of §33.603(f) by H.B. 2387, projects without a cost share were limited to one large scale beach nourishment project each biennium and projects for debris and structure removal.

The amendments to §15.42 amending subsection (f), formerly subsection (e), concerning the qualified project partner's portion of the shared project costs for a project undertaken for the removal of debris pursuant to Texas Natural Resources Code §33.603(b)(11), as well as removal and relocation of structures from the public beach pursuant to Texas Natural Resources Code §33.603(b)(12) and for projects that include the purchase of property necessary for an erosion response project pursuant to Texas Natural Resources Code §33.603(b)(13) provide that the Land Commissioner may determine the percentage that the qualified project partner must pay in accordance with Texas Natural Resources Code §33.603(h) as amended by H.B. 2387.

FISCAL IMPACTS

Ms. Jody Henneke, Deputy Commissioner for Coastal Resources, has determined that for the first five-year period that the proposed rulemaking is in effect there will be no fiscal implications for state governments. Ms. Henneke has also determined that for the first five-year period that the proposed rulemaking is in effect there will be fiscal implications for local governments. In 2006 the Commissioner implemented a voluntary house relocation program for houses on the public beach providing for reimbursement of removal and relocation expenses up to $50,000. However, at that time Texas Natural Resources Code, §33.603(h), did not allow the use of CEPRA funds for the purchase of real property. Some property owners were reluctant to accept reimbursement of removal and relocation expenses for houses on the public beach without compensation for the real property upon which the house is located that has become subject to the public beach easement due to erosion. Texas Natural Resources Code, §33.603(d) and (h) as amended by H.B. 2387 allow the GLO to provide a more comprehensive voluntary removal program. The GLO expects to implement the authority granted for purchasing property located on a public beach by providing funding from money appropriated in H.B. 4586 (Acts 2009, 81st Leg., ch. 1302) for the local match for Federal Emergency Management Administration (FEMA) hazard mitigation grants involving the voluntary purchase of property where houses have become located on the public beach as a result of Hurricane Ike. Local government tax revenue may be affected by the removal of these properties from local tax rolls. Property values as well as tax rates vary widely along the coast. Property values in the area the subject of the hazard mitigation grants range from less than $100,000 to over $500,000. Tax rates vary from 55.86 cents per $100 valuation in Galveston County and 49.4 cents per $100 valuation for the City of Galveston. Brazoria County has a tax rate of 33 cents per $100 valuation and the Village of Surfside Beach has a tax rate of approximately 35.24 cents per $100 valuation. For a typical house in the City of Galveston valued at $300,000 the fiscal impact to the City would be a reduction in revenue of $1,482 each year and the fiscal impact to Galveston County would be $1,675.80 each year. For a similarly valued house in Surfside Beach the impact would be $1,057.20 each year and the impact to Brazoria County would be $990 each year. The total fiscal impact to the local jurisdictions would depend on the valuation of individual properties and the total number of houses involved in the buyouts. Some of the fiscal impacts to local governments may be offset by the preservation of the value of properties adjacent to and further landward of erosion response projects such as beach nourishment and dune restoration projects that are facilitated by removal of houses from the public beach. The local government may also benefit from increased revenue from tourists that may be sustained by improved beaches resulting from such beach nourishment projects. Finally, the buyout program is a voluntary program, sponsored by local governments.

PUBLIC BENEFIT

In areas of the coast where erosion response projects are needed to protect critical public infrastructure, the existence of structures on the public beach has prevented or delayed the undertaking of erosion response projects such as beach nourishment projects, dune restoration projects, or shore protection projects due to the existence of lengthy unresolved litigation related to the structures. In such circumstances where acquisition of the property is necessary for the construction of an erosion response project, the ability to reimburse qualified project partners for the purchase of real property may facilitate such projects. In addition, the flexibility for determining the level of the cost share requirement for the qualified project partner afforded to the Commissioner by H.B. 2387 as implemented by these amendments will also facilitate new erosion response projects, including erosion response structures, dune restoration projects, and beach nourishment projects. Ms. Henneke has determined that for each year of the first five-year period the proposed rulemaking is in effect, the public benefit from such erosion response projects include: reduction in losses to public property from storm damage and erosion; preserving property value in proximity to the project areas; generating additional property tax revenue from property protected by projects seaward of the property; and sustaining visitation and tourist spending related to the increased capacity of beaches improved with nourishment projects. In addition, the hazard mitigation projects related to the buyout of houses on the public beach and the reduction in damage to properties further landward will contribute to public health and safety by removing those hazards and may qualify the community for better ratings under FEMA regulations which benefit property owners by reducing flood insurance premiums.

BUSINESS IMPACT

Ms. Henneke has determined that there will be no additional cost of compliance for small or large businesses or individuals.

EMPLOYMENT IMPACT

The Land Office has determined that the proposed rulemaking will have no adverse local employment impact that requires an impact statement pursuant to the Government Code, §2001.022.

ENVIRONMENTAL REGULATORY ANALYSIS

The Land Office has evaluated the proposed rulemaking action in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the action is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the statute. "Major environmental rule" means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The proposed amendments to Chapter 15, Subchapter B are not anticipated to adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state because the proposed rulemaking implements legislative requirements in CEPRA relating to coastal erosion studies or projects undertaken in cooperation with a qualified project partner under an agreement with the Commissioner of the Land Office.

CONSISTENCY WITH TEXAS COASTAL MANAGEMENT PROGRAM (CMP)

The proposed rulemaking is not subject to the Texas Coastal Management Program (CMP), Texas Natural Resources Code §33.2053 and 31 TAC §505.11, relating to the Actions and Rules Subject to the Coastal Management Program. Individual erosion response projects undertaken in compliance with these rules may be subject to the CMP, and consistency with the CMP is determined at the appropriate stage of project planning.

TAKINGS ANALYSIS

The Land Office has evaluated the proposed rulemaking in accordance with Texas Government Code, §2007.043(b), and §2.18 of the Attorney General's Private Real Property Rights Preservation Act Guidelines, to determine whether a detailed takings impact assessment is required. The Land Office has determined that the proposed rulemaking does not affect private real property in a manner that requires real property owners to be compensated as provided by the Fifth and Fourteenth Amendments to the United States Constitution or Article I, Sections 17 and 19, of the Texas Constitution. Furthermore, the Land Office has determined that the proposed rulemaking would not affect any private real property in a manner that restricts or limits the owner's right to the property that would otherwise exist in the absence of the rule amendments. The Land Office has determined that the proposed rulemaking will not result in a taking of private property and that there are no adverse impacts on private real property interests.

REQUEST FOR PUBLIC COMMENTS

To comment on the proposed rulemaking, please send a written comment to Mr. Walter Talley, Texas Register Liaison, Texas General Land Office, P.O. Box 12873, Austin, TX 78711-2873, facsimile number (512) 463-6311 or email to walter.talley@glo.state.tx.us. Comments must be received no later than thirty (30) days from the date of publication of this proposal.

STATUTORY AUTHORITY

The amendments are proposed under the Texas Natural Resources Code, §33.602(c) that provides the Commissioner of the General Land Office with the authority to adopt rules to implement Subchapter H, Chapter 33, Texas Natural Resources Code, concerning coastal erosion.

CROSS REFERENCE TO STATUTES

Texas Natural Resources Code, §§33.601 - 33.605 are affected by the proposed amendment.

§15.42. Funding Projects From the Coastal Erosion Response Account.

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

(e) The Land Commissioner may, pursuant to Texas Natural Resources Code §33.603(f), undertake at least one erosion response project each biennium without requiring a qualified project partner to pay a portion of the shared project cost if the total cost of projects that do not have a cost share requirement does not exceed one-half of the total amount appropriated to the Land Office for coastal erosion planning and response during the state fiscal biennium.

(f) [~~(e)~~] The Land Commissioner may determine the percentage of the shared project cost a qualified project partner must pay for a project undertaken pursuant to Texas Natural Resources Code §33.603(b)(11), (12), or (13) for the removal of debris, removal and [~~or structures or the~~] relocation of structures from the public beach through reimbursement of expenses or purchase of property, and the acquisition of property necessary for the construction, reconstruction, maintenance, widening, or extension of an erosion response project under this subchapter.

(g) [~~(f)~~] The project cooperation agreement shall specify the terms of the qualified project partner's commitment to pay the required percentage of shared project costs.

(h) [~~(g)~~] No costs incurred by a potential project partner before becoming a qualified project partner by entering into a project cooperation agreement with the Land Office may be used to offset the cost-sharing requirement of the CEPRA.

(i) [~~(h)~~] In-kind goods or services provided by the qualified project partner after entering into a project cooperation agreement with the Land Office may offset the cost-sharing requirement, if the qualified project partner provides the Land Office with a reasonable basis for estimating the monetary value of those goods or services. The decision on whether to allow any in-kind good or service to offset the cost-sharing requirement is in the sole discretion of the Land Office.

(j) [~~(i)~~] Local governments that receive financial assistance from the state to clean and maintain public beaches fronting the Gulf of Mexico under Chapter 25 of this title, relating to Beach Cleaning and Maintenance Assistance Program, will not be allowed to use funds received under that program to meet the cost-sharing 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 September 22, 2009.

TRD-200904214
Trace Finley
Deputy Commissioner, Policy and Governmental Affairs
General Land Office
Earliest possible date of adoption: November 8, 2009
For further information, please call: (512) 475-1859

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PART 9. ON-SITE WASTEWATER TREATMENT RESEARCH COUNCIL

CHAPTER 286. ON-SITE WASTEWATER TREATMENT RESEARCH COUNCIL

The On-Site Wastewater Treatment Research Council (council) proposes to amend §§286.1, 286.2, 286.31, 286.51 - 286.53, and 286.95 - 286.98; proposes to repeal §§286.9, 286.14, 286.74, 286.91 - 286.94, and 286.131; and proposes new §286.11 and §286.75.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

The council has proposed the rulemaking as a result of the rule review it conducted in the spring and summer of 2009. This rulemaking would remove language that is obsolete and inconsistent with other council rules or procedures and provisions that are more appropriately contained within the internal policies of the council. The rulemaking would clarify council requirements for grant applications; clarify the council's criteria for applicant eligibility and for selection of grant awards; and clarify procedures related to application review and to the awarding of grants.

SECTION BY SECTION DISCUSSION

Proposed §286.1, Purpose and Scope, is amended by replacing the word "subchapter" with "chapter" in subsections (a) and (b).

Proposed §286.2, Definitions, is amended by replacing the reference to the "Texas Natural Resource Conservation Commission" with "Texas Commission on Environmental Quality;" add the definition for "On-site wastewater treatment system," which was originally defined elsewhere in the chapter; and define the term, "Private research center."

Section 286.9, Officers, is proposed to be repealed because the language in this rule would more appropriately be addressed in the council's internal policies.

Proposed new §286.11, Grants and Donations to the Council, addresses grants and donations to the council. Language concerning grants and donations to the council currently exists in §286.131, Grants and Donations, which is simultaneously repealed in this proposed rulemaking.

Section 286.14, Impartiality and Non-discrimination, is proposed to be repealed because the language in this rule would be more appropriately addressed in the council's internal policies.

The council proposes to amend §286.31, Purpose. Specifically, proposed §286.31(a) is amended to more accurately track the council's authority as stated in the council's enabling statute, Texas Health and Safety Code, Chapter 367. Proposed §286.31(b) is amended to provide that the council will not accept unsolicited grant applications. In an effort to ensure that grant awards are competitive, as required by statute, the council has determined it appropriate to invite all interested parties to submit grant applications before a grant award is made.

Proposed §286.51, Applied Research Grants, is amended to provide references to the Texas Business Organizations Code. The proposed amendment would also clarify that corporations that are delinquent in the payment of certain taxes are ineligible to receive a grant award; require grant applicants to make a clear reference to a topic covered by the council's solicitation document; and require the applicant to indicate how the proposed project is directed toward meeting a purpose stated in the council's enabling statute. Furthermore, the proposed amendment also broadens the scope of the eligibility criteria for grant awards.

Proposed §286.52, Demonstration and Monitoring Grants, is amended to remove the word "monitoring" from the title of the section and from the text of the rule because the statute governing the council and its programs does not make reference to monitoring grants as a type of grant that the council is authorized to award. To avoid confusion as to the type of grants the council may fund, the council has determined that no reference should be made to monitoring grants as a type of grant. The council, however, does not intend to change or weaken the requirement that each demonstration project funded by the council include a monitoring component. In proposed subsection (a)(1) language is added to make the rule consistent with the council's definition for the term, "demonstrate." Proposed subsection (a)(2) is amended to include clarifying language as to what services the applicant must provide for any demonstration project to which the council awards funds, by requiring the applicant to: 1) show the council how the applicant will provide those services; and 2) provide written assurances to that effect. It also requires the applicant to show that the project site remains compliant with all applicable federal, state, and local laws and rules. The proposed amendment would also provide references to the Texas Business Organizations Code. In addition, the proposed amendment would also clarify that corporations that are delinquent in the payment of certain taxes are ineligible to receive a grant award; require grant applicants to make a clear reference to a topic covered by the council's solicitation document; and require the applicant to indicate how the proposed project is directed toward meeting a purpose stated in the council's enabling statute. Furthermore, the proposed amendment also broadens the scope of the eligibility criteria for grant awards.

Proposed §286.53, Technology Transfer Grants, is amended to add references to the Texas Business Organizations Code. The proposed amendment would also clarify that corporations that are delinquent in the payment of certain taxes are ineligible to receive a grant award; require grant applicants to make a clear reference to a topic covered by the council's solicitation document; and require the applicant to indicate how the proposed project is directed toward meeting a purpose stated in the council's enabling statute. Furthermore, the proposed amendment also broadens the scope of the eligibility criteria for grant awards. Proposed subsection (b)(3) is amended to add to the list of categories of activity that constitute "technology transfer" under the council's grants program. Proposed §286.53(c) is amended to broaden the scope of the eligibility criteria for grant awards.

Section 286.74, Mailing Address, is proposed to be repealed because the language in this rule would more appropriately be addressed in the council's internal policies.

Proposed new §286.75, Submission of Grant Applications, addresses the requirements related to the submission of grant applications.

Section 286.91, Receipt of Proposals, is proposed to be repealed because the language in this rule concerns only internal council procedures and would more appropriately be addressed in the council's internal policies.

Section 286.92, Council Review, is proposed to be repealed because the language matter addressed in the rule will be addressed elsewhere in this rulemaking or in the council's internal policies.

Section 286.93, Discussion of Proposals, is proposed to be repealed because the language matter addressed in the rule will be addressed elsewhere in this rulemaking or in the council's internal policies.

Section 286.94, Status of Proposals, is proposed to be repealed because the language matter addressed in the rule will be addressed elsewhere in this rulemaking or in the council's internal policies.

Proposed §286.95, Decision Making, is amended to address the steps that the council will take concerning the selection of a project for a grant award.

Proposed §286.97, Denials, is amended to clarify that the council will not reimburse expenses incurred by a grant applicant in preparing a grant application or a request for reconsideration.

Proposed §286.98, Tabling Decision, is amended to clarify some of the situations in which the council may decide to table consideration of a grant application.

Section §286.131, Grants and Donations, is proposed to be repealed because the topic will be addressed in proposed new §286.11, Grants and Donations to the Council.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

The council estimates that there will be no fiscal impact on costs and revenues to state and local governments as a result of enforcing or administering the rules for each year of the first five years that the rules will be in effect.

PUBLIC BENEFITS AND COSTS

The public benefit expected as a result of adoption of the proposed rules is that procedures for awarding grants will be easier to understand and to follow consistently. The council estimates that there will be no economic cost to persons required to comply with the rules for each year of the five years that the rules are in effect.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

The council estimates that there will be no cost to small businesses or micro-businesses resulting from compliance with the rule.

LOCAL EMPLOYMENT IMPACT STATEMENT

The council estimates that the rules will have no effect on employment in each geographic area affected by the rule for each of the first five years that the rule will be in effect.

SUBMITTAL OF COMMENTS

Written comments may be submitted to Patricia Durón, 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. All comments should reference 31 TAC Chapter 286 TOWTRC rules. The comment period closes on November 9, 2009. Copies of the proposed rulemaking can be obtained by contacting Patricia Durón, (512) 239-0667. For further information, please contact Cassandra Derrick, Compliance Support Division, (512) 239-5304.

SUBCHAPTER A. COUNCIL PROCEDURES

31 TAC §§286.1, 286.2, 286.11

STATUTORY AUTHORITY

With the exception of proposed new §286.11, concerning grants and donations to the council, the proposed amendments implement and are authorized under the authority of Texas Health and Safety Code, §367.008(a), which directs the council to establish procedures for awarding competitive grants and disbursing money. The council interprets this provision to authorize the adoption of rules because the Administrative Procedure Act, §2001.003, defines a "rule" as, among other things, a state agency statement of general applicability that describes the procedure or practice requirements of a state agency. Certain procedures the council adopts would necessarily affect parties other than the council and would be generally applicable to all grant applicants. Proposed new §286.11 implements Texas Health and Safety Code, §367.007(c), which authorizes the council to accept grants and donations. Proposed new §286.11 is adopted under the authority of Texas Government Code, §2255.001, which directs each agency that is authorized to accept donations to adopt rules addressing the acceptance and handling of gifts and donations and the agency's relationship with donors.

§286.1. Purpose and Scope.

(a) The purpose of this chapter [~~subchapter~~] is to implement the provisions of Texas Health and Safety Code, Chapter 367, concerning the On-site Wastewater Treatment Research Council.

(b) The scope of this chapter [~~subchapter~~] covers the organization, administration, and other general procedures and policies concerning the [~~council's~~] operation of the council and its grants program.

§286.2. Definitions.

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

(1) Commission--The Texas Commission on Environmental Quality [~~Texas Natural Resource Conservation Commission~~].

(2) Council--The Texas On-site Wastewater Treatment Research Council.

(3) Demonstrate--To make a display of, to show outwardly, hence, to show or prove publicly as by the actual operation, the special value or merits of an article, process, or product with a view to its introduction or sale, also to teach by demonstration, to explain, or to illustrate.

(4) Donor--One or more individuals or organizations that offer to give financial assistance to the council.

(5) Executive Secretary--An employee of the commission who acts as a liaison between the council and the commission.

(6) Officer or member--Any one of the eleven members of the council that has duly been appointed by the governor.

(7) On-site wastewater treatment system--A system of treatment devices or disposal facilities that:

(A) is used for the disposal of domestic sewage, excluding liquid waste resulting from the process used in industrial and commercial establishments;

(B) is located on the site where the sewage is produced; and

(C) produces not more than 5,000 gallons of waste a day.

(8) [~~(7)~~] Other council representative--An employee of the council, an employee of the commission acting on behalf of the council, and any other person(s) acting on behalf of the council.

(9) Private Research Center--A non-profit or for profit non-governmental organization that has an established research function, as defined in council rules, as opposed to exclusively being involved in the manufacturing or sale of goods. This definition does not affect the eligibility and grant selection criteria contained elsewhere in the rules of the council.

(10) [~~(8)~~] Research--Studious inquiry or examination and usually critical and exhaustive investigation or experimentation having for its aim the discovery of new facts and their correct interpretation, the revision of accepted conclusions, theories or laws in the light of newly discovered facts or the practiced application of such new or revised conclusions.

(11) [~~(9)~~] UGMS--The Uniform Grant Management Standards issued by the Governor's Office of Budget and Planning pursuant to the Uniform Grant Management Act, Texas Government Code, Chapter 783, and the related rules [~~promulgated thereunder~~] in 1 TAC §§5.141 - 5.167.

§286.11. Grants and Donations to the Council.

(a) General provisions.

(1) Purpose. The purpose of this section is to establish procedures for the acceptance of grants and donations made to the council and to create standards of conduct to govern the relationship between the council and the donor.

(2) All donations will be accepted on behalf of the council, by vote of the council. No officer or other council representative can accept donations in the person's individual capacity.

(3) The donor and the council shall execute a donation agreement which includes the following information:

(A) a description of the donation, including a statement of the value;

(B) a statement by the donor attesting to its ownership rights in the donation and its authority to make the donation;

(C) the signature of the donor or its official representative;

(D) the signature of the council chair or other person who the council has authorized to execute the donation agreement;

(E) any conditions restricting the use of the donations if the donor imposes restrictions and if these restrictions are agreed to by the council;

(F) the mailing address of the donor and principal place of business if the donor is a business entity;

(G) a statement briefly describing any relationship between the donor and the council; and

(H) a statement advising the donor to seek legal and/or tax advice from its own legal counsel.

(4) The chair shall submit all proposed donations received for the council's consideration at the next regular meeting of the council.

(b) Administration of funds.

(1) Grants and donations shall be deposited to the credit of the On-Site Wastewater Treatment Research Council account of the general revenue appropriated fund and may be disbursed as the council directs and consistent with Texas Health and Safety Code, Chapter 367. All gifts of money are automatically appropriated to the council in accordance with the General Appropriations Act.

(2) Donations will be used for the purpose specified by the donor, as nearly as practicable, and in accordance with state, federal, and local law. In no event shall donations be used for purposes not within the council's statutory authority.

(c) Donations from individuals and/or entities receiving grant funds. The council shall adhere to all state ethics laws, regulations, and policies relating to the acceptance of gifts from persons appearing before and receiving funds from state agencies.

(d) Standards of conduct between the council and private donors.

(1) Standards of conduct of officers, members, and other council representatives are governed by the Texas Government Code, Chapter 572;

(2) A council member or other council representative shall not accept or solicit any gift, favor, or service from a donor that might reasonably tend to influence his official conduct or that the council member or other representative knows is being offered with the intent to influence official conduct;

(3) A council member or other council representative shall not accept employment or engage in any business or professional activity with a donor which the council member or other council representative might reasonably expect would require or induce him to disclose confidential information acquired by reason of his position, or which could reasonably be expected to impair the council member's independence of judgment in the performance of his/her official position;

(4) A member or other representative of the council shall not authorize a donor to use property of the council, unless the property is used in accordance with a specific provision of a contract between the council and the donor;

(5) A council member or representative shall not make personal investments in association with a donor which could reasonably be expected to create a substantial conflict between the representative's private interests and the interests of the council;

(6) A council member or representative shall not solicit, accept, or agree to accept any benefit for having exercised his or her official powers on behalf of a private donor for, or performed his or her official duties in favor of a donor;

(7) A council member or representative who serves as an officer, director or otherwise has policy direction over a donor shall not vote on or otherwise participate in any measure, proposal, or decision before the donor if the council might reasonably be expected to have an interest in such measure, proposal, or decision.

(8) Any person or entity seeking to contract with the council on a competitive bid basis or otherwise shall disclose all previous donations occurring within the previous two years to the council or any other state agency. The disclosure shall include the name of the recipient, the nature and value of the donation, and the date that the donation was made. If the donation is on-going or periodic in nature, the last

date the donation was available to the council shall be used to determine the date of the donation.

(e) Public records. Documents and other information pertaining to the official business of the council is public information and may be subject to the Texas Public Information Act, Texas Government Code, Chapter 552. The council may seek a determination from the attorney general regarding the confidentiality of information relating to a donation before releasing the requested information if it is determined that an exception to the Texas Public Information Act is applicable.

(f) Conflict of laws. These rules shall not be interpreted or construed in a manner that conflicts with a requirement of a statute regulating the conduct of a state officer of state employee. In the event of conflict between these rules and a statute, the statute controls.

This 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 September 25, 2009.

TRD-200904279
Janet Meyers
Council Chairman
On-Site Wastewater Treatment Research Council
Earliest possible date of adoption: November 8, 2009
For further information, please call: (512) 239-6087

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31 TAC §286.9, §286.14

(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 On-Site Wastewater Treatment Research Council or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

STATUTORY AUTHORITY

The proposed repeals are authorized under the authority of Texas Health and Safety Code, §367.008(a), which directs the council to establish procedures for awarding competitive grants and disbursing money. The council interprets this provision to authorize the adoption of rules because the Administrative Procedure Act, §2001.003, defines a "rule" as, among other things, a state agency statement of general applicability that describes the procedure or practice requirements of a state agency. Certain procedures the council adopts would necessarily affect parties other than the council and would be generally applicable to all grant applicants.

§286.9. Officers.

§286.14. Impartiality and Non-discrimination.

This 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 September 25, 2009.

TRD-200904278
Janet Meyers
Council Chairman
Texas On-Site Wastewater Treatment Research Council
Earliest possible date of adoption: November 8, 2009
For further information, please call: (512) 239-6087

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SUBCHAPTER B. GRANTS

31 TAC §§286.31, 286.51 - 286.53, 286.75, 286.95 - 286.98

STATUTORY AUTHORITY

The proposed amendments and new section implement and are authorized under the authority of Texas Health and Safety Code, §367.008(a), which directs the council to establish procedures for awarding competitive grants and disbursing money. The council interprets this provision to authorize the adoption of rules because the Administrative Procedure Act, §2001.003, defines a "rule" as, among other things, a state agency statement of general applicability that describes the procedure or practice requirements of a state agency. Certain procedures the council adopts would necessarily affect parties other than the council and would be generally applicable to all grant applicants.

§286.31. Purpose.

(a) The [~~purpose of the~~] Texas On-site Wastewater Treatment Research Council awards competitive grants [~~is~~] to enhance the development of on-site treatment technology and systems that [~~which~~] will improve the quality of and/or reduce the cost of on-site wastewater treatment.

(b) Unsolicited grant applications will not be accepted and will be returned to the sender.

[~~(b) On-site wastewater treatment is a system of treatment devices or disposal facilities that is used for the disposal of domestic sewage, excluding liquid waste resulting from the processes used in industrial and commercial establishments, and is located on the site where the sewage is produced, and produces not more than 5,000 gallons of waste a day.~~]

[~~(c) Grant applications received in response to council solicitation will have highest priority.~~]

§286.51. Applied Research Grants.

(a) Eligibility for applied research grants. The following are the criteria which identify an applicant's eligibility for an applied research grant.

(1) The applicant must show that the specific application of the proposed research is for the improvement of the quality of wastewater treatment and/or reducing the cost of providing wastewater treatment to consumers.

(2) The research project must be conducted in Texas, and must concern technology or systems applicable in Texas.

(3) Corporations organized under the Texas Business Corporations Act or the Texas Business Organizations Code that are [~~must not be~~] delinquent in taxes owed the state under the Texas Tax Code, Chapter 171 are ineligible to receive a grant award.

(b) Information required for applied research grants. The following information must be submitted in writing for each applied research grant proposal:

(1) [~~if the proposal is in response to the council's solicitation or request,~~] the applicant shall include in the proposal title a clear reference to a topic covered in the council's solicitation document; [~~and~~

~~the method of improving the quality of wastewater treatment and/or reducing the cost of providing wastewater treatment to consumers; or~~]

(2) a description of how the project is directed toward [~~if the proposal is submitted on an unsolicited basis and does not address a specific project identified by the council, the applicant shall include the method of~~] improving the quality of wastewater treatment and/or reducing the cost of providing wastewater treatment to consumers;

(3) for applicants who are affiliated with an accredited college or university in Texas, a verified statement from the college or university's president, or dean of the appropriate program, describing the affiliation in detail;

(4) a discussion of how the applicant intends to fulfill the requirements of the proposal, including an identification of the potentials for, or plans to incorporate and use, proprietary information;

(5) resumés [~~resumes~~] of principals, potential subcontractors, and principal investigators (including names, addresses, and phone numbers), and a summary of pertinent experience of each entity;

(6) site(s) of proposed project;

(7) a list of tasks and a time schedule for tasks to be completed by principals and subcontractors;

(8) recommendations for implementing research results, including identification, and involvement of potential users;

(9) the total project cost, the amount(s) and source(s) of the local matching funds and services, and the total amount requested from the council;

(10) a detailed project budget and timetable, and a detailed task budget for all aspects of the project;

(11) all information required to satisfy the criteria for eligibility as set out in this section;

(12) all information necessary to evaluate the application under the selection criteria as set out in this section;

(13) a list of reports, plans, products and other deliverables the applicant will provide to the council;

(14) information of other sources of funding, matching funds and like-kind funding or matching grants, if applicable;

(15) suggested progress monitoring procedures;

(16) any other pertinent data as deemed necessary by the council; and

(17) evidence that the applicant is insured or can become insured for the tasks undertaken as a result of receiving a grant.

(c) Criteria for selection of applied research grants. The council will review eligible [~~the~~] grant applications [~~proposals~~]. Grants may be awarded based upon the following criteria or other criteria identified in the council's solicitation document:

(1) the availability of matching funds and other sources of funding for the proposal;

(2) the urgency of need for the research;

(3) the degree to which the proposal is responsive to the overall council objectives listed in these rules;

(4) the qualifications of project staff and directly-related project and staff experience;

(5) the reasonableness of the proposed budget and time schedules;

(6) project organization and management, including project monitoring procedures;

(7) statewide or regional application of research results;

(8) technical, economic and environmental merit of the proposal;

(9) relevance to and probability that the research will result in the improvement of the quality of wastewater treatment and reducing the cost of providing wastewater treatment to consumers; and

(10) any other information as may be required for the specific project.

§286.52. Demonstration [~~and Monitoring~~] Grants.

(a) The following are the criteria which identify an applicant's eligibility for a demonstration [~~and monitoring~~] grant.

(1) The applicant must show that the proposed project provides a demonstration of the special value or merit of an article, product, or process directed toward the improvement of the treatment and disposal of wastewater and/or reduction of the cost of providing that treatment to consumers. The applicant must provide the protocol for monitoring the [~~(testing and calibration) this~~] project, including testing and calibration, to demonstrate the project's effectiveness.

(2) An applicant must demonstrate to the council and provide written assurances that the applicant will [~~be able to~~] provide the following services as applicable:

(A) a proper area for outdoor research and demonstration;

(B) a proper area for controlled research and demonstration;

(C) basic laboratory facilities;

(D) testing or calibrating [~~and calibration~~] equipment;

(E) untreated domestic sewage for demonstrations;

(F) a permitted area for land disposal application or a license specifically for alternative/special applications;

(G) adequate assistance personnel; and

(H) other facilities for instruction and seminars.

(3) An applicant must show that all calibration, testing, and demonstration will be conducted in a manner that ensures that: [~~so that~~]

(A) groundwater and surface water are [~~is~~] protected; [~~and~~]

(B) the health and welfare of the public are [~~will be~~] protected; and

(C) the project site complies at all times with applicable state and local laws and rules.

(4) The applicant must conduct the testing and calibration in Texas.

(5) Corporations organized under the Texas Business Corporations Act or the Texas Business Organizations Code that are [~~must not be~~] delinquent in taxes owed the state under the Texas Tax Code, Chapter 171 are ineligible to receive a grant award.

(b) Information required for demonstration [~~and monitoring~~] grants. The following information must be submitted in writing for each demonstration [~~and monitoring~~] grant:

(1) [~~If the proposal is in response to the council's solicitation or request,~~] the applicant shall include in the proposal title a

clear reference to a topic covered in the council's solicitation document; and the method of improving the quality of wastewater treatment and/or reducing the cost of providing wastewater treatment to consumers through the demonstration project;[.]

(2) a description of how the project is directed toward [~~If the proposal is submitted on an unsolicited basis and does not address a specific project identified by the council, the applicant shall include the method of~~] improving the quality of wastewater treatment and/or reducing the cost of providing wastewater treatment to consumers through the demonstration project;[.]

(3) a discussion of how the applicant intends to fulfill the requirements of the proposal;

(4) resumés [~~resumes~~] of principals, potential subcontractors, and principal investigators (including names, addresses, and telephone numbers), and a summary of pertinent experience of each entity;

(5) site(s) of proposed project;

(6) a detailed description of the facilities to be provided including land area, laboratories, classroom space, auditoriums, and other applicable facilities proposed;

(7) a description of how the applicant intends to provide the raw, untreated sewage to the units being tested, the amount of flow available to the units, and emergency plans for failed units;

(8) a description of how the applicant intends to protect groundwater and surface water, as well as the protection of public health and welfare during demonstration;

(9) a detailed description of the testing equipment to be provided, including any equipment to be purchased through the awarding of the grant;

(10) an explanation of the proposed calibration and testing techniques;

(11) the total project cost, the amount(s) and source(s) of the local matching funds and services, and the total amount requested from the council;

(12) a detailed project budget;

(13) a commitment date for work to begin and a progress time schedule;

(14) the designation of a contact person for additional information;

(15) all information required to satisfy the criteria for eligibility as specified in this section;

(16) any other information as deemed necessary by the council; and

(17) evidence that the applicant is insured or can become insured for the tasks undertaken as a result of receiving a grant.

(c) Criteria for selection of [~~for~~] demonstration [~~and monitoring~~] grants. The council will review the grant proposals. Grants may be awarded based upon the following criteria or other criteria identified in the council's solicitation document:

(1) the availability of matching funds and other sources of funding for the proposal;

(2) the degree to which the proposal is responsive to the overall objectives listed in this section;

(3) the qualifications of project staff and directly-related project and staff experience;

(4) the reasonableness of the proposed budget and time schedules;

(5) project organization and management, including project monitoring procedures;

(6) technical and environmental merit of the proposal;

(7) the method of assuring the protection of groundwater, surface water, as well as the protection of public health and welfare; and

(8) any other information as may be required for the specific project.

§286.53. Technology Transfer Grants.

(a) The following are the criteria which identify an applicant's eligibility for a technology transfer grant:

(1) An [~~an~~] applicant must be able to provide the technology transfer within the State of Texas.

(2) Corporations [~~corporations~~] organized under the Texas Business Corporations Act or the Texas Business Organizations Code that are [~~must not be~~] delinquent in taxes owed the state under the Texas Tax Code, Chapter 171 are ineligible to receive a grant award.

(b) Information required for technology transfer grants. The following information must be submitted in writing for each technology transfer grant proposal:

(1) the applicant shall include in the proposed title a clear reference to a topic covered in the council's solicitation document; [~~if the proposal is in response to the council's solicitation or request, the specific proposal title shall be included in the proposals; or~~]

(2) [~~if the proposal is submitted on an unsolicited basis and does not address a specific project identified by the council,~~] the applicant shall identify the category of technology transfer the applicant proposes, using one of the categories listed under paragraph (3) of this subsection [~~subsection (b)(3) of this section~~];

(3) a technology transfer must be from one or more of the following categories:

(A) educational courses;

(B) seminars;

(C) symposia;

(D) publications [~~(by printed word or video tape)~~]; [~~or~~]

(E) other forms of information dissemination; or [.]

(F) other form of technology transfer that is consistent with the standards current in the industry at the time the grant application is considered by the council;

(4) a discussion of how the applicant intends to fulfill the requirements of the proposal, including distribution of materials at the end of the grant period;

(5) resumés [~~resumes~~] of principals, potential subcontractors and principal investigators (including names, addresses, and phone numbers), and a summary of pertinent experience of each entity;

(6) a list of the types of information dissemination proposed with the estimated budget and timetable for each type;

(7) information of other sources of funding, matching funds and like-kind funds or matching grants, if possible;

(8) all information required to satisfy the criteria for eligibility as specified in this section;

(9) any other pertinent data as deemed necessary by the council; and

(10) evidence that the applicant is insured or can become insured for the tasks undertaken as a result of receiving a grant.

(c) Criteria for selection for technology transfer grants. The council will review eligible [~~the~~] grant proposals. Grants may be awarded based upon the following criteria or other criteria identified in the council's solicitation document:

(1) the availability of matching funds and other sources of funding for the proposal;

(2) the degree to which the proposal is responsive to the overall objectives listed in this section;

(3) the qualifications of project staff and directly-related project and staff experience;

(4) the quality of examples submitted to the council, if any;

(5) the reasonableness of the proposed budget and time schedules;

(6) project organization and management, including project monitoring procedures;

(7) technical, economic, and environmental merit of the proposal; and

(8) any other information as may be required for the specific project.

§286.75. Submission of Grant Applications.

All grant applications must be submitted in compliance with the requirements of the applicable solicitation document issued by the council.

§286.95. Decision Making.

The council will evaluate and discuss each eligible grant application it receives. An applicant whose grant application is determined to be eligible and meritorious by the council may be required to make an oral presentation of the proposal prior to a council decision being made. The council may [~~proposal and will decide to~~] award, deny, [~~or~~] table, or take other action regarding a grant application based upon the funding available, [~~and~~] the applicable selection criteria, including any additional criteria contained in the solicitation document, and other appropriate considerations. All council decisions are final.

§286.97. Denials.

(a) All applicants denied an award will be notified of the denial and the reason(s) [~~therefor~~] in writing by the executive secretary.

(b) Any applicants denied funding will have the right to request one reconsideration of the project by the council. The request shall be made in writing and shall be reviewed at the next quarterly meeting.

(c) The council shall not be liable for any expense incurred by an applicant in preparing a grant application or a request for reconsideration [~~if funding for the grant application is denied~~].

§286.98. Tabling Decision.

The council may table a decision on a grant application [~~proposal in order~~] to gather more information, [~~or~~] to await confirmation from the state comptroller of the availability of funds, or for any other purpose. Any grant application [~~project~~] so tabled shall be given priority for discussion at the next scheduled meeting of the council.

This 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 September 25, 2009.

TRD-200904277
Janet Meyers
Council Chairman
On-Site Wastewater Treatment Research Council
Earliest possible date of adoption: November 8, 2009
For further information, please call: (512) 239-6087

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31 TAC §§286.74, 286.91 - 286.94

(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 On-Site Wastewater Treatment Research Council or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

STATUTORY AUTHORITY

The proposed repeals are authorized under the authority of Texas Health and Safety Code, §367.008(a), which directs the council to establish procedures for awarding competitive grants and disbursing money. The council interprets this provision to authorize the adoption of rules because the Administrative Procedure Act, §2001.003, defines a "rule" as, among other things, a state agency statement of general applicability that describes the procedure or practice requirements of a state agency. Certain procedures the council adopts would necessarily affect parties other than the council and would be generally applicable to all grant applicants.

§286.74. Mailing Address.
§286.91. Receipt of Proposals.
§286.92. Council Review.
§286.93. Discussion of Proposals.
§286.94. Status of Proposals.

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

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Janet Meyers
Council Chairman
On-Site Wastewater Treatment Research Council
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SUBCHAPTER C. GRANTS AND DONATIONS TO THE COUNCIL

31 TAC §286.131

(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 On-Site Wastewater Treatment Research Council or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

STATUTORY AUTHORITY

The proposed repeal is authorized under the authority of Texas Health and Safety Code, §367.008(a), which directs the council to establish procedures for awarding competitive grants and disbursing money. The council interprets this provision to authorize the adoption of rules because the Administrative Procedure Act, §2001.003, defines a "rule" as, among other things, a state agency statement of general applicability that describes the procedure or practice requirements of a state agency. Certain procedures the council adopts would necessarily affect parties other than the council and would be generally applicable to all grant applicants.

§286.131. Grants and Donations.

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

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Janet Meyers
Council Chairman
On-Site Wastewater Treatment Research Council
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PART 17. TEXAS STATE SOIL AND WATER CONSERVATION BOARD

CHAPTER 523. AGRICULTURAL AND SILVICULTURAL WATER QUALITY MANAGEMENT

31 TAC §523.3

The Texas State Soil and Water Conservation Board (State Board) proposes amendments to §523.3(j), concerning water quality management plans for poultry facilities.

The proposed amendment to §523.3(j)(1) deletes reference to a schedule of implementation dates by which poultry facilities must have obtained a certified water quality management plan, the latest of which expired January 1, 2008. The proposed amendment adds language to clarify that all poultry facilities must request a certified water quality management plan prior to placing poultry at a facility consistent with Texas Water Code §26.302(b) and Senate Bill 1339 of the 77th Texas Legislature.

The proposed amendment to §523.3(j)(2) deletes reference to a table of scheduled implementation dates that have all expired. The amendment adds language which is being moved from the former §523.3(j)(3) regarding the process by which poultry facilities may obtain a water quality management plan, deletes reference to §523.3(a) - (d), which are not part of the process of obtaining a water quality management plan, and adds conditional language referring to an assessment process in a new §523.3(j)(3).

In accordance with Senate Bill 1693 of the 81st Texas Legislature, the State Board must promulgate rules to assess the siting and construction of certain new or expanding poultry facilities. The proposed amendment to add a new §523.3(j)(3) describes the facilities affected.

The proposed amendment to add §523.3(j)(3)(A) lists the assessment criteria (i) - (vi) that will cause certain new or expanding poultry facilities to obtain an odor control plan.

The proposed amendment to add §523.3(j)(3)(B) provides a table that will be used to assess those poultry facilities that do not meet the criteria in subparagraph (A).

The proposed amendment to add §523.3(j)(3)(C) causes any expanding poultry facility that was previously approved under subparagraphs (A) or (B) to again submit to this process to gain approval for the expansion.

The proposed amendment to add §523.3(j)(3)(D) allows a proposed poultry facility to avoid the requirements of subparagraphs (A) - (C) if each neighbor within one half of one mile of the proposed facility provides a letter of consent.

Mr. Kenny Zajicek, Fiscal Officer, State Board, has determined that for the first five-year period there will be no fiscal implications for state or local government as a result of administering this amended rule.

Mr. Zajicek has also determined that for the first five-year period this amended rule is in effect, the public benefit anticipated as a result of administering this rule will be the possibility of improved future placement of poultry facilities.

There are no anticipated costs to small businesses or individuals resulting from this amended rule.

Comments on the proposed amendment may be submitted in writing to Rex Isom, Executive Director, Texas State Soil and Water Conservation Board, P.O. Box 658, Temple, Texas 76503, (254) 773-2250 ext. 231.

The amendment is proposed under Agriculture Code of Texas, Title 7, Chapter 201, §201.020, which authorizes the State Board to adopt rules that are necessary for the performance of its functions under the Agriculture Code.

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

§523.3. Water Quality Management Plan Certification Program.

(a) - (i) (No change.)

(j) Water Quality Management Plans for Poultry Facilities.

(1) All [~~After September 1, 2001 in accordance with the schedule in paragraph (2) of this subsection, all~~] poultry facilities producing poultry for commercial purposes are [~~will be~~] required to develop and implement a certified water quality management plan covering the poultry operating unit. Poultry facilities must request development and certification or recertification of a water quality management plan prior to placing poultry at a new facility or placing additional poultry at an existing facility.

[~~(2) Poultry facilities must request development and certification of a water quality management plan according to the following:~~] [~~Figure: 31 TAC §523.3(j)(2)~~]

(2) [~~(3)~~] Poultry facilities may obtain a water quality management plan as prescribed in subsections (e) [~~(a)~~] - (h) of this section, unless a facility is unable to attain certification based on conditions prescribed in paragraph (3) of this subsection.

(3) After September 1, 2009 the State Board may not certify a water quality management plan for a proposed newly constructed poultry facility, or an existing poultry facility that proposes to expand by more than 50 percent the number of birds included in the existing certified water quality management plan as of September 1, 2009, that

is located less than one half of one mile from a neighbor if the presence of the facility is likely to create a persistent nuisance odor for such neighbors, unless the facility provides an odor control plan the Texas Commission on Environmental Quality determines is sufficient to control odors. A facility that will house fewer than 10,000 total birds is unlikely to create a persistent nuisance odor. Within this paragraph and subparagraphs, the term neighbor includes business, off-site permanently inhabited residence, place of worship, or other poultry farm under separate ownership; and proposed facility has the meaning described in paragraph (2) of this subsection.

(A) Factors that are considered likely to create a persistent nuisance odor and will require the proposed facility to submit an odor control plan are:

(i) Any neighbor within one quarter of one mile of a proposed facility;

(ii) Any neighbor between one quarter and one half of one mile in the prevailing wind direction of a proposed facility, considering both cool and warm seasons;

(iii) Any school, place of worship, healthcare facility, or other poultry facility within one half of one mile of a proposed facility;

(iv) Proposed facility will house more than 225,000 birds per flock;

(v) Proposed facility will use a liquid waste handling system; or

(vi) A notice of violation for odor has been issued to the proposed facility within the previous 12 months.

(B) If none of the factors in subparagraph (A) of this paragraph apply to the proposed facility, the following table will be used to assess the site to determine if the proposed facility is likely to create a persistent nuisance odor for neighbors. If the total score from the assessment of each of the factors exceeds 50 points, the presence of the proposed facility is likely to cause a persistent nuisance odor for neighbors, and the proposed facility must provide an odor control plan the Texas Commission on Environmental Quality determines is sufficient to control odors.

Figure: 31 TAC §523.3(j)(3)(B)

(C) Any facility whose water quality management plan was previously certified by meeting the conditions of subparagraphs (A) or (B) of this paragraph or an approved odor control plan and proposes to expand the number of poultry at the facility, regardless of the percent of the expansion, must again submit to the process in subparagraphs (A) or (B) before the water quality management plan can be recertified.

(D) Alternatively to meeting conditions of subparagraphs (A), (B), or (C) of this paragraph a proposed facility may obtain certification of a water quality management plan if subsections (e) - (h) of this section are met and each neighbor within one half of one mile of the proposed facility provides a notarized letter of consent signed by the neighbor or authorized legal representative(s) of the neighbor. The letter must contain the name, physical and mailing addresses, and phone number of the neighbor and consent to location and operation of permanent odor sources of a poultry facility within one half of one mile of the neighbor. Such letter(s) must be contained in the water quality management plan.

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

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

Filed with the Office of the Secretary of State on September 24, 2009.

TRD-200904256
Mel Davis
Special Projects Coordinator
Texas State Soil and Water Conservation Board
Earliest possible date of adoption: November 8, 2009
For further information, please call: (254) 773-2250 x252

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CHAPTER 525. AUDIT REQUIREMENTS FOR SOIL AND WATER CONSERVATION DISTRICTS

SUBCHAPTER A. AUDITS OF DISTRICTS

31 TAC §§525.1, 525.3 - 525.9

The Texas State Soil and Water Conservation Board (State Board or agency) proposes amendments to §§525.1 and 525.3 - 525.9, Audit Requirements for Soil and Water Conservation Districts, concerning the requirements and guidelines for soil and water conservation districts to implement an audit.

Amended §525.1, Policy Statement, proposes to insert the word "Texas" in front of our agency name to better formalize our name.

Amended §525.3, Duty to Audit, and §525.4, Form of the Audit, both propose to delete the word "the" and replaces it with the word "an" for purposes of grammar.

Amended §525.5, Audit Exemptions, proposes to change annual financial "report" to annual financial "statement" for those district that do not meet the criteria for having an audit required; the audit requirement trigger is proposed to be raised from $25,000 in any year of the biennial period to $50,000; the connector word "and" is deleted from §525.5(a)(3) as it is not needed with new additions to the section.

Section 525.5(a)(4) the connector word "and" is added to tie in the new additions; §525.5(a)(5) is proposed as new language to exempt a district from having a required audit if the district is not otherwise required by the State Board to have an audit.

Section 525.5(b) is amended to insert the words "compilation and" in front of review and this requirement for the compilation and review is amended to not require it be completed by a certified public accountant provided new criteria is meet; subsection 525.5(b)(1) is created from prior language and amended by deleting "that the" and inserting "the"; §525.5(b)(2) is proposed as new language to provide the audit exemption that a district did not have gross state revenues in excess of $100,000 in any year of the biennial; §525.5(b)(3) is proposed as new to provide the audit exemption that the a district did not have cash, receivables, and short term investments balances were not in excess of $50,000 in any year of the biennial period.

Section 525.5(b)(4) is proposed as new to provide the audit exemption that the district is not otherwise required by any other state, federal or local entity to have an audit; §525.5(b)(5) is proposed as new to provide the audit exemption that the district is not required by the State Board to have an audit; §525.5(b)(6) is

proposed as new to provide the person who performs a compilation and review shall be a certified public accountant or public accountant holding a permit from the Texas Board of Public Accountancy.

Section 525.5(c) and §525.5(d) are both amended to delete "report" and replace it with "statement, compilation and review, or audit" to reflect the changes already discussed; §525.5(d) is also amended to specify the annual financial statement, compilation and review or audit must be accompanied by an original affidavit signed by the district chairman.

Section 525.6, Access to and Maintenance of District Records, is amended to delete the word "report" in two places and have that portion of the rule read "audit, compilation and review or annual financial statement" to reflect the changes already discussed.

Section 525.7, Filing of Audits and Annual Financial Reports, the sectional title is proposed for amending to "Filing of Audits, Compilation and Reviews, and Annual Financial Statements" to reflect the changes already discussed; §525.7(a) is amended to insert the same descriptive terms as used in the title; deletes the unnecessary word "the" as used in the prior language; and amends the rule to stipulate that the documents required by this rule are no longer required to be filed with the Governor's Office and the Legislative Budget Board, and instead specify the documents will be available to them upon request; §525.7(b) is amended to capitalize Audit Exemption, since it is in reference to a section title; delete language specifying three copies of an audit must be submitted and reduce the number to two as that number will serve the State Board's requirements; and specifying "an audit" instead of "the Audit Report" to make the sentence read correctly.

Section 525.7(c) is amended to specify that districts governed by the provisions of §525.5(a) (as amended) of this title will need to file two copies of the audit, instead of three, as previously discussed; capital letters are changed and "statement" replaces the word "report" to be consistent with previous changes; and new language is added to specify that districts governed by the provisions of §525.5(b) (as amended) of this title must file two copies of the compilation and review with the state board no later than 120 days after August 31 of each year to be consistent with previous text in this title.

Section 525.7(e), which stated that after proper review, the State Board would forward the required copies of the Audit Report or the Annual Financial Report to the Governor's Office and the Legislative Budget Board is deleted as the State Board is no longer required to automatically forward the documents.

Section 525.8(a) is amended to replace the "Annual Financial Report" with "An annual financial statement" as previously discussed.

Section 525.8(a)(1) is amended remove capitalization from the words "Annual Financial Statement" as previously discussed; and it removes "Soil and Water Conservation" from the name of the State Board to be consistent with overall language in this title.

Section 525.8(a)(2) is amended to remove capitalization from the words "Annual Financial Statement" as previously discussed and deletes "on the Annual Financial Statement" as it is redundant language.

Section 525.8(b) replaces "The Audit Report" with "An audit" as previously discussed. Section 525.8(b)(1) replaces "Audit Report" with "audit" as previously discussed and deletes Soil and Water Conservation from the State Board name as previously discussed.

Section 525.8(b)(2) is amended to delete "the Audit Report" and insert "an audit" as previously discussed and deletes "on the Audit Report" as redundant language.

Section 525.8(c) is proposed as new language to specify that a compilation and review must be filed no later than 120 days after August 31 of each year as established in prior text.

Section 525.8(c)(1) is proposed as new language to specify a district's funds will be considered out of compliance and placed on "hold" status if a compilation and review is not received by the State Board by January 1 as established in prior text.

Section 525.8(c)(2) is proposed as new language to specify a district's funds will be placed on "hold" status if the compilation and review has been received by the due date but the district has not corrected errors by February 28 of each fiscal year as established in prior text.

Section 525.9(b) is amended to replace the word "report" with "statement" as discussed previously.

Section 525.9(c) is amended to restate that two copies of an audit must be submitted instead of three.

Mr. Kenny Zajicek, Fiscal Officer, State Board, has determined that for the first five-year period there will be no fiscal implications for state or local government as a result of administering these amended rules.

Mr. Zajicek has also determined that for the first five-year period these amended rules are in effect, the public benefit anticipated as a result of administering these rules will be the possibility of improved future placement of poultry facilities.

There are no anticipated costs to small businesses or individuals resulting from these amended rules.

Comments on the proposed amendments may be submitted in writing to Rex Isom, Executive Director, Texas State Soil and Water Conservation Board, P.O. Box 658, Temple, Texas 76503, (254) 773-2250 ext. 231.

The amendments are proposed under Agriculture Code of Texas, Title 7, Chapter 201, §201.020, which authorizes the State Board to adopt rules that are necessary for the performance of its functions under the Agriculture Code.

No other statutes, articles, or codes are affected by these amendments.

§525.1. Policy Statement.

It is the policy of the Texas State Soil and Water Conservation Board to develop and implement audit guidelines that adequately safeguard assets administered within the purview of this agency in a cost effective manner. In accordance with this purpose, §§525.1 - 525.8 of this subchapter [~~title~~] (relating to Audits of Districts) are adopted.

§525.3. Duty to Audit.

(a) The directors of each district created under Chapter 201, Agriculture Code of Texas, shall have the district's fiscal accounts and records audited as of August 31 of each even numbered year.

(b) The person who performs an [~~the~~] audit shall be a certified public accountant or public accountant holding a permit from the Texas State Board of Public Accountancy.

(c) The audit required by this section shall be completed no later than 120 days after the end of each biennial audit period.

§525.4. Form of the Audit.

Except as otherwise provided by the Manual of Fiscal Operations, an [~~the~~] audit shall be performed according to the generally accepted auditing standards adopted by the American Institute of Certified Public Accountants and shall include the auditor's opinion as to the fair presentation of the financial statements taken as a whole.

§525.5. Audit Exemption.

(a) A district may elect to file an annual financial statement [~~report~~] as of August 31 of each year in lieu of the district's compliance with §525.3 of this subchapter [~~title~~] (relating to Duty to Audit) provided:

(1) the district had no long term (more than one year) liabilities outstanding during the biennial period other than rent/lease contracts;

(2) the district did not have gross state revenues in excess of $40,000 in any year of the biennial period;

(3) the district's State Fund cash, receivables, and short term investments balances were not in excess of $50,000 [~~$25,000~~] in any year of the biennial period; [~~and~~]

(4) the district is not otherwise required to have its accounts and records audited in compliance with a funding agreement with any federal, county, or other agency; and[~~.~~]

(5) the district is not otherwise required at the discretion of the State Board to have its accounts and records audited under Agriculture Code of Texas, §201.080, Records, Reports, Accounts, and Audits.

(b) A district may elect to file a compilation and review with required procedures [~~completed by a certified public accountant~~] as of August 31 of each year in lieu of the district's compliance with §525.3 of this subchapter [~~title (relating to Duty to Audit)~~] provided:

(1) [~~that~~] the district has no more than one long term (more than one year) liabilities outstanding during the biennial period other than rent/lease contracts and that the one liability consists of real property utilized by the district as it's primary office location; [~~.~~]

(2) the district did not have gross state revenues in excess of $100,000 in any year of the biennial period;

(3) the district's State Fund cash, receivables, and short term investments balances were not in excess of $50,000 in any year of the biennial period;

(4) the district is not otherwise required to have its accounts and records audited in compliance with a funding agreement with any federal, county, or other agency;

(5) the district is not otherwise required at the discretion of the State Board to have its accounts and records audited under Agriculture Code of Texas, §201.080, Records, Reports, Accounts, and Audits; and

(6) the person who performs a compilation and review shall be a certified public accountant or public accountant holding a permit from the Texas State Board of Public Accountancy.

(c) The annual financial statement, compilation and review, or audit [~~report~~] must be reviewed and approved by the district directors and so recorded in the minutes of the board meeting at which such action was taken.

(d) The annual financial statement, compilation and review, or audit [~~report~~] must be accompanied by an original affidavit signed by the district's current chairman, vice chairman, and secretary attesting to the accuracy and authenticity of the financial report.

(e) Districts governed by this section are subject to periodic audits by the State Board.

§525.6. Access to and Maintenance of District Records.

The State Board shall have access to all vouchers, checks, receipts, district fiscal and financial records, and other district records, which the State Board considers necessary for the review of an audit, compilation and review, [~~report~~] or annual financial statement [~~report~~].

§525.7. Filing of Audits, Compilation and Reviews, and Annual Financial Statements [~~Reports~~].

(a) A copy of a compilation and review, audit, [~~the Audit Report~~] or annual financial statement [~~the Annual Financial Report~~] required by this subchapter shall be filed with the [~~Governor's Office, the Legislative Budget Board, and the~~] State Board and available to the Governor's Office and the Legislative Budget Board upon request.

(b) Districts not exempted by §525.5 of this subchapter [~~title~~] (relating to Audit Exemption [~~audit exemption~~]) must file two [~~three~~] copies of an audit [~~the Audit Report~~] with the State Board no later than 120 days after August 31 of even numbered years.

(c) Districts governed by the provisions of §525.5(a) of this subchapter [~~title~~] must file two [~~three~~] copies of an annual financial statement [~~the Annual Financial Report~~] with the State Board no later than 60 days after August 31 of each year. Districts governed by the provisions of §525.5(b) of this subchapter must file two copies of the compilation and review with the State Board no later than 120 days after August 31 of each year.

(d) The filings required by subsections (b) and (c) of this section will satisfy the filing requirement for subsection (a) of this section.

[~~(e) After proper review the State Board will forward the required copies of the Audit Report or the Annual Financial Report to the Governor's Office and the Legislative Budget Board.~~]

§525.8. Compliance Contingencies.

(a) An annual financial statement [~~The Annual Financial Report~~] must be filed no later than 60 days after August 31 of each fiscal year.

(1) A District's funds will be considered out of compliance and placed on "hold" status if an annual financial statement [~~Annual Financial Statement~~] is not received by the State [~~Soil and Water Conservation~~] Board by October 30 of each fiscal year.

(2) A District's funds will be placed on "hold" status if a annual financial statement [~~the Annual Financial Statement~~] has been received by the due date but the District has not corrected errors [~~on the Annual Financial Statement~~] by December 31 of each fiscal year.

(b) An audit [~~The Audit Report~~] must be filed no later than 120 days after August 31 of each even numbered year [~~years~~].

(1) A District's funds will be considered out of compliance and placed on "hold" status if an audit [~~Audit Report~~] is not received by the State [~~Soil and Water Conservation~~] Board by January 1 of each odd numbered year.

(2) A District's funds will be placed on "hold" status if an audit [~~the Audit Report~~] has been received by the due date but the District has not corrected errors [~~on the Audit Report~~] by February 28 of odd numbered years.

(c) A compilation and review must be filed no later than 120 days after August 31 of each year.

(1) A District's funds will be considered out of compliance and placed on "hold" status if a compilation and review is not received by the State Board by January 1.

(2) A District's funds will be placed on "hold" status if the compilation and review has been received by the due date but the District has not corrected errors by February 28 of each fiscal year.

§525.9. District Divisions and Reorganizations.

(a) Other sections of this subchapter notwithstanding an audit of the accounts and records of a district dividing, reorganizing, or dissolving under the provisions of Chapter 201, Subchapter C, of the Agriculture Code must be performed by an individual meeting the requirements of §525.3(c) of this subchapter [~~title~~] (relating to Duty to Audit).

(b) The period to be covered by the audit is from the date of the most recent audit or financial statement [~~report~~] through the date of division, reorganization, or dissolution.

(c) Two [~~Three~~] copies of the audit required by this section must be filed with the State Board no later than 15 days prior to the date of division, reorganization, or dissolution.

This 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 September 25, 2009.

TRD-200904287
Mel Davis
Special Projects Coordinator
Texas State Soil and Water Conservation Board
Earliest possible date of adoption: November 8, 2009
For further information, please call: (254) 773-2250 x252

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 1. TEXAS DEPARTMENT OF PUBLIC SAFETY

CHAPTER 14. SCHOOL BUS SAFETY STANDARDS

SUBCHAPTER D. SCHOOL BUS SAFETY STANDARDS

37 TAC §14.52

(Editor's note: In accordance with Texas Government Code, §2002.014, which permits the omission of material which is "cumbersome, expensive, or otherwise inexpedient," the figure in 37 TAC §14.52 is not included in the print version of the Texas Register. The figure is available in the on-line version of the October 9, 2009, issue of the Texas Register.)

The Texas Department of Public Safety proposes an amendment to Chapter 14, Subchapter D, §14.52, concerning Texas School Bus Specifications.

Amendment to the section is necessary in order to update the rule so that it reflects the revised 2010 Texas School Bus Specifications as the current publication for model school buses that will be operated in the State of Texas.

Oscar Ybarra, Chief of Finance, has determined that for each year of the first five-year period the rule is in effect there will be no fiscal implications for state or local government or local economies.

Mr. Ybarra also has determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the rule as proposed. There is no anticipated economic cost to individuals who are required to comply with the rule as proposed. There is no anticipated negative impact on local employment.

In addition, Mr. Ybarra has also determined that for each year of the first five-year period the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be current and updated rules.

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

The Department has determined that Chapter 2007 of the Government Code does not apply to this rule. Accordingly, the Department is not required to complete a takings impact assessment regarding this rule.

Comments on the proposal may be submitted to Rebecca Rocha, School Bus Transportation Program, Texas Department of Public Safety, P.O. Box 4087, Austin, Texas 78773-0525, (512) 424-7395.

The amendment is proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; Texas Education Code, §34.002, which authorizes the department to adopt safety standards for school buses; and Texas Transportation Code, §547.102, which authorizes the department to adopt standards and specifications for school bus equipment; and §547.7015, which authorizes the department to adopt rules governing the design, color, lighting, and other equipment, construction, and operation of a school bus for the transportation of schoolchildren.

Texas Government Code, §411.004(3), Texas Education Code, §34.002, and Texas Transportation Code, §547,102 and §547.7015 are affected by this proposal.

§14.52. Texas School Bus Specifications.

(a) All school bus chassis and body manufacturers shall certify to the department, in the form of a letter, that all school buses offered for sale to or use by the public school systems in Texas meet or exceed all standards, specifications, and requirements as specified in the department's publication Texas School Bus Specifications. The department hereby adopts the Texas School Bus Specifications for 2010 [~~2009~~] Model School Buses. Previously published Texas School Bus Specifications remain in effect for earlier model year school buses until the department repeals these publications.
Figure: 37 TAC §14.52(a)

(b) All school bus chassis and body manufacturers shall certify to the department, in the form of a letter, that all multifunction school activity buses offered for sale to or use by the public school systems in Texas meet or exceed all federal standards, specifications, and require-

ments of a multifunction school activity bus as specified in the Title 49, Code of Federal Regulations, Part 571.

(1) A multifunction school activity bus may be painted any color except National School Bus Glossy Yellow.

(2) A multifunction school activity bus cannot be used for home to school or school to home transportation. Before delivery of a multifunction school activity bus, the manufacturer must place a label in the direct line of site of the driver while seated in the driver's seat stating: "This vehicle is not to be used for home to school or school to home transportation."

(c) Any new school bus found out of compliance with the specifications that were in effect in Texas on the date the vehicle was manufactured will be placed out of service by the vehicle's owner until it is brought into compliance with the applicable specifications.

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

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TRD-200904270
Steven C. McCraw
Director
Texas Department of Public Safety
Earliest possible date of adoption: November 8, 2009
For further information, please call: (512) 424-2135

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CHAPTER 27. CRIME RECORDS
SUBCHAPTER J. UNIFORM CRIME REPORTING

37 TAC §27.121

The Texas Department of Public Safety proposes amendments to §27.121, concerning Sexual Assault Reporting. Proposed amendments to the rule are necessary in order to implement provisions of Texas Government Code, §411.042, directing the Texas Department of Public Safety, in consultation with statewide, nonprofit sexual assault programs, to establish rules and procedures to ensure law enforcement agencies report sexual assault offenses in the proper form and manner and at regular intervals.

Oscar Ybarra, Chief of Finance, has determined that for each year of the first five-year period the rule is in effect there will be no fiscal implications for state or local government or local economies.

Mr. Ybarra also has determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the rule as proposed. There is no anticipated economic cost to individuals who are required to comply with the rule as proposed. There is no anticipated negative impact on local employment.

In addition, Mr. Ybarra has also determined that for each year of the first five-year period the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be the accuracy and completeness of information reported by law enforcement agencies and to ensure the promptness of information reporting.

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

The Department has determined that Chapter 2007 of the Government Code does not apply to this rule. Accordingly, the Department is not required to complete a takings impact assessment regarding this rule.

Comments on the proposal may be submitted to Louis Beaty, Manager, Crime Records Service, Texas Department of Public Safety, P.O. Box 4087, Austin, Texas 78773-0230, (512) 424-5836.

The amendments are proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work and Texas Government Code, §411.042(i).

Texas Government Code, §411.004(3) and §411.042(i) are affected by this proposal.

§27.121. Sexual Assault Reporting.

(a) Section 411.042, Texas Government Code, mandates that a law enforcement agency shall report offenses under §22.011 and §22.021, Penal Code, to the Texas Department of Public Safety. The Department shall create a statistical breakdown of these offenses.

(b) Information collected by the local law enforcement agency must include information indicating the specific offense committed and information regarding:

(1) the victim's age, sex, race, and ethnic origin [~~victim~~];

(2) the offender's age, sex, race, and ethnic origin;

(3) the offender's relationship to the victim;

(4) the number of victims and the number of offenders;

(5) any weapons used or exhibited in the commission of the offense;

(6) any injuries sustained by the victim;

(7) the location of the offense;

(8) the incident date and time;[~~,~~]

(9) use of alcohol or drugs by the offender.

(c) For purposes of this report, the following Texas Penal Code offense classifications will be collected:

(1) §21.02--Continuous sexual abuse of young child or children;

(2) §21.11(a)(1)--Indecency with a child by contact;

(3) §21.11(a)(2)--Indecency with a child by exposure;

(4) §22.011--Sexual Assault;

(5) §22.021--Aggravated sexual assault;

(6) §43.25--Sexual performance by a child.

(d) Reports should be forwarded to the Department on a monthly basis using the method and form approved by the Department Uniform Crime Reporting.

This 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 September 25, 2009.

TRD-200904269
Steven C. McCraw
Director
Texas Department of Public Safety
Earliest possible date of adoption: November 8, 2009
For further information, please call: (512) 424-2135

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PART 11. TEXAS JUVENILE PROBATION COMMISSION

CHAPTER 359. MEMORANDUM OF UNDERSTANDING

37 TAC §359.100

The Texas Juvenile Probation Commission proposes new Chapter 359, §359.100, relating to memorandums of understanding. This new standard is being proposed in an effort to comply with the requirements of §1701.258 of the Texas Occupations Code, which was enacted during the 81st Legislative Session, 2009.

Lisa Capers, Deputy Executive Director and General Counsel, has determined that for the first five year period the rules are in effect, there will be no fiscal implications for state government and local government as a result of enforcement or implementation of this standard.

Ms. Capers has also determined that for each year of the first five years the new rule is in effect, the public benefit expected as a result of enforcement or implementation will be an increase in public safety and the personal safety of juvenile probation officers while performing official duties.

Public comments on the proposed rule may be submitted in writing to Diane Laffoon at the Texas Juvenile Probation Commission, P.O. Box 13547, Austin, Texas 78711-3547. Comments may also be submitted electronically to *Diane.Laffoon@tjpc.state.tx.us* or faxed to (512) 424-6718.

This standard is proposed under Texas Human Resources Code §141.042, which provides the Texas Juvenile Probation Commission with the authority to adopt reasonable rules that provide minimum standards for juvenile boards and that are necessary to provide adequate and effective probation services.

No other rule or standard is affected by this new chapter.

§359.100. Memorandum of Understanding Between the Texas Juvenile Probation Commission and the Texas Commission on Law Enforcement Officer Standards and Education.

(a) The Texas Juvenile Probation Commission (Commission) adopts by reference the memorandum of understanding (MOU) between the Texas Commission on Law Enforcement Officer Standards and Education. The MOU contains the agreement required by Texas Occupations Code, Chapter 1701, §1701.258, to establish the respective responsibilities of these agencies in developing a basic training program in the use of firearms by juvenile probation officers and fulfilling related statutory mandates.

(b) The MOU is adopted by rule in this section.

(c) The effective date of the MOU, with respect to the Commission, is January 1, 2010.
Figure: 37 TAC §359.100(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 September 28, 2009.

TRD-200904385
Lisa A. Capers
Deputy Executive Director and General Counsel
Texas Juvenile Probation Commission
Earliest possible date of adoption: November 8, 2009
For further information, please call: (512) 694-7894

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 20. TEXAS WORKFORCE COMMISSION

CHAPTER 800. GENERAL ADMINISTRATION
SUBCHAPTER A. GENERAL PROVISIONS

40 TAC §800.9

The Texas Workforce Commission (Commission) proposes the following new section to Chapter 800, relating to General Administration:

Subchapter A, General Provisions, §800.9

PART I. PURPOSE, BACKGROUND, AND AUTHORITY

PART II. EXPLANATION OF INDIVIDUAL PROVISIONS

PART III. IMPACT STATEMENTS

PART IV. COORDINATION ACTIVITIES

PART I. PURPOSE, BACKGROUND, AND AUTHORITY

The purpose of the proposed Chapter 800 rule change is to establish a rule for the acceptance of donations by the Commission in support of any TWC-administered program.

Texas Labor Code §301.201 authorizes the Commission to "accept donations"--but not to "solicit" donations. Further, Texas Government Code §2255.001 requires the Commission to adopt rules governing the relationship between "the donor or organization and the agency and its employees."

Texas Government Code §2255.001 also governs all aspects of conduct of the Agency and its employees in the relationship, including:

--administration and investment of the funds;

--a donor's use of an Agency employee or property;

--service by an Agency officer or employee as an officer or director of the donor or organization; and

--monetary enrichment of an Agency officer or employee by the donor or organization.

PART II. EXPLANATION OF INDIVIDUAL PROVISIONS

(Note: Minor editorial changes are made that do not change the meaning of the rule and, therefore, are not discussed in the Explanation of Individual Provisions.)

SUBCHAPTER A. GENERAL PROVISIONS

The Commission proposes the following amendments to Subchapter A:

§800.9. Donations.

New §800.9(a) relates the purpose of this section, which is to establish rules for the acceptance of donations made to the Commission.

New §800.9(b) establishes the general authority to accept donations. Texas Labor Code §301.021 allows the Commission to accept a donation of services or money that it determines furthers the lawful objectives of the Commission.

New §800.9(c) sets forth the general prohibitions regarding donations as:

(1) Texas Labor Code §301.021(b) and (c), which identifies the entities that the Commission is not authorized to accept donations from; and

(2) Texas Government Code §575.005, which states that the Commission is not authorized to accept donations from entities in contested cases.

New §800.9(d) provides that the Agency, prior to the Commission's consideration of a donation, shall perform an inquiry and analysis to determine if there is a detrimental effect to accepting the donation. This subsection also identifies the Agency's option, under Texas Government Code §551.073, to hold a closed meeting to discuss any possible detrimental information relating to an offered donation.

New §800.9(e), the criteria for the Commission's acceptance of donations, requires that donations be:

(1) accepted in an open meeting;

(2) reported in the minutes to include donor's name, purpose, and description of the donation;

(3) either money or in-kind assets; and

(4) at least $500.00.

New §800.9(f) sets forth that the Commission, following its acceptance of the donation, must execute a donation agreement that includes the following:

(1) Description of the donation to include the value;

(2) Donor's statement attesting to the donor's ownership rights and authority to make the donation;

(3) Signature of the donor or designee;

(4) Signature of Agency designee;

(5) Restrictions on the use of the donations, if any, agreed upon by the donor and the Commission;

(6) Mailing address of the donor and principal place of business if the donor is a business entity;

(7) Statement identifying any official relationship between the donor and the Agency; and

(8) Statement advising the donor to seek legal and tax advice from its own legal counsel.

New §800.9(g) details the administration of donations. The Agency must:

(1) deposit all monetary donations to the Texas Workforce Commission account of the state General Revenue Fund;

(2) disperse all monetary donations by the Agency's direction; and

(3) use the donation according to the purpose specified by the donor, to the extent possible, and in accordance with applicable laws and within the Agency's statutory authority.

New §800.9(h) recognizes that Texas Government Code, Chapter 572, governs the standards of conduct between the Agency and donors.

New §800.9(i) clarifies that all information pertaining to donations is public record subject to the Texas Public Information Act but exceptions can be made upon application by the Agency to the Attorney General's Office.

New §800.9(j) provides that state statute controls in the resolution of any conflicts regarding these rules.

PART III. IMPACT STATEMENTS

Randy Townsend, Chief Financial Officer, has determined that for each year of the first five years the rule will be in effect, the following statements will apply:

There are no additional estimated costs to the state and local governments expected as a result of enforcing or administering the rule.

There are no estimated reductions in costs to the state and to local governments as a result of enforcing or administering the rule.

There are no estimated losses in revenue to the state or to local governments as a result of enforcing or administering the rule.

There are no foreseeable implications relating to costs or revenue of the state or local governments as a result of enforcing or administering the rule.

There are no anticipated economic costs to persons required to comply with the rule, including small or microbusinesses.

The reasoning that led to these conclusions is as follows:

The proposed rule has no implications for cost or revenue increases, or reductions, and there are no anticipated costs to small or microbusinesses. Any changes required to implement the proposed rule are procedural only for the Agency and will be accomplished within existing baseline resources.

Mark Hughes, Director of Labor Market Information, has determined that there is no significant negative impact upon employment conditions in the state as a result of the rule.

Laurence M. Jones, Director, Workforce Development Division, has determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the proposed rule will be to potentially increase available funds

for specific employment and training programs administered by the Commission.

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

PART IV. COORDINATION ACTIVITIES

In the development of this rule for publication and public comment, the Commission sought the involvement of Texas' 28 Boards. The Commission provided the concept paper regarding this rule to the Boards for consideration and review on April 21, 2009. The Commission also conducted a conference call with Board executive directors and Board staff on April 24, 2009, to discuss the concept paper. During the rulemaking process, the Commission considered all information gathered in order to develop a rule that provides clear and concise direction to all parties involved.

Comments on the proposed rule may be submitted to TWC Policy Comments, Workforce Policy and Service Delivery, attn: Workforce Editing, 101 East 15th Street, Room 440T, Austin, Texas 78778; faxed to (512) 475-3577; or e-mailed to TWCPolicyComments@twc.state.tx.us. The Commission must receive comments postmarked no later than 30 days from the date this proposal is published in the *Texas Register.*

The rule is proposed under Texas Labor Code §301.0015 and §302.002(d), which provide the Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities.

The proposed rule affects Title 4, Texas Labor Code, particularly Chapters 301 and 302.

§800.9. Donations.

(a) Purpose. The purpose of this section is to establish rules for the acceptance of donations made to the Commission.

(b) General Authority to Accept Donations. Texas Labor Code §301.021 allows the Commission to accept a donation of services or money that it determines furthers the lawful objectives of the Commission.

(c) General Prohibitions Regarding Donations.

(1) Texas Labor Code §301.021(b) and (c) identify entities that the Commission is not authorized to accept donations from; and

(2) Texas Government Code §575.005 states that the Commission is not authorized to accept donations from entities in contested cases.

(d) Analysis of Offered Donations. The Agency, prior to the Commission's consideration of a donation, shall perform an inquiry and analysis to determine if there is a detrimental effect to accepting the donation. Texas Government Code §551.073 allows the Commission to hold a closed meeting regarding an identified detrimental effect as determined by the Agency.

(e) Acceptance of Donations. Acceptance of donations by the Commission on behalf of the Agency shall:

(1) be in an open meeting by a majority of the voting members of the Commission;

(2) be reported in the public records of the Commission and include the name of the donor, and the purpose and a description of the donation;

(3) be in the form of monetary or in-kind assets; and

(4) have a minimum value of $500.00.

(f) Donation Agreement. Following acceptance of the donation by the Commission, the donor and the Agency shall execute a donation agreement, which includes:

(1) description of the donation, including a statement of the value;

(2) statement by the donor attesting to the donor's ownership rights in the donation and the donor's authority to make the donation;

(3) signature of the donor or designee;

(4) signature of the Agency designee;

(5) restrictions on the use of the donations, if any, agreed to by the donor and Commission;

(6) mailing address of the donor and principal place of business if the donor is a business entity;

(7) statement identifying any official relationship between the donor and the Agency; and

(8) statement advising the donor to seek legal and/or tax advice from its own legal counsel.

(g) Administration of Donations. The Agency shall:

(1) deposit monetary donations to the credit of the Texas Workforce Commission account of the state General Revenue Fund;

(2) disburse monetary donations at the Agency's direction. All monetary gifts are automatically appropriated to the Commission in accordance with the General Appropriations Act; and

(3) use the donations for the purpose specified by the donor, to the extent possible, and in accordance with any local, state, and federal laws. In no event shall donations be used for purposes not within the Agency's statutory authority.

(h) Texas Government Code, Chapter 572, governs the standards of conduct between the Agency and donors.

(i) Public Records.

(1) Documents and other information pertaining to the official business of the Commission are public information and are subject to the Texas Public Information Act (Texas Government Code, Chapter 552).

(2) If the Commission determines an exception to the Texas Public Information Act is applicable, it may seek a determination from the Attorney General of Texas regarding the confidentiality of information relating to a donation before releasing the requested information.

(j) Conflict of Laws. These rules shall not conflict with a requirement of a statute regulating the conduct of an officer or employee of a state agency or the procedures of the Agency. In the event that there appears to be a conflict between these rules and a state statute, the state statute controls.

This 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 September 22, 2009.

TRD-200904231

Reagan Miller
Deputy Division Director, Workforce Policy and Service Delivery
Texas Workforce Commission
Earliest possible date of adoption: November 8, 2009
For further information, please call: (512) 475-0230

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CHAPTER 801. LOCAL WORKFORCE DEVELOPMENT BOARDS
SUBCHAPTER B. ONE-STOP SERVICE DELIVERY NETWORK

40 TAC §801.23

The Texas Workforce Commission (Commission) proposes the following amendments to Chapter 801 relating to Local Workforce Development Boards:

Subchapter B, One-Stop Service Delivery Network, §801.23

PART I. PURPOSE, BACKGROUND, AND AUTHORITY

PART II. EXPLANATION OF INDIVIDUAL PROVISIONS

PART III. IMPACT STATEMENTS

PART IV. COORDINATION ACTIVITIES

PART I. PURPOSE, BACKGROUND, AND AUTHORITY

The U.S. Department of Labor Veterans' Employment and Training Service (DOL-VETS) final rules and regulations (20 C.F.R. Part 1010), effective January 19, 2009, implement priority of service for covered persons, as set forth in the Jobs for Veterans Act, and as specified by the Veterans' Benefits, Health Care, and Information Technology Act of 2006. The final rules articulate how to apply priority of service across all new and existing qualified DOL-funded job training programs.

Under 20 C.F.R. §1010.110, DOL defines a *veteran* as: "a person who served in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable, as specified in 38 U.S.C. §101(2). Active service includes full-time duty in the National Guard or a Reserve component, other than full-time duty for training purposes."

Further, 20 C.F.R. §1010.110 defines an *eligible spouse* as the spouse of:

(1) any veteran who died of a service-connected disability;

(2) any member of the Armed Forces serving on active duty who, at the time of application for the priority, is listed in one or more of the following categories and has been so listed for a total of more than 90 days:

(i) missing in action;

(ii) captured in line of duty by a hostile force; or

(iii) forcibly detained or interned in line of duty by a foreign government or power;

(3) any veteran who has a total disability resulting from a service-connected disability, as evaluated by the Department of Veterans Affairs;

(4) any veteran who died while a disability, as indicated in paragraph (3) of this section, was in existence.

Additionally, House Bill (HB) 1452, enacted by the 81st Texas Legislature, Regular Session (2009) (to be codified in Texas Labor Code, Chapter 302, Subchapter G) mandates that state qualified veterans receive preference (i.e., priority of service) for training or assistance under a job training or employment assistance program or service. This requirement applies to services funded in whole or in part by state funds.

The statute also aligns the definitions of "active military, naval, or air service," "covered person," and "veteran" with federal law for purposes of receiving priority of service in certain job training and employment assistance programs. HB 1452 also includes the spouse of any member of the armed forces who died while serving on active military, naval, or air service in the definition of "qualified spouse."

The purpose of this rule change is to provide a new definition of "eligible veteran" based on DOL definitions and HB 1452.

PART II. EXPLANATION OF INDIVIDUAL PROVISIONS

(Note: Minor editorial changes are made that do not change the meaning of the rules and, therefore, are not discussed in the Explanation of Individual Provisions.)

SUBCHAPTER B. ONE-STOP SERVICE DELIVERY NETWORK

The Commission proposes the following amendments to Subchapter B:

§801.23. Definitions.

New §801.23(4), the definition of "eligible foster youth," is unchanged; however, it is renumbered from §801.23(5) to maintain alphabetical order.

New §801.23(5) defines eligible veteran as one of the following:

--Federal/state qualified veteran

--Federal qualified spouse

--State qualified spouse

The new definition is derived from the definitions of veteran found in the DOL definition of federal qualified veteran at 20 C.F.R. §1010.110 and the state definition of veteran set forth in HB 1452.

Section 801.23(7) is removed. The definition of "state qualified veteran" is included in new §810.23(5)(A).

PART III. IMPACT STATEMENTS

Randy Townsend, Chief Financial Officer, has determined that for each year of the first five years the rule will be in effect, the following statements will apply:

There are no additional estimated costs to the state and local governments expected as a result of enforcing or administering the rule.

There are no estimated reductions in costs to the state and to local governments as a result of enforcing or administering the rule.

There are no estimated losses or increases in revenue to the state or to local governments as a result of enforcing or administering the rule.

There are no foreseeable implications relating to costs or revenue of the state or local governments as a result of enforcing or administering the rule.

There are no anticipated economic costs to persons required to comply with the rule, including small or microbusinesses.

The reasoning that led to these conclusions is as follows:

All workforce services are provided to eligible veterans with current funding. Giving veterans priority over all other individuals in the receipt of services (e.g., job referrals, support services, child care, and training) does not indicate or infer that any increase in costs from current requirements would result. It also has been determined that modifications required in the information system to accommodate the minor change in definitions for "veteran," if any, will be accomplished within the existing baseline resources.

Laurence M. Jones, Director, Workforce Development Division, has determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the proposed rule will be to ensure Agency operations with regard to veterans' priority of service are consistent with state statute and regulations issued by DOL-VETS and that eligible veterans will be appropriately served.

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

PART IV. COORDINATION ACTIVITIES

In the development of this rule for publication and public comment, the Commission sought the involvement of Texas' 28 Boards. The Commission provided the concept paper regarding these rule amendments to the Boards for consideration and review on April 21, 2009. The Commission also conducted a conference call with Board executive directors and Board staff on April 24, 2009, to discuss the concept paper. During the rulemaking process, the Commission considered all information gathered in order to develop a rule that provides clear and concise direction to all parties involved.

Comments on the proposed rule may be submitted to TWC Policy Comments, Workforce Policy and Service Delivery, attn: Workforce Editing, 101 East 15th Street, Room 440T, Austin, Texas 78778; faxed to (512) 475-3577; or e-mailed to TWCPolicyComments@twc.state.tx.us. The Commission must receive comments postmarked no later than 30 days from the date this proposal is published in the *Texas Register.*

The rule is proposed under Texas Labor Code §301.0015 and §302.002(d), which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities.

The proposed rule affects Title 4, Texas Labor Code, particularly Chapters 301 and 302; Texas Family Code, Chapter 264; and Texas Government Code, Chapter 551 and Chapter 2308.

§801.23. Definitions.

In addition to the definitions contained in §800.2 of this title, the following words or terms shall have the following meanings, unless the context clearly indicates otherwise.

(1) Certified Full-Service Texas Workforce Center--A local full-service workforce center that has integrated service functions to aid employers and job seekers in all aspects of employment and training in a seamless, nonprogram-specific manner, and has been found to meet the requirements of a Full-Service Texas Workforce Center set out in §801.25(b) of this subchapter.

(2) Certified Texas Workforce Center--A local workforce center that provides integrated services to aid employers and job seekers in all aspects of employment and training in a seamless nonprogram-specific manner, and has been found to meet the requirements of a Certified Texas Workforce Center set out in §801.25(a) of this subchapter.

(3) Competent--A federal or state qualified veteran who meets the eligibility requirements of the program from which he or she is seeking services, and is determined eligible for a specific employment and training service funded by that program.

~~[(4) Federal Qualified Veteran or Qualified Spouse--For purposes of implementing priority of service for DOL-funded employment and training programs, the term "federal qualified veteran or qualified spouse" is defined as:]~~

~~[(A) A veteran as defined:]~~

~~*[(i)* under the Workforce Investment Act (29 U.S.C. §2801), or by any relevant waivers, as an individual who served in the active military, naval, or air service, and who was discharged or released from such service under conditions other than dishonorable; or]~~

~~*[(ii)* in 38 U.S.C. §4211 as a person who:]~~

~~*[(I)* served on active duty for a period of more than 180 days and was discharged or released therefrom with other than a dishonorable discharge;]~~

~~*[(II)* was discharged or released from active duty because of a service-connected disability; or]~~

~~*[(III)* as a member of a reserve component under an order to active duty pursuant to 10 U.S.C. §12301(a), (d), or (g), §12302, or §12304, served on active duty during a period of war or in a campaign or expedition for which a campaign badge is authorized and was discharged or released from such duty with other than a dishonorable discharge.]~~

~~[(B) The spouse of any of the following individuals:]~~

~~*[(i)* Any veteran who died of a service-connected disability.]~~

~~*[(ii)* Any member of the Armed Forces serving on active duty who, at the time of application for assistance under this section, is listed, pursuant to 37 U.S.C. §556 and regulations issued thereunder, by the Secretary concerned in one or more of the following categories and has been so listed for a total of more than 90 days:]~~

~~*[(I)* Missing in action;]~~

~~*[(II)* Captured in line of duty by a hostile force; or]~~

~~*[(III)* Forcibly detained or interned in line of duty by a foreign government or power.]~~

~~*[(iii)* Any veteran who has a total disability resulting from a service-connected disability.]~~

~~*[(iv)* Any veteran who died while a disability, as defined in clause (iii) of this subsection, was in existence.]~~

(4) [~~(5)~~] Eligible Foster Youth--An eligible foster youth is a:

(A) Current Foster Youth--A youth, age 14 or older, who is receiving substitute care services under the managing conservatorship of the Texas Department of Family and Protective Services (DFPS). This includes youth residing in private foster homes, group

homes, residential treatment centers, juvenile correctional institutions, and relative care; or

(B) Former Foster Youth--A youth up to 23 years of age, who formerly was under the managing conservatorship of DFPS, until:

(i) the conservatorship was transferred by a court;

(ii) the youth was legally emancipated (i.e., the youth's minority status was removed by a court); or

(iii) the youth attained 18 years of age.

(5) Eligible Veteran--An eligible veteran is one of the following:

(A) Federal/state qualified veteran--an individual who served in the active military, naval, or air service, and who was discharged or released from such service under conditions other than dishonorable as specified at 38 U.S.C. §101(2). Active service includes full-time duty in the National Guard or a Reserve component, other than full time for training purposes.

(B) Federal qualified spouse--the spouse of one of the following:

(i) Any veteran who died of a service-connected disability.

(ii) Any member of the Armed Forces serving on active duty who, at the time of application for assistance under this section, is listed, pursuant to 37 U.S.C. §556 and regulations issued thereunder, by the Secretary concerned in one or more of the following categories and has been so listed for a total of more than 90 days:

(I) Missing in action;

(II) Captured in line of duty by a hostile force; or

(III) Forcibly detained or interned in line of duty by a foreign government or power.

(iii) Any veteran who has a total disability resulting from a service-connected disability as evaluated by the Department of Veterans Affairs.

(iv) Any veteran who died while a disability, as defined in clause (iii) of this subparagraph, was in existence.

(C) State qualified spouse:

(i) A spouse who meets the definition of federal qualified spouse; or

(ii) A spouse of any member of the armed forces who died while serving on active military, naval, or air service.

(6) National Emergency--A condition declared by the President by virtue of powers previously vested in that office to authorize certain emergency actions to be undertaken in the national interest pursuant to 50 U.S.C. §1621.

~~[(7) State Qualified Veteran--An individual who meets the criteria of Texas Government Code §657.002(c) is entitled to a preference (i.e., priority) for training or assistance under a job training or employment assistance program or service funded in whole or in part by state funds if the individual:]~~

~~[(A) served in the military for not less than 90 consecutive days during a national emergency declared in accordance with federal law or was discharged from military service for an established service-connected disability;]~~

~~[(B) was honorably discharged from military service; and]~~

~~[(C) is competent as defined in paragraph (1) of 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 September 22, 2009.

TRD-200904232
Reagan Miller
Deputy Division Director, Workforce Policy and Service Delivery
Texas Workforce Commission
Earliest possible date of adoption: November 8, 2009
For further information, please call: (512) 475-0230

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TITLE 43. TRANSPORTATION

PART 1. TEXAS DEPARTMENT OF TRANSPORTATION

CHAPTER 2. ENVIRONMENTAL POLICY

The Texas Department of Transportation (department) proposes the repeal of §2.22 and simultaneously proposes new 43 TAC Chapter 2, Subchapter E, §2.101, Purpose, §2.102, Texas Natural Diversity Database, §2.103, Applicability of MOU, §2.104, Definitions, §2.105, Coordination with TPWD Concerning Transportation Project, §2.106, Standard Coordination Procedure, §2.107, Coordination During Early Project Development, §2.108, Review and Comment on Maintenance Programs, §2.109, Mitigation and Mitigation Payments to TPWD, §2.110, Agreement for Calculating Mitigation Payments for Unregulated Resources, §2.111, TxDOT and TPWD Commitment to Enter into Other Agreements, and §2.112, Review of Performance; Updates of MOU, relating to Memorandum of Understanding with Texas Parks and Wildlife Department.

EXPLANATION OF PROPOSED REPEAL AND NEW SECTIONS

Transportation Code, §201.607 requires the department to adopt a Memorandum of Understanding (MOU) with each state agency that has responsibility for the protection of the natural environment, or for the preservation of historical or archeological resources. Transportation Code, §201.607 also requires the department to adopt the memoranda and all revisions by rule and to periodically examine and revise the memoranda. In accordance with Transportation Code, §201.607, the department has examined the memoranda adopted in 1999 and proposes to repeal 43 TAC §2.22 (relating to Memorandum of Understanding with the Texas Parks and Wildlife Department) and propose new 43 TAC Chapter 2, Subchapter E, §§2.101 - 2.112 to ensure continued effective coordination of the review of the environmental effects of highway projects.

Current 43 TAC §2.22 describes the procedures, as set out in the MOU executed by the department and Texas Parks and Wildlife Department (TPWD) in 1999, that provide for TPWD review of department projects that have the potential to affect natural resources within the jurisdiction of TPWD. The section

provides a formal mechanism by which TPWD may review applicable department transportation projects that promotes sharing of information between the department and TPWD that assists the department in making environmentally sound decisions. Instead of amending current 43 TAC §2.22, the section is being repealed and replaced by new 43 TAC §§2.101 - 2.112 because the changes to the procedures and processes from the current to the new MOU are substantial and because the MOU has been reorganized for clarity and ease of understanding by those interested in or affected by it.

New §2.101 describes the general purpose of the MOU. The purpose is to provide an MOU between the two agencies for the coordination and environmental review of transportation projects. The MOU establishes the procedure for submission of information by the department to TPWD, the TPWD review and submission of comments to the department, and for the department's response.

New §2.102 provides a description of the TPWD Texas Natural Diversity Database (TXNDD), a database of documented occurrences of listed and proposed threatened and endangered species, and describes the department's access and use of TXNDD under a memorandum of agreement.

New §2.103 defines the applicability of the MOU to transportation projects as defined in §2.1 of 43 TAC Chapter 2 and to improvement projects on the state highway system developed by entities other than the department. The proposed MOU applies to department toll projects. Such projects had been excluded from the prior MOU because at the time the MOU was executed a separate state agency developed toll projects.

New §2.104 provides definitions applicable for this subchapter and for documents prepared under this subchapter. Definitions for terms in current 43 TAC §2.22 that are not included in proposed §2.104 are: construction; early project development; habitat; maintenance; maintenance programs, memorandum of understanding (MOU); project development; public involvement; and transportation projects. The definition for the term "construction" is replaced by a new definition for "construction project." The meaning of the term "early project development" is clarified in proposed §2.107 and therefore a definition is not necessary. The definition of "habitat" is incorporated within the proposed definitions of "range" and "suitable habitat" in new 43 TAC §2.106(a)(4). The term "maintenance program" is already defined in 43 TAC §2.2 and the definition of the term "maintenance" has been omitted with references to 43 TAC §2.2 made where appropriate. The term "memorandum of understanding (MOU)" is defined in 43 TAC §2.101. The term "public involvement" is not utilized in the proposed new rules and therefore is not defined. The department's public involvement process relating to environmental processes is described in 43 TAC Chapter 2, Subchapter A. "Transportation project" is described in 43 TAC §2.103. Existing definitions that were revised for clarity are "environmental document," "mitigation," "NEPA," and "right of way." New definitions are proposed for the following terms: "construction project," "coordination," "federal endangered species," "federal threatened species," "floodplains or creek drainages," "mature habitat," "qualified biologist," "riparian vegetation," "regulated resources," "significant remnant vegetation," "species of concern," "state threatened or endangered species," "unregulated resources," and "wetlands."

New §2.105 provides that the department will coordinate with TPWD on transportation projects according to 43 TAC §2.106 and 43 TAC §2.107. Generally, the department will interact with TPWD under the MOU through the Wildlife Habitat Assessment Program of TPWD.

New §2.106 delineates the standard procedure for project coordination. Section 2.106(a) provides that coordination is required for projects that are the subject of a draft environmental impact statement (EIS), a final EIS, a supplemental EIS, an environmental assessment, and certain categorical exclusions. Projects classified as categorical exclusions only require coordination if they meet or exceed criteria defined in §2.106(a)(3)(A) - (F). Section 2.106(a) also provides that coordination is only required for the reevaluation of either an EIS or an environmental assessment project if: the reevaluation relates to an issue TPWD commented on; or if the reevaluation addresses a change that if considered separately as a stand-alone project would trigger coordination under the criteria delineated in §2.106(a)(3)(A) - (F). Similarly, projects that were the subject of early coordination under new 43 TAC §2.107 do not require coordination under this section unless there has been a significant change to the project subsequent to coordination. Significant change is defined as a change that is equal to or greater than one or more of the criteria delineated in §2.106(a)(3)(A) - (F). The coordination criteria for the disturbance of mature woody vegetation delineated in subsection §2.106(a)(3)(F) is now based on the acreage of disturbance specific to each of 11 TPWD defined ecoregions.

New §2.106(b) defines the procedure for coordination. TPWD is provided 45 days from the date of the department transmittal letter to review and provide comment on projects undergoing initial coordination and on projects undergoing early project development coordination under §2.107(a)(2). If additional information is requested in either case, and the information is available or reasonably can be obtained, TPWD will have 30 days to review and comment from the date of the department transmittal letter containing the additional information. The department must consider all timely submitted comments in making project decisions and notify TPWD in writing of the department's decisions. TPWD comments submitted outside of the defined timeframes must be considered by the department to the extent practicable in making project decisions, and a written notice provided to TPWD of the department's decisions. In accordance with Parks and Wildlife Code, §12.0011 the department will provide a written response to TPWD's comments no later than the 90th day after the date the environmental review for the project is completed. The department will incorporate the results of coordination within the project's final environmental documentation.

New §2.107 describes coordination during early project development. Section 2.107(a) provides that the department may request coordination of a project during early development if the department has conducted preliminary project planning, field surveys, database searches, in-house coordination, initial resource agency coordination, or scoping and if the project would otherwise require coordination under 43 TAC §2.106. TPWD may decline a request for early coordination.

Section 2.107(b) defines the coordination procedure. If TPWD agrees to coordinate during early project development, TPWD is provided 60 days from the date of the department transmittal letter to review and provide comment. If additional information is requested, and the information is available or reasonably can be obtained, TPWD will have an additional 30 days to review and comment from the date of the department transmittal letter containing the additional information. In accordance with Parks and Wildlife Code, §12.0011 the department will provide a written

response to TPWD's comments no later than the 90th day after the date the environmental review for the project is completed.

Section 2.107(c) requires the department to consider any comments submitted under §2.107 during final project development and to incorporate the results in the project's final environmental documentation.

New §2.108 will allow TPWD the opportunity to review and comment on the environmental review of a maintenance program under 43 TAC §2.18.

New §2.109 provides a new procedure for the department to provide monetary compensation to TPWD for unregulated resources, and establishes an initial compensation process that may be modified for long-term implementation by an interagency team and agreement described in new 43 TAC §2.110.

Section 2.109(a) states it is the department's order of preference to first avoid impacts to natural resources, then to minimize impacts, and finally to consider monetary compensation. The department will describe actions to mitigate effects during coordination with TPWD, the TPWD Wildlife Habitat Assessment Program will provide advice and assistance in designing mitigation plans or agreements, and the department will then describe the mitigation proposal in the project's environmental document. Mitigation will be included if mutually agreed to by the department and TPWD.

Section 2.109(b) requires the department to consult with TPWD when unforeseen impacts occur during construction of a project, and to incorporate best management practices or other measures suggested by TPWD, when practical and reasonable, to avoid or minimize impacts.

Section 2.109(c) identifies the authority for the department to provide state highway funds as monetary compensation to mitigate adverse environmental effects resulting from either construction or maintenance of a state highway. The authority to mitigate impacts in Transportation Code, §222.001 relates only to effects from projects on the state highway system. Accordingly, the payments made under subsection 2.109(c) will not relate to other projects, for example, rail projects. The subsection also clarifies that impacts on regulated resources (as defined in the MOU) are mitigated in accordance with federal law. The payments made under §2.109(c) will not relate to impacts to regulated resources. Section 2.109(c) sets an immediate process for the department to provide estimated compensation for upcoming projects on a quarterly timeframe, with amounts based on the volume of project lettings and upon agreed rates specific to the categories of the projects. At the end of each fiscal year the department will calculate actual impacts to resources based on acreage impacted that have occurred, and calculate compensation based on agreed rates for seven categories of natural resources: $4,002 per acre for riparian habitat; $2,668 per acre for upland trees; $1,334 per acre for brush; $166 per acre for maintained right of way; and $666 per acre for other types of habitat. Values for unique vegetation and habitat may be developed and agreed upon according to procedures in new 43 TAC §2.110. The department will reconcile the monetary difference between the amount of compensation paid in the estimated quarterly payments and the calculated amount for the actual annual impact from completed projects.

New §2.110 requires development of an agreement for calculating mitigation payments for unregulated resources by an interagency team. Section 2.110(a) provides that following the execution of the MOU an interagency team will meet and adopt an agreement on procedures and methodologies for a final compensation plan for adverse environmental impacts from all transportation projects, whether or not they were referred to TPWD for coordination and review.

Section 2.110(b) requires the interagency team to meet on a quarterly basis to review the calculation of acreage impacted by transportation projects.

Section 2.110(c) requires the interagency team to develop a final compensation plan that supports the TPWD goals and objectives for conservation of resources, determine if additional or more refined habitats should be tracked, determine an appropriate monetary compensation for each habitat and ecoregion, and evaluate if a new category for unique vegetation and habitat features is necessary.

Section 2.110(d) requires that if a new category for unique vegetation and habitat features is proposed, TPWD and the department must concur that it provides significant refuge or habitat to wildlife or represents a localized but significant stand of vegetation. The monetary compensation rate would be determined by the executive offices of the department and TPWD.

Section 2.110(e) states that on the effective date of the agreement that adopts the compensation plan under subsection (c) of §2.110, mitigation based on construction letting will end and the payments will be based on the final compensation plan. If new habitat types are included, a transition from payments on the prior habitat types may be provided.

New §2.111 allows the department and TPWD to enter into other agreements. Section 2.111(a) states that the department and TPWD will enter into an agreement concerning the methods and guidelines for habitat description.

Section 2.111(b) states that the department and TPWD agree to enter into an agreement concerning procedures for review and adoption of best management practices for the mitigation of environmental impacts of construction projects, maintenance projects, and maintenance programs. All adopted best management practices will be incorporated into the department standard specifications.

Section 2.111(c) states that the department and TPWD agree to enter into an agreement adopting a list of significant remnant vegetation types and unique vegetation and habitat features.

Section 2.111(d) states that the department and TPWD agree to enter into an agreement to adopt a procedure for the department to request coordination with TPWD on projects during early project coordination.

Section 2.111(e) requires the agreements described in §2.111 to be finalized and executed by the department and TPWD not later than December 31, 2010.

New §2.112 requires the department and TPWD to enter into an agreement concerning the review of how the agencies have implemented the MOU. If agreed on criteria are not met then the department and TPWD agree to address the deficiency.

FISCAL NOTE

James Bass, Chief Financial Officer, has determined that for each of the first five years the repeal and new sections as proposed are in effect, there will be fiscal implications for state government as a result of enforcing or administering the repeal and new sections. Currently there is no monetary compensation paid by the department to TPWD for impacts to unregulated natural

resources from transportation projects. Under the initial compensation process delineated in 43 TAC §2.109, based on recent historic volumes of construction letting for each of the affected categories, it is estimated that the annual monetary compensation to TPWD will be approximately $3,000,000 annually for fiscal years 2010 - 2014. The amount of compensation may change following the development and implementation of a final compensation plan according to 43 TAC §2.110. The amount of change, either an increase or a decrease, will be dependent upon the mutual agreements contained in the final plan and cannot be estimated at this time. There will be no fiscal implications for local government as a result of enforcing or administering the repeal and new sections.

Dianna Noble, Director, Environmental Affairs Division, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the repeal and new sections.

PUBLIC BENEFIT AND COST

Ms. Noble has also determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of enforcing or administering the repeal and new sections will be the availability of new funds to TPWD for use in furthering the protection or development of natural resources and wildlife habitat. There are no anticipated economic costs for persons required to comply with the sections as proposed. There will be no adverse economic effect on small businesses.

COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW

This rulemaking action has been determined to be subject to the Coastal Management Program (CMP) in accordance with the Coastal Coordination Act, as amended (Texas Natural Resources Code, §33.201 et. seq.), and the rules of the Coastal Coordination Council (31 TAC Chapters 501 - 506). As required by 31 TAC §505.22(a), this rulemaking action must be consistent with all applicable CMP policies.

This action has been reviewed for consistency, and it has been determined that this rulemaking is consistent with the applicable CMP goals and policies. The primary CMP policy applicable to this rulemaking action is the policy that transportation projects be located at sites that, to the greatest extent practicable, avoid and otherwise minimize the potential for adverse effects to coastal natural resource areas from construction and maintenance of roads, bridges, causeways, and other development associated with the project. This rulemaking action provides a means for identifying the environmental impacts of department transportation projects on natural resources, including threatened and endangered species and habitat, for coordination of these projects with the relevant state resource agency, and for inclusion of these investigations and coordination in the environmental documentation for each project. All of these purposes will provide a mechanism for avoiding, minimizing, or compensating, where practicable, for the adverse effects of department projects on coastal natural resource areas that serve as habitat, on coastal preserves, and on threatened and endangered species. For these same reasons, the rulemaking action is consistent with the CMP goal of protecting, preserving, restoring, and enhancing the diversity, quality, quantity, functions, and values of coastal natural resource areas. Interested persons are requested to submit comments on the consistency of the proposed rules with the CMP.

PUBLIC HEARING

Pursuant to the Administrative Procedure Act, Government Code, Chapter 2001, the Texas Department of Transportation will conduct a public hearing to receive comments concerning the proposed rules. The public hearing will be held at 9:00 a.m. on October 28, 2009, in the first floor hearing room of the Dewitt C. Greer State Highway Building, 125 East 11th Street, Austin, Texas and will be conducted in accordance with the procedures specified in 43 TAC §1.5. Those desiring to make comments or presentations may register starting at 8:30 a.m. Any interested persons may appear and offer comments, either orally or in writing; however, questioning of those making presentations will be reserved exclusively to the presiding officer as may be necessary to ensure a complete record. While any person with pertinent comments will be granted an opportunity to present them during the course of the hearing, the presiding officer reserves the right to restrict testimony in terms of time and repetitive content. Organizations, associations, or groups are encouraged to present their commonly held views and identical or similar comments through a representative member when possible. Comments on the proposed text should include appropriate citations to sections, subsections, paragraphs, etc. for proper reference. Any suggestions or requests for alternative language or other revisions to the proposed text should be submitted in written form. Presentations must remain pertinent to the issues being discussed. A person may not assign a portion of his or her time to another speaker. 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 Government and Public Affairs Division, 125 East 11th Street, Austin, Texas 78701-2483, (512) 305-9137 at least two working days prior to the hearing so that appropriate services can be provided.

SUBMITTAL OF COMMENTS

Written comments on the proposed repeal of §2.22 and new §§2.101 - 2.112 may be submitted to Dianna Noble, Director, Environmental Affairs Division, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is 5:00 p.m. on November 9, 2009.

SUBCHAPTER B. MEMORANDA OF UNDERSTANDING WITH NATURAL RESOURCE AGENCIES

43 TAC §2.22

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

STATUTORY AUTHORITY

The repeal is proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §201.607, which requires the department every fifth year to revise the MOU with each state agency that is responsible for the protection of the natural environment or for the preservation of historical and archeological resources.

CROSS REFERENCE TO STATUTE

Transportation Code, §§201.604, 201.607, and 222.001.

§2.22. Memorandum of Understanding with the Texas Parks and Wildlife Department.

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

Filed with the Office of the Secretary of State on September 25, 2009.

TRD-200904260
Bob Jackson
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: November 8, 2009
For further information, please call: (512) 463-8683

♦ ♦ ♦

SUBCHAPTER E. MEMORANDUM OF UNDERSTANDING WITH TEXAS PARKS AND WILDLIFE DEPARTMENT

43 TAC §§2.101 - 2.112

STATUTORY AUTHORITY

The new sections are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §201.607, which requires the department every fifth year to revise the MOU with each state agency that is responsible for the protection of the natural environment or for the preservation of historical and archeological resources.

CROSS REFERENCE TO STATUTE

Transportation Code, §§201.604, 201.607, and 222.001.

§2.101. Purpose.

(a) This subchapter provides the memorandum of understanding (MOU) between the Texas Department of Transportation (TxDOT) and the Texas Parks and Wildlife Department (TPWD) relating to the environmental review of transportation projects developed by TxDOT, as required by Transportation Code, §201.607, and the mitigation of the effects of certain transportation projects.

(b) The MOU establishes the procedure for the submission of information concerning a proposed transportation project by TxDOT to TPWD, the review of the project by TPWD, the submission of comments by TPWD to TxDOT, and TxDOT's response to those comments.

(c) The MOU takes effect January 7, 2010 and on that date, the previous memorandum of understanding between TxDOT and TPWD expires.

(d) Nothing in this subchapter or the MOU supersedes, modifies, or nullifies any agreement entered into by TxDOT and TPWD, other than the MOU.

(e) TxDOT and TPWD shall review and by rule shall update the MOU not later than the fifth anniversary of its effective date, as required by Transportation Code, §201.607.

§2.102. Texas Natural Diversity Database.

TPWD maintains the Texas Natural Diversity Database. The database contains information on listed and proposed threatened and endangered species, both state and federal, species of concern, significant remnant native vegetation, and other features of concern to TPWD. The data are in a nationally recognized biological Geographic Information System (GIS) database format. TPWD makes the database accessible to TxDOT under the memorandum of agreement entitled Sharing and Maintaining Natural Diversity Database Information, effective April 11, 2007 that concerns the use by TxDOT of the database. The memorandum of agreement authorizes certain limited use and distribution of this information, and specifies security requirements.

§2.103. Applicability of MOU.

The MOU applies only to a transportation project, as described by §2.1(b)(2) of this chapter (relating to General; Emergency Action Procedures), developed by TxDOT and to a highway improvement project on the state highway system developed by another entity.

§2.104. Definitions.

The following words and terms, when used in this subchapter, or in documents prepared by TxDOT or TPWD pursuant to this subchapter, have the following meanings, unless the context clearly indicates otherwise.

(1) Construction project--The construction of a new transportation facility or the expansion, rehabilitation, or reconstruction of an existing transportation facility.

(2) Coordination--Actions between TxDOT and TPWD that relate to and facilitate TPWD's review of and comments on the potential environmental effect of a highway project and that are carried out in accordance with the requirements of either National Environmental Policy Act or this chapter, or both.

(3) Environmental document--Environmental document includes categorical exclusion documentation, environmental assessments, environmental impact statements, supplemental environmental assessments, and supplemental environmental impact statements. An environmental document incorporates environmental reports and shows coordination and consultation efforts and cost and engineering elements.

(4) Federal endangered species--Endangered species, as defined by the Endangered Species Act (16 U.S.C. §§1531 et seq.), including the rules implementing that Act.

(5) Federal threatened species--Threatened species, as defined by the Endangered Species Act (16 U.S.C. §§1531 et seq.), including the rules implementing that Act.

(6) Floodplains or creek drainages--Water related features that exhibit riparian vegetation or would have riparian vegetation if not previously disturbed; the extent of riparian habitat.

(7) Mature habitat--Any native vegetation community that exhibits a composition and structure closely resembling a native condition, and in which a significant percentage of the plants are reproductively mature.

(8) Mitigation--The actions taken to address the adverse impacts to the natural environment that result directly from a transportation project. The term includes actions taken to avoid, minimize, or to compensate for impacts.

(9) NEPA--The National Environmental Policy Act of 1969, as amended (42 U.S.C. §4371 et seq.), and the rules adopted to implement the Act by the Council on Environmental Quality or by a federal agency with jurisdiction over a proposed transportation project.

(10) Qualified biologist--A person holding a bachelor's degree from an accredited university in a natural resource field, or who

possesses demonstrated experience and training in the assessment of biological resources.

(11) Right of way--The land provided for a transportation facility, for example, the roadway itself (including shoulders), and areas between the roadway and adjacent properties (including drainage easements). The term is also known as "project limits" when a transportation project is under development or construction.

(12) Riparian vegetation--Vegetation that would not be present in an area except for the presence of a water feature.

(13) Regulated resources--Natural resources that when impacted by a transportation project may require mandatory mitigation as directed by federal law, including but not limited to mitigation directed by the United States Army Corps of Engineers under the Clean Water Act, Section 404 (26 U.S.C. §1344), concerning impacts to waters of the United States, or as directed by the United States Fish and Wildlife Service concerning impacts to federal threatened or endangered species.

(14) Significant remnant vegetation--A type of native vegetation that is considered by TPWD or other recognized authorities to be rare or to have significantly declined in recent times and listed in an agreement under §2.111(c) of this subchapter (relating to TxDOT and TPWD Commitment to Enter into Other Agreements).

(15) Species of concern--A species of plants or animals that is on the current and applicable county list prepared by TPWD and that TPWD identified in the Texas wildlife action plan as rare, declining, or priority. The term does not include a federal threatened or endangered species.

(16) State threatened or endangered species--A species of wildlife listed under Parks and Wildlife Code, §68.003 as threatened with statewide extinction or a plant species on the list of endangered, threatened, or protected native plants filed with the Office of the Secretary of State under Parks and Wildlife Code, §88.003 or amended under Parks and Wildlife Code, §88.004.

(17) Unregulated resources--Natural resources that are not regulated resources.

(18) Wetlands--Areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. The term includes swamps, marshes, bogs, and similar areas.

§2.105. Coordination with TPWD Concerning Transportation Project.

TxDOT will coordinate with TPWD concerning a proposed transportation project in accordance with §2.106 of this subchapter (relating to Standard Coordination Procedure) or §2.107 of this subchapter (relating to Coordination during Early Project Development), as applicable. Unless otherwise expressly provided in this subchapter, if TxDOT is required by this subchapter to coordinate with or submit an environmental or other document to TPWD, TxDOT will coordinate with or submit the document, as appropriate, to the Wildlife Habitat Assessment Program of TPWD.

§2.106. Standard Coordination Procedure.

(a) Projects subject to review.

(1) TxDOT will coordinate with TPWD under this section concerning a proposed transportation project if:

(A) the project is the subject of a draft environmental impact statement, final environmental impact statement, environmental assessment, or supplemental environmental impact statement or supplemental environmental assessment; and

(B) TxDOT undertakes a reevaluation of an environmental impact statement or an environmental assessment related to the project and:

(i) the project has been reviewed by TPWD and the scope of the reevaluation relates to an issue TPWD commented on; or

(ii) the change proposed in the reevaluation, considered as a stand-alone transportation project, is equal to or greater than at least one of the factors listed in paragraph (3)(A) - (F) of this subsection.

(2) TxDOT will coordinate with TPWD under this section concerning a transportation project that was the subject of coordination under §2.107 of this subchapter (relating to Coordination during Early Project Development) only if a significant change to the project occurred after coordination during early project development. A significant change is equal to or greater than at least one of the factors listed in paragraph (3)(A) - (F) of this subsection. TxDOT's Environmental Affairs Division will review a project before final approval of the environmental document to determine if significant changes to the project occurred after the project underwent coordination during early project development.

(3) TxDOT will coordinate with TPWD under this section concerning a proposed transportation project that is classified as a categorical exclusion only if the project:

(A) is in the range of a state threatened or endangered species or a species of concern, and within the limits of the project there is suitable habitat;

(B) temporarily or permanently disturbs any significant remnant vegetation;

(C) contains floodplains or creek drainages or wetlands that require a nationwide permit with pre-construction notification or an individual permit, issued by the United States Army Corps of Engineers, or a water-related feature that has associated riparian vegetation or would have riparian vegetation if the vegetation was not previously disturbed;

(D) includes in the TxDOT right of way more than 200 linear feet of one or more of the following that is not already channelized or otherwise maintained:

(i) channel realignment; or

(ii) stream bed or stream bank excavation, scraping, clearing, or other permanent disturbance.

(E) contains isolated wetlands outside existing TxDOT right of way that will be directly impacted by the project; or

(F) temporarily or permanently disturbs mature woody vegetation that is at least 50 percent native species in an area equal to or greater than the area of disturbance in Figure: 43 TAC §2.106(a)(3)(F) associated with the ecoregion, as designated by TPWD, in which the project is located.

Figure: 43 TAC §2.106(a)(3)(F)

(4) For the purpose of paragraph (3)(A) of this subsection, "range" is the general area where a species would be expected to occur as shown in a selection of field guides or other references and "suitable habitat" is an area with minimum conditions required by a species.

(5) For the purpose of paragraph (3)(F) of this subsection, "mature woody vegetation" means plant communities described in "The Vegetation Types of Texas" with aspect dominants that are

woody in character and for which the majority of the dominant plants are capable of producing seed. The term includes trees and shrubs.

(b) Procedure.

(1) TxDOT will submit the environmental documentation for an applicable project to TPWD for review and comment. TPWD shall have a period of 45 days from the date of the TxDOT transmittal letter for its review. If TPWD requests additional information, TxDOT will provide the requested information if the information is available or reasonably can be obtained. If requested information is provided, TPWD shall have 30 days from the date of TxDOT's second transmittal letter that will accompany the additional information forwarded to TPWD to review the documentation.

(2) If a project that underwent coordination during early project development under §2.107 of this subchapter is also subject to coordination under this section, TPWD shall have a period of 45 days from the date of the TxDOT transmittal letter submitted under this section to amend or expand upon earlier comments and recommendations made under §2.107 of this subchapter.

(3) TxDOT will consider the comments that are timely submitted by TPWD in making decisions on the project, and will give to TPWD a written explanation of TxDOT's decisions. If TPWD submits comments after the dates established by paragraph (1) or (2) of this subsection, TxDOT will consider the comments in making decisions on the project to the extent practicable, and provide a written explanation of TxDOT's response to those comments.

(4) TxDOT will incorporate the results of the coordination documentation into the project's final environmental documentation.

(5) TxDOT will submit to TPWD its written explanation to TPWD's comments under paragraph (3) of this subsection not later than the 90th day after the date the environmental review for a transportation project is completed.

§2.107. Coordination during Early Project Development.

(a) Request.

(1) TxDOT may request early project coordination with TPWD if:

(A) the project meets the requirements for required coordination under §2.106(a) of this subchapter (relating to Standard Coordination Procedure); and

(B) TxDOT has conducted one or more of the following activities for the project: preliminary project planning, field surveys, database searches, in-house coordination, initial resource agency coordination, or scoping.

(2) A request under this subsection must be made in accordance with the agreement entered into under §2.110(d) of this subchapter (relating to Agreement for Calculating Mitigation Payments for Unregulated Resources) and must be submitted to TPWD.

(3) TPWD may decline a request.

(b) Coordination procedure. If a request under subsection (a) of this section is accepted by TPWD, TPWD shall have a period of 60 days from the date of the TxDOT transmittal letter to review each early project development project referral. If TPWD requests additional information, TxDOT will provide the requested information if the information is available or reasonably can be obtained. If requested information is provided, TPWD shall have 30 days from the date of TxDOT's second transmittal letter that will accompany the additional information forwarded to TPWD. TxDOT will submit to TPWD a written response to TPWD's comments not later than the 90th day after the date the environmental review for a transportation project is completed.

(c) Use of results. TxDOT will consider any comments submitted by TPWD under this section during final project development. TxDOT will incorporate the results of early project coordination into the project's final environmental documentation.

§2.108. Review and Comment on Maintenance Programs.

TxDOT will allow TPWD the opportunity to review and comment on the environmental review for a maintenance program under §2.18 of this chapter (relating to Maintenance Projects and Programs).

§2.109. Mitigation and Mitigation Payments to TPWD.

(a) Mitigation.

(1) TxDOT seeks to mitigate impacts to resources through avoidance, minimization, and compensation, in that order of preference. TxDOT will consider procedures and methods for avoidance and minimization measures throughout transportation project development.

(2) In the referral of a project to TPWD under §2.106 of this subchapter (relating to Standard Coordination Procedure) or §2.107 of this subchapter (relating to Coordination during Early Project Development), TxDOT will describe the proposed steps to be taken to mitigate potential adverse impacts on resources. TxDOT will consider TPWD recommendations for changed or additional steps.

(3) The Wildlife Habitat Assessment Program of TPWD will provide advice and assistance to TxDOT staff, including districts and the Environmental Affairs Division, in designing mitigation plans or agreements.

(4) TxDOT will describe the mitigation proposal for the project in the project's environmental document. Mitigation will be included if mutually agreed to by TPWD and TxDOT.

(b) Mitigation during construction.

(1) TxDOT will consult with TPWD when unforeseen impacts on state threatened or endangered species, species of concern, or their habitats are identified during construction of a project. TxDOT will incorporate best management practices and other mitigation measures suggested by TPWD when practical and reasonable.

(2) The Wildlife Habitat Assessment Program of TPWD and district staff of TxDOT will conduct on-site project coordination when appropriate.

(c) Payments to TPWD for Impacts to Unregulated Resources.

(1) Authority. Impacts on unregulated resources resulting from a transportation project that result directly from construction or maintenance of a state highway by TxDOT will be mitigated in accordance with this subsection. Transportation Code, §222.001 authorizes TxDOT to use funds deposited to the state highway fund to mitigate adverse environmental effects that result directly from the construction or maintenance of a state highway. Impacts on regulated resources are mitigated in accordance with federal law and not covered by this subsection.

(2) Payment dates. TxDOT will pay to TPWD on March 1, June 1, September 1, and December 1 of each year an amount to compensate for environmental effects on unregulated resources. Payments are due within 60 days of the payment date.

(3) Payment based on construction contracts awarded. The amount of a payment will be calculated using the amount of specified categories of contracts entered into by TxDOT during the three months immediately preceding the payment date. TxDOT and TPWD will agree on a factor to be applied to the category that, when applied to the contract amount for the preceding three months, will result in the

best estimate of the dollar impact on unregulated resources per dollar of contracts awarded. TxDOT will assign each project to the category that most accurately describes the project. The categories are:

(A) Category 1: preventative maintenance and rehabilitation;

(B) Category 4: statewide connectivity corridor projects;

(C) Category 6: structures, highway bridges, and railroad grade separation;

(D) Category 8: safety;

(E) Category 11: district discretionary; or

(F) Category 12: strategic priorities.

(4) Payment based on acreage impacted; reconciliation.

(A) Not later than October 1 of each year, TxDOT will complete a list of construction projects awarded during the preceding fiscal year. Each project will be identified by its control section job (CSJ) number, district, and the number of acres affected within the project's right of way, for each of the following habitat categories: riparian, upland trees, brush, maintained right of way, other, and unique vegetation or habitat. Figure 43 TAC §2.109(c)(4)(A) indicates the value per acre for each habitat type.
Figure: 43 TAC §2.109(c)(4)(A)

(B) Not later than November 1 of each year, TxDOT will calculate the total payments made under paragraph (3) of this subsection during the preceding state fiscal year to TPWD. Using the procedure set forth in this paragraph, or a revised procedure as developed under §2.110 of this subchapter (relating to Agreement for Calculating Mitigation Payments for Unregulated Resources), TxDOT will calculate the total payments based on acreage impacted. If the sum of the quarterly payments based on construction contract awards exceeds the sum of the total payments calculated based on acreage impacted, TPWD will return to TxDOT the excess payments. If the sum of quarterly payments based on construction contract awards was less than the calculated acreage impacted, TxDOT will make payment for the remaining acreage impacted.

§2.110. Agreement for Calculating Mitigation Payments for Unregulated Resources.

(a) Immediately after the execution of the MOU, a team of TxDOT and TPWD staff will meet to adopt an agreement on procedures and methodologies to calculate the environmental effects directly caused by transportation projects that result directly from construction or maintenance of a state highway by TxDOT on unregulated resources and to provide recommendations to accurately and equitably compensate for environmental effects. The procedures and methodologies will provide compensation for every TxDOT construction project. TxDOT will track impacts for all construction projects by TxDOT district and submit a quarterly list to TPWD that includes both projects that are referred and not referred to TPWD for review.

(b) Under the agreement an interagency team will meet on a quarterly basis to review the calculation of acreage impacted by projects as required under §2.109 of this subchapter (relating to Mitigation and Mitigation Payments to TPWD).

(c) The interagency team will review the process by which impact is measured and will prepare a final compensation plan. The team will:

(1) determine if the process supports the TPWD goals and objectives for conservation of regulated and unregulated resources;

(2) determine if additional or more refined types of habitats should be tracked;

(3) determine an appropriate rate of compensation for each habitat within each of the ecoregions designated by TPWD; and

(4) evaluate whether it is necessary to add a category for unique vegetation and habitat features to address unique areas or features differing from the general descriptions provided for the region in TPWD's "Vegetation Types of Texas."

(d) To add a category described by subsection (c)(4) of this section, both TPWD and TxDOT must agree that the unique vegetation and habitat features either provide significant refuge or habitat to wildlife or represent a localized but significant stand of vegetation. The amount of compensation under the new category will be determined by the executive offices of TxDOT and TPWD on a case-by-case basis.

(e) On the effective date of the agreement that adopts the compensation plan prepared under subsection (c) of this section, the quarterly payments under §2.109 of this subchapter based on construction contract awards will end and the payments will be based on that compensation plan. If new habitat types are provided under the plan, the plan may provide for a transition from payments based on the impacts to the habitat types identified in §2.109 of this subchapter to payments based on the new habitat types.

§2.111. TxDOT and TPWD Commitment to Enter into Other Agreements.

(a) TxDOT and TPWD agree to enter into an agreement concerning the methods of and guidelines for habitat description.

(b) TxDOT and TPWD agree to enter into an agreement concerning procedures for review and adoption of best management practices. Under the agreement a working group of TPWD and TxDOT staff will meet regularly to identify, assess, and adopt best management practices for the mitigation of the environmental impacts of construction projects and the maintenance projects and programs described by §2.18 of this chapter (relating to Maintenance Projects and Programs) on resources and habitat. The best management practices will be documented in standard specifications and will be applied as appropriate.

(c) TxDOT and TPWD agree to enter into an agreement adopting a list of significant remnant vegetation types in Texas and any unique vegetation and habitat features.

(d) TxDOT and TPWD agree to enter into an agreement adopting a procedure under which TxDOT may request coordination with TPWD concerning a project processed during early project development under §2.107 of this subchapter (Coordination during Early Project Development).

(e) TxDOT and TPWD agree that the agreements described in this section will be finalized and executed by TxDOT and TPWD by no later than December 31, 2010.

§2.112. Review of Performance; Updates of MOU.

(a) TxDOT and TPWD agree to enter into an agreement adopting a list of measurable performance criteria and goals for benchmark reviews for implementing the MOU.

(b) Semiannually, TxDOT and TPWD will jointly review the transportation projects that TxDOT has referred to TPWD for coordination under the MOU. The review will evaluate whether coordination work meets the performance criteria established in the agreement entered into under this section. If a performance criterion is not met, TxDOT and TPWD will take steps to address the deficiency.

This 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 September 25, 2009.

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Bob Jackson
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: November 8, 2009
For further information, please call: (512) 463-8683

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CHAPTER 9. CONTRACT MANAGEMENT
SUBCHAPTER A. GENERAL

43 TAC §9.3

The Texas Department of Transportation (department) proposes amendments to §9.3, concerning Protest of Department Purchases under the State Purchasing and General Services Act.

EXPLANATION OF PROPOSED AMENDMENTS

The department previously adopted §9.3 to provide a procedure for vendors to protest purchases made by the department. Under the current rule, the protest is addressed to the district engineer or the director of purchasing, depending on the location of the purchase, but sent to the director of general services. Revisions to this delegation authority are necessary due to recent department organization changes. The delegation authority afforded by this revision will also serve to accommodate future organizational changes that may affect personnel associated with the receipt and processing of department purchases under the State Purchasing and General Services Act.

Amendments to §9.3 update the delegation authority associated with department personnel responsible for the receipt and processing of protests related to the applicable purchases. All references to district engineer are removed throughout the section. The amendments also simplify the process prescribed for vendor complainants filing protests with the department by providing one point of contact within the department to whom complainants will send their complaints. The department point of contact will handle any further distribution of the complaint to department personnel.

FISCAL NOTE

James Bass, Chief Financial Officer, has determined that for each of the first five years the amendments as proposed are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the amendments.

Scott Burford, Director, General Services Division, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the amendments.

PUBLIC BENEFIT AND COST

Mr. Burford has also determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of enforcing or administering the amendments will be a more streamlined and efficient process for the submission and processing of vendor complaints. There are no anticipated economic costs for persons required to comply with the sections as proposed. There will be no adverse economic effect on small businesses.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments to §9.3 may be submitted to Scott Burford, Director, General Services Division, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is 5:00 p.m. on November 9, 2009.

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Government Code, §2155.076, which provides the department with the authority to develop rules for protest procedures associated with the State Purchasing and General Services Act.

CROSS REFERENCE TO STATUTE

Transportation Code, §201.101 and Government Code, §2155.076.

§9.3. Protest of Department Purchases under the State Purchasing and General Services Act.

(a) Purpose. The purpose of this section is to provide a procedure for vendors to protest purchases made by the department. Purchases made by the Texas Procurement and Support Services division of the Comptroller of Public Accounts office on behalf of the department are addressed in 34 TAC Chapter 20.

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

(1) Act--Government Code, Chapters 2151-2177, the State Purchasing and General Services Act.

(2) Commission--The Texas Transportation Commission.

(3) Department--The Texas Department of Transportation.

(4) Director of general services--The director of the general services division of the department.

(5) Director of purchasing--The director of purchasing in the general services division of the department, or other individual as designated by the director of general services.

[~~(6) District engineer--The chief administrative officer in charge of a district of the department.~~]

(6) [~~(7)~~] Division--An organizational unit in the department's Austin headquarters.

(7) [~~(8)~~] Executive director--The executive director of the department.

(8) [~~(9)~~] Interested party--A vendor that has submitted a bid, proposal, or other expression of interest for the purchase involved.

(9) [~~(10)~~] Purchase--A procurement action for commodities or non-professional services under the Act.

(c) Filing of protest.

(1) An actual or prospective bidder or offeror who is aggrieved in connection with the solicitation, evaluation, or award of a purchase may file a written protest. The protest must be [~~addressed to the attention of the district engineer in whose district the action is being~~

~~or was processed,~~ ~~or to the director of purchasing for purchases made on behalf of a division, but sent to the office of the director of general services. The protest must be~~] received in the office of the director of general services within 10 working days after such aggrieved person knows, or should have known, of the action.

(2) The protest must be sworn and contain:

(A) the provision of or rule adopted under the Act that the action is alleged to have violated;

(B) a specific description of the alleged violation;

(C) a precise statement of the relevant facts;

(D) the issue to be resolved;

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

(F) a statement that copies of the protest have been mailed or delivered to other identifiable interested parties.

(d) Suspension of award. If a protest or appeal of a protest has been filed, then the department will not proceed with the solicitation or the award of the purchase until the executive director or his or her designee, not below the level of division director, consults with the director of general services [~~and the appropriate district engineer or the director of purchasing,~~] and makes a written determination that the award of the purchase should be made without delay to protect substantial interests of the department.

(e) Informal resolution. The [~~district engineer or the~~] director of purchasing may informally resolve the dispute, including:

(1) soliciting written responses to the protest from other interested parties; and

(2) resolving the dispute by mutual agreement.

(f) Written determination. If the protest is not resolved by agreement, the [~~district engineer or the~~] director of purchasing will issue a written determination to the protesting party and interested parties which sets forth the reason for [~~of~~] the determination. The [~~district engineer or the~~] director of purchasing may determine that:

(1) no violation has occurred; or

(2) a violation has occurred and it is necessary to take remedial action which may include:

(A) declaring the purchase void;

(B) reversing the award; and

(C) re-advertising the purchase using revised specifications.

(g) Appeal.

(1) An interested party may appeal the determination to the executive director. The written appeal must be received in the executive director's office no later than 10 working days after the date of the determination. The appeal is limited to a review of the determination.

(2) The appealing party must mail or deliver copies of the appeal to the [~~determining district engineer or the~~] director of purchasing and other interested parties with an affidavit that such copies have been provided.

(3) The general counsel shall review the protest, the determination, and the appeal, and prepare a written opinion with recommendation to the executive director.

(4) The executive director may:

(A) issue a final written determination; or

(B) refer the matter to the commission for its consideration at a regularly scheduled open meeting.

(5) The commission may consider oral presentations and written documents presented by the department and interested parties. The chair shall set the order and the amount of time allowed for presentation. The commission's determination of the appeal shall be adopted by minute order and reflected in the minutes of the meeting.

(6) The decision of the commission or executive director shall be final.

(h) Filing deadline. Unless the commission determines that the appealing party has demonstrated good cause for delay or that a protest or appeal raises issues significant to procurement practices or procedures, a protest or appeal that is not filed timely will not be considered.

(i) Document retention. The department shall maintain all documentation on the purchasing process that is the subject of a protest or appeal in accordance with the retention schedule of the department.

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

Filed with the Office of the Secretary of State on September 25, 2009.

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Bob Jackson
General Counsel
Texas Department of Transportation
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For further information, please call: (512) 463-8683

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SUBCHAPTER D. BUSINESS OPPORTUNITY PROGRAMS

43 TAC §9.51, §9.54

The Texas Department of Transportation (department) proposes amendments to §9.51, Definitions, and §9.54, Historically Underutilized Business (HUB) Program, concerning business opportunity programs.

EXPLANATION OF PROPOSED AMENDMENTS

House Bill 2702, 79th Legislature, Regular Session, 2005 amended Government Code, §2166.302 to exempt the department's building contracts from the requirement that all state building contracts incorporate the Comptroller of Public Accounts' (CPA) Uniform General Conditions, which require compliance with CPA's HUB rules. These rule amendments will enable bidders on building construction contracts to use the department's newly implemented electronic bidding system, which will improve the continuity and efficiency of the letting process without reducing contracting opportunities for participants in the HUB and SBE programs. The amendments will also allow building construction contracts to use the same contract provisions as construction contracts, which will improve contract management.

Amendments to §9.51 add a definition for CPA, which stands for Comptroller of Public Accounts. This definition is added due to

the statutory change in responsibility from the Texas Building and Procurement Commission, later renamed to the Texas Facilities Commission, to the Comptroller of Public Accounts. Subsequent definitions are renumbered for clarity. Renumbered definition (17) corrects a reference to the Texas Building and Procurement Commission, changing the reference to the Comptroller of Public Accounts instead. Former definition (24), which refers to the Texas Building and Procurement Commission, is deleted as it is no longer necessary.

Amendments to §9.54 remove aviation contracts from the department's HUB program. The reference to aviation contracts is deleted as superfluous because, while the department administers aviation grants, it does not enter into aviation contracts. The amendments also correct the references to the CPA and the CPA's rules related to the HUB program.

Amendments to §9.54 also exempt building contracts from the requirement that each bidder submit a HUB plan prior to contract award. The amended rule will instead require only the low bidder to submit a HUB plan. Requirements for the form of the plan and submittal deadlines will be included in the contract or proposal for each project.

FISCAL NOTE

James Bass, Chief Financial Officer, has determined that for each of the first five years the amendments as proposed are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the amendments. There are no anticipated economic costs for persons required to comply with the sections as proposed.

Toribio Garza, Jr., Director, Maintenance Division has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the amendments.

PUBLIC BENEFIT

Mr. Garza has also determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of enforcing or administering the amendments will be improved efficiency in contract letting and management. The amendments will not affect the department's ability to comply with the intent and initiative to increase minority participation in state construction contracts. This is the best option to meet those goals, simplify and make more efficient the participation process, and maximize bid letting efficiencies. Maintenance Division building projects will be incorporated into the new electronic bid system (EBS) for all state funded contracts and this change will allow building projects and highway projects to be bid, opened, and tabulated automatically. There are no anticipated economic costs for persons required to comply with the sections as proposed. There will be no adverse economic effect on small businesses.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments to §§9.51 and 9.54, may be submitted to Toribio Garza, Jr., Director, Maintenance Division, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is 5:00 p.m. on November 9, 2009.

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §201.702, which establishes the department's disadvantaged business program.

CROSS REFERENCE TO STATUTE

Government Code, §2161.004 and §2166.302.

§9.51. Definitions.

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

(1) Building contract--A contract entered under Transportation Code, Chapter 223, Subchapter A, for the construction or maintenance of a department building or appurtenant facilities.

(2) Business opportunity programs section (CSTB) of the Construction Division--The department office that certifies DBEs and SBEs and administers the DBE, HUB, and SBE programs.

(3) Commission--The Texas Transportation Commission.

(4) Construction contract--A contract entered under Transportation Code, Chapter 223, Subchapter A, for the construction or reconstruction of a segment of the state highway system.

(5) CPA--Comptroller of Public Accounts.

(6) [~~(5)~~] DBE certification--The process governed by 49 CFR Part 26 which verifies an applicant's eligibility to be a DBE.

(7) [~~(6)~~] DBE joint venture--An association of a DBE firm and one or more other firms to carry out a single business enterprise for profit for which purpose they combine their property, capital, efforts, skills, and knowledge, and in which the DBE is responsible for a distinct, clearly defined portion of the work of the contract and whose share in the capital contribution, control, management, risks, and profits of the joint venture are commensurate with its ownership interest.

(8) [~~(7)~~] DBE, HUB, or SBE participation goal--A number representing participation in contracts and purchasing by a DBE, HUB, or SBE firm determined by a percentage of the total cost of the contract or purchase.

(9) [~~(8)~~] Department--The Texas Department of Transportation.

(10) [~~(9)~~] Director--The Director of the Construction Division of the department.

(11) [~~(10)~~] Disadvantaged Business Enterprise (DBE)--As defined in 49 CFR §26.5, a for profit small business concern which is at least 51% owned by one or more socially and economically disadvantaged individuals, or in the case of a publicly owned business, at least 51% of the stock of which is owned by one or more socially and economically disadvantaged individuals, and whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.

(12) [~~(11)~~] District engineer--The chief administrative officer in charge of a district of the department.

(13) [~~(12)~~] Division--An organizational unit in the department's Austin headquarters.

(14) [~~(13)~~] Executive director--The executive director of the department or designee not below the level of assistant executive director.

(15) [~~(14)~~] Federal-aid contract--A contract between the department and a contractor that is paid for in whole or in part with

United States Department of Transportation or other federal financial assistance.

(16) [~~(15)~~] Good faith efforts--Efforts to achieve a DBE, HUB, or SBE goal that, by their scope, intensity, and appropriateness to the objectives, can reasonably be expected to fulfill the program requirements, even if they are not fully successful.

(17) [~~(16)~~] Historically Underutilized Business (HUB)--Any business so certified by the Comptroller of Public Accounts [~~Texas Building and Procurement Commission~~].

(18) [~~(17)~~] Liquidated damages--An amount contractually stipulated as a reasonable estimation of actual damages to be recovered by the department if the other party breaches the terms of the contract.

(19) [~~(18)~~] Maintenance contract--A contract entered under Transportation Code, Chapter 223, Subchapter A, for the maintenance of a segment of the state highway system.

(20) [~~(19)~~] Operating administration--The Federal Highway Administration (FHWA), Federal Aviation Administration (FAA), or Federal Transit Administration (FTA).

(21) [~~(20)~~] Packager--A person or firm engaged in the commercial packing of materials or supplies produced by others.

(22) [~~(21)~~] Race-neutral DBE or HUB participation--Any participation by a DBE or HUB through customary competitive procurement procedures.

(23) [~~(22)~~] Small Business Enterprise (SBE)--A firm (including its affiliates) whose annual gross receipts do not exceed the U.S. Small Business Administration's size standards for four consecutive years. The U.S. Small Business Administration's size standards are categorized by four-digit Standard Industrial Classification (SIC) codes as stated in 13 CFR §121.201. A firm must meet the size standard for the SIC code designated by the principal business of the firm. The department considers those firms that meet these size standards to be disadvantaged.

(24) [~~(23)~~] Socially and economically disadvantaged individuals--As defined in 49 CFR §26.5, individuals who are United States citizens or lawfully admitted permanent residents and who the department finds to be socially and economically disadvantaged on a case-by-case basis or who are members of the following groups which are rebuttably presumed to be socially and economically disadvantaged:

(A) Black Americans which includes persons having origins in any of the Black racial groups of Africa;

(B) Hispanic Americans which includes persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race;

(C) Native Americans which includes persons who are American Indian, Eskimo, Aleut, or native Hawaiian;

(D) Asian-Pacific Americans which includes persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, Philippines, Brunei, Samoa, Guam, the Commonwealth of the Northern Marianas or the United States Trust Territories of the Pacific Islands (Republic of Palau), Macao, Fiji, Tonga, Kirbati, Juvalu, Nauru, Federated States of Micronesia, or Hong Kong;

(E) Subcontinent Asian-Americans which includes persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal, or Sri Lanka; or

(F) women.

[~~(24) TBPC--The Texas Building and Procurement Commission.~~]

§9.54. Historically Underutilized Business (HUB) Program.

(a) Applicability. The HUB program is applicable to contracts relating to buildings, professional services, [~~aviation~~], public transportation, private consultant services, and purchases funded entirely with state and local funds.

(b) HUB goals. The commission will establish overall annual HUB participation goals. Individual contract goals will be assigned as necessary to achieve the overall goal.

(1) Annual goals. The commission will establish annual agency HUB participation goals making use of disparity studies, including the disparity study described in Government Code, §2161.002(c) or its replacement, as well as other relevant information. The department will make a good faith effort to meet or exceed this annual goal.

(2) Contract goals. Individual contracts are assigned HUB goals based on the availability of qualified HUBs, work site location, dollar value of the contract, and type of work items specified in the contract. The department will assign individual contract goals for HUB participation to cumulatively meet the annual HUB goals that are not being met through race-neutral means.

(c) Contractor obligation. Department contracts, as listed in subsection (a) of this section, that are funded entirely with state and local funds will include a contract provision addressing HUB requirements. A contract estimated to involve more than $100,000.00, with available subcontracting opportunities, will include provisions requiring a HUB subcontracting plan.

(1) HUB plan. For contracts other than building contracts, the [~~The~~] HUB plan will be submitted at the same time as the response (bid, proposal, offer, or other applicable expression of interest). Responses that do not include a completed HUB plan shall be rejected due to material failure to comply with advertised specifications. For building contracts, the HUB plan will be submitted after conditional contract award as specified in the contract or proposal. A respondent must state whether it is a certified HUB. The department will approve any changes to the HUB plan and determine whether any additional opportunities exist for HUBs and will require submission of a revised HUB plan for additional opportunities if the original scope of work is expanded through a change order or contract amendment. The department will monitor the plan on a monthly basis to determine compliance with the plan. The contractor will be given an opportunity to explain why failure to fulfill the plan should not be attributed to a lack of good faith. If the determination is made that the HUB plan was not implemented in good faith, the department may report to the CPA [~~TBPC~~] in the manner described by Title 34, Chapter 20, Subchapter B (relating to Historically Underutilized Business Program) [~~Title 1, Chapter 113, Subchapter F~~] and may revoke the contract for breach of contract and make a claim against the contractor. The HUB plan will include the following information.

(A) The names and vendor numbers of the HUBs that will be used during the course of the contract.

(B) The approximate dollar value expected to be paid to each HUB and expected percentage of the work the HUB will perform.

(C) When a contractor is unable to obtain HUB participation, a description of the actions taken in an attempt to solicit HUB participation. The department will consider these actions in determin-

ing a respondent's good faith effort. These actions may include, but are not limited to:

(i) advertising in general circulation and trade association media concerning subcontracting opportunities;

(ii) contacting three or more qualified HUBs and allowing no less than five working days from receipt of notice for HUBs to participate effectively, unless circumstances require a different time period, as determined by the department, and documented in the contractor's files;

(iii) dividing the contract work into reasonable portions in accordance with standard industry practices;

(iv) providing qualified HUBs with adequate information about bonding, insurance, plans, specifications, scope of work, and the requirements of the contract;

(v) contacting, for HUB referrals, available small business community organizations, contractor groups, local, state, and federal business assistance offices, and other organizations that provide support services to HUBs;

(vi) negotiating in good faith with qualified HUBs, not rejecting qualified HUBs who were also the best value responsive bidder;

(vii) participating in a Mentor Protégé Program under Government Code, §2161.065, and the submission of a protégé in the HUB plan; and

(viii) providing written justification of the selection process if no HUB subcontractors are selected.

(2) No assigned goal. A contract estimated to involve more than $100,000 with available subcontracting opportunities, but without an assigned goal, will include provisions requiring a HUB participation plan as a condition of contract award.

(3) Assigned goal. A contract with an assigned goal will include provisions that will require the contractor to satisfy the following stipulations as a condition of contract award.

(A) Commitments. Within the time specified in the contract or proposal, the contractor must furnish a commitment agreement for each certified HUB that will be used to meet the contract goal. The commitment agreement must include:

(i) the items of work to be performed;

(ii) the quantities of work or material;

(iii) the unit measure, unit price, and total cost for each item;

(iv) the total amount of the HUB commitment;

(v) the original signatures of the contractor and the proposed HUB; and

(vi) if the commitment involves a HUB material supplier, an explanation of the function to be performed and a description of any arrangements, including joint check agreements, made with other material suppliers, manufacturers, distributors, hauling firms, or freight companies.

(B) Good faith effort. If the contractor is unable to meet the goal, the contractor must document the good faith efforts taken to obtain HUB participation in accordance with applicable contract provisions. The department will consider as good faith efforts all documented explanations that are submitted and that describe a contractor's failure to meet a goal, including actions described under paragraph (1)(C) of this subsection for contracts without an assigned goal.

(4) Reporting.

(A) The contractor must submit periodic reports at intervals specified in the contract using a report form acceptable to the department that includes, but is not limited to, identification of the HUB by name and vendor number. The report must indicate the actual amount paid to each HUB. The report must be submitted even if no payments were made during the period being reported. When required by the department, the contractor must attach proof of payment including, but not limited to, copies of canceled checks.

(B) The contractor must submit a final report in accordance with the contract, using a form acceptable to the department which shows the total paid to each HUB.

(5) Credit for expenditures. A contractor will receive credit for all payments actually made to a HUB for work performed and costs incurred in accordance with the contract, including all subcontracted work.

(6) Subcontracting.

(A) A HUB contractor or subcontractor may not subcontract more than 75% of a contract. The HUB shall perform not less than 25% of the value of the contract work with:

(i) assistance of employees employed and paid directly by the HUB;

(ii) employees leased from a licensed employee leasing company; and

(iii) equipment owned or rented directly by the HUB.

(B) A contractor may not furnish work crews to a HUB subcontractor.

(C) A HUB may lease equipment consistent with standard industry practice. A HUB may lease equipment from the prime contractor if a rental agreement, separate from the subcontract specifying the terms of the lease arrangement, is approved by the department prior to the HUB starting the work.

(i) If the equipment is of a specialized nature, the lease may include the operator. If the practice is generally acceptable within the industry, the operator may remain on the lessor's payroll. The operation of the equipment shall be subject to the full control of the HUB, for a short term, and involve a specialized piece of heavy equipment readily available at the job site.

(ii) For equipment that is not specialized, the HUB shall provide the operator and be responsible for all payroll and labor compliance requirements.

(d) HUB certification.

(1) The department and CPA [~~TBPC~~] operate under a memorandum of agreement that allows CPA [~~TBPC~~] to recognize the department's certified DBE firms as HUB firms. The CPA [~~TBPC~~] certifies businesses as HUBs using procedures set forth at Title 34, Texas Administrative Code, §20.17 (relating to Certification Process) [~~Title 1, Texas Administrative Code, §§111.11 et seq~~]. A business denied HUB certification though CPA's [~~TBPC's~~] certification process may appeal the CPA [~~TBPC~~] determination in accordance with procedures set forth at Title 34 , Texas Administrative Code, §20.18 (relating to Protests) [~~Title 1, Texas Administrative Code, §111.14 (relating to Protests)~~]. A business denied DBE/HUB certification through the department's certification process may seek review of the denial as de-

scribed in §9.53(d)(8) and (10) of this subchapter (relating to Disadvantaged Business Enterprise (DBE) Program).

(2) The department will submit information regarding DBEs who qualify as HUBs to CPA [~~TBPC~~] for certification.

(3) A challenge regarding a firm's eligibility as a HUB and based on the department's certification process must be submitted to the department for resolution. A HUB firm whose certification is based on the department's DBE certification will lose both certifications if found to be ineligible as a DBE.

(4) CPA [~~TBPC~~] maintains a directory of certified HUBs.

This 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 September 25, 2009.

TRD-200904262
Bob Jackson
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: November 8, 2009
For further information, please call: (512) 463-8683

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ADOPTED RULES

Adopted rules include new rules, amendments to existing rules, and repeals of existing rules. A rule adopted by a state agency takes effect 20 days after the date on which it is filed with the Secretary of State unless a later date is required by statute or specified in the rule (Government Code, §2001.036). If a rule is adopted without change to the text of the proposed rule, then the *Texas Register* does not republish the rule text here. If a rule is adopted with change to the text of the proposed rule, then the final rule text is included here. The final rule text will appear in the Texas Administrative Code on the effective date.

TITLE 4. AGRICULTURE

PART 1. TEXAS DEPARTMENT OF AGRICULTURE

CHAPTER 17. MARKETING AND PROMOTION

SUBCHAPTER C. GO TEXAN AND DESIGN MARK

The Texas Department of Agriculture (the department) adopts an amendment to Chapter 17, Subchapter G, §17.52, concerning meats that may be certified and promoted by licensees as part of the department's GO TEXAN promotional marketing program, and the repeal of §17.58, concerning the GO TEXAN Beef Program, without changes to the proposal published in the August 7, 2009, issue of the *Texas Register* (34 TexReg 5261). The amendment to §17.52 is adopted to allow for the classification of all meats including beef, lamb, goat, pork, poultry and exotics, as GO TEXAN meats, for purposes of certification and promotion under the GO TEXAN program and use of the GO TEXAN mark. The repeal of §17.58 is adopted to eliminate the specific requirements regarding Texas beef, and to allow the department to incorporate beef into §17.52. With the repeal of §17.58, removing unnecessary requirements, and the proposed amendment to §17.52, which will include beef, more beef producers will be eligible for the GO TEXAN program.

No comments were received on the proposal.

4 TAC §17.52

The amendment of §17.52 is adopted under Agriculture Code (the Code), §12.0175, which provides that the department by rule may establish programs to promote and market agricultural products and other products grown, processed, or produced in the state and that the department may adopt rules necessary to administer a program established under this section, including rules governing the use of any registered logo of the department.

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 September 28, 2009.

TRD-200904367

Dolores Alvarado Hibbs

General Counsel

Texas Department of Agriculture

Effective date: October 18, 2009

Proposal publication date: August 7, 2009

For further information, please call: (512) 463-4075

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4 TAC §17.58

The repeal of §17.58 is adopted under Agriculture Code (the Code), §12.0175, which provides that the department by rule may establish programs to promote and market agricultural products and other products grown, processed, or produced in the state and that the department may adopt rules necessary to administer a program established under this section, including rules governing the use of any registered logo of the department.

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 September 28, 2009.

TRD-200904368

Dolores Alvarado Hibbs

General Counsel

Texas Department of Agriculture

Effective date: October 18, 2009

Proposal publication date: August 7, 2009

For further information, please call: (512) 463-4075

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PART 2. TEXAS ANIMAL HEALTH COMMISSION

CHAPTER 45. REPORTABLE DISEASES

4 TAC §45.2

The Texas Animal Health Commission (TAHC) adopts amendments to Chapter 45, Reportable Diseases, §45.2, concerning Duty to Report, without changes to the proposed text as published in the June 19, 2009, issue of the *Texas Register* (34 TexReg 4073) and will not be republished.

The Texas Agriculture Code, Chapter 161, §161.101 requirements provide for the duty of a veterinarian, veterinary diagnostic laboratory or a person having care, custody, or control of an animal to report specified animal health diseases to the TAHC. The Commission has a specific list of diseases reportable in Chap-

ter 45 of the Commission rules. This proposal is for the purpose of modifying several elements of the rule. During the 81st Texas Legislative Session House Bill (H.B.) 4006 was passed and adopted, which modified the reportable disease requirement in §161.101.

Section 45.2 contains outdated language regarding requirements to report diseases to the agency. The current statute authorizes TAHC to adopt rules requiring the reporting of diseases to TAHC if the disease is named on "List A" of the Office International Des Epizooties (OIE). However, the OIE no longer maintains "List A." H.B. 4006 removes the reference to "List A" from the statute and specifies, in its place, a disease reportable to the OIE. The bill also adds three diseases to the list of diseases that must be reported to TAHC. Therefore, the Commission is collaterally removing the distinction in §45.2(a) by removing the destination for a List A disease. Also, H.B. 4006 legislatively ratified three diseases already adopted in Chapter 45 as being reportable. They were Equine Viral Arteritis (EVA), Equine Herpes Virus-1 (EHV-1), and Bovine Trichomonosis. As such, the single asterisk is being removed as these diseases have now been supported by the legislative action. Lastly, the Commission is proposing to remove Duck virus enteritis (Herpesvirus) as a reportable disease. It is no longer a listed Office International Des Epizooties Disease and is therefore recommended for removal.

No comments were received regarding adoption of the rule.

The amendments are adopted under the Texas Agriculture Code, Chapter 161, §161.041(a) and (b), and §161.046 which authorizes the Commission to promulgate rules in accordance with the Texas Agriculture Code. Section 161.101 provides that the Commission may adopt rules that require a veterinarian, a veterinary diagnostic laboratory, or a person having care, custody, or control of an animal to report a disease not covered by subsection (a) or (b) if the Commission determines that action to be necessary for the protection of animal health in this state. The Commission shall immediately deliver a copy of a rule adopted under this subsection to the appropriate legislative oversight committees. A rule adopted by the Commission under this subsection expires on the first day after the last day of the first regular legislative session that begins after adoption of the rule unless the rule is continued in effect by act of the legislature. House Bill 4006 relating to veterinarian reports of diseased animals was passed during the 81st Legislative Session and amended the requirements found in §161.101.

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 September 25, 2009.

TRD-200904288
Gene Snelson
General Counsel
Texas Animal Health Commission
Effective date: October 15, 2009
Proposal publication date: June 19, 2009
For further information, please call: (512) 719-0714

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CHAPTER 51. ENTRY REQUIREMENTS

4 TAC §51.8

The Texas Animal Health Commission (Commission) adopts amendments to Chapter 51, Entry Requirements, §51.8, concerning Cattle, without changes to the proposed text as published in the June 19, 2009, issue of the *Texas Register* (34 TexReg 4074) and will not be republished.

The purpose of the amendments to Chapter 51 is to provide entry requirements and entry permits for agriculture animals. This adoption is regarding entry requirements for a trichomoniasis test for breeding bulls from Mexico, Canada and other foreign countries entering the state, as well as potential testing of exhibition bulls capable of breeding and staying within the state for more than sixty (60) days. Also, a permit requirement is being added for all "M" brand steers, which are recognized as potential rodeo and/or roping stock.

The Commission is adding to §51.8(b)(4) the requirement that all "M" brand steers, which are recognized as potential rodeo and/or roping stock, imported into Texas from another state shall obtain an entry permit. The reason for this proposal is to ensure that all of these exhibition animals obtain a permit so that we can adequately account for those animals entering the state and meeting the existing test requirement. Without having them obtain permits, we are able to assure compliance with our entry requirements only after entry and possible commingling with Texas cattle at an event. Because this group of animals constitutes a higher risk and concern for tuberculosis, the Commission wants to ensure that we are able to identify those high risk animals and ensure they meet the test requirements.

Under our trichomoniasis entry requirements for cattle the Commission is proposing to add additional requirements to ensure any potential breeding animals entering the state are trichomoniasis free or to determine if the animals are entering for a purpose other than breeding. This requirement is for all bulls entering Texas for the purpose of participating at fairs, shows, exhibition and/or rodeo, which are twelve (12) months of age or older and capable of breeding, to obtain a permit, in accordance with §51.2(a) of this chapter, prior to entry into the state. Bulls permitted for entry into the State of Texas under the provisions of this subsection shall not be commingled with female cattle or used for breeding. Bulls that stay in the state more than sixty (60) days must be tested negative for trichomoniasis with an official culture test or official Polymerase Chain Reaction (PCR) test. This adopted rule is intended to close a potential loophole through which animals that come to this state for the purpose of exhibition are diverted to use for breeding purposes, thus avoiding the entry testing requirements.

To ensure breeding bulls originating from Mexico are not infected with trichomoniasis, the Commission is proposing to require that all breeding bulls, which are twelve (12) months of age or older, entering from Mexico, must enter on a permit to a premises of destination in Texas and remain under Hold Order until tested negative for Trichomoniasis.

The Commission is also adopting the same test requirement on breeding bulls from Canada to make sure they meet the same standard.

No comments were received regarding adoption of the amendment.

The amendment is adopted under the following statutory authority as found in Chapter 161 of the Texas Agriculture Code. The Commission is vested by statute, §161.041(a), with the re-

quirement to protect all livestock, domestic animals, and domestic fowl from disease. The Commission is authorized, by §161.041(b), to act to eradicate or control any disease or agent of transmission for any disease that affects livestock. If the Commission determines that a disease listed in §161.041 of this code or an agent of transmission of one of those diseases exists in a place in this state among livestock, or that livestock are exposed to one of those diseases or an agent of transmission of one of those diseases, the Commission shall establish a quarantine on the affected animals or on the affected place. That authority is found in §161.061.

As a control measure, the Commission, by rule may regulate the movement of animals. The Commission may restrict the intrastate movement of animals even though the movement of the animals is unrestricted in interstate or international commerce. The Commission may require testing, vaccination, or another epidemiologically sound procedure before or after animals are moved. That authority is found in §161.054. An agent of the Commission is entitled to stop and inspect a shipment of animals or animal products being transported in this state in order to determine if the shipment originated from a quarantined area or herd; or determine if the shipment presents a danger to the public health or livestock industry through insect infestation or through a communicable or noncommunicable disease. That authority is found in §161.048.

Section 161.005 provides that the Commission may authorize the executive director or another employee to sign written instruments on behalf of the Commission. A written instrument, including a quarantine or written notice signed under that authority, has the same force and effect as if signed by the entire Commission.

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 September 25, 2009.

TRD-200904289
Gene Snelson
General Counsel
Texas Animal Health Commission
Effective date: October 15, 2009
Proposal publication date: June 19, 2009
For further information, please call: (512) 719-0714

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TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 101. ASSESSMENT

SUBCHAPTER CC. COMMISSIONER'S RULES CONCERNING IMPLEMENTATION OF TESTING PROGRAM

19 TAC §101.3003

The Texas Education Agency (TEA) adopts an amendment to §101.3003, concerning assessment requirements for graduation. The amendment is adopted without changes to the proposed text as published in the August 21, 2009, issue of the *Texas Register* (34 TexReg 5642) and will not be republished. The section establishes graduation testing requirements for certain students. The adopted amendment substitutes a more current state assessment for testers previously covered by the Texas Assessment of Academic Skills (TAAS). House Bill (HB) 3, 81st Texas Legislature, 2009, prohibits districts from administering exit level TAAS and requires the commissioner of education to specify an alternate assessment for testers who previously needed to pass exit level TAAS to receive a Texas high school diploma.

In accordance with HB 3, 81st Texas Legislature, 2009, TEC, §39.025(c-1), eliminates the use of the TAAS assessment instrument. A school district may administer an alternate assessment instrument for testers who fall under TAAS graduation requirements. A student eligible to take the alternate assessment must not be tested in a subject that was not assessed by the exit level TAAS. The commissioner of education must determine the performance level considered satisfactory on the alternate assessment instrument and provide the information to school districts to administer these assessments.

The amendment to 19 TAC §101.3003 adopts appropriate subject area exit level Texas Assessment of Knowledge and Skills (TAKS) assessments to be used in place of TAAS beginning in October 2009 and specifies that passing standards will be set and posted to the TEA website. Currently there is not sufficient data to set a TAAS-TAKS link and the data will not be available until after the affected testers take the appropriate exit level TAKS tests in October 2009. Once established by the commissioner of education, the applicable performance standards will be adopted in rule as part of 19 TAC §101.3003.

The adopted amendment addresses testing requirements that apply to testers who originally were eligible to graduate under Texas Educational Assessment of Minimum Skills (TEAMS) requirements and subsequently have been held to TAAS performance standards linked to exit level TEAMS performance standards. As stated earlier, applicable passing standards will be established by the commissioner of education and posted to the TEA website once sufficient data are available. The performance standards linked to the TEAMS will be adopted in rule as part of 19 TAC §101.3003.

The adopted amendment also removes reference to specific end-of-course examinations taken in spring 2002 or earlier since the provision is no longer applicable.

The adopted rule action places the appropriate alternate assessment for affected testers in the *Texas Administrative Code*. Performance standards for these students, once determined, will be posted to the TEA website and reports will be issued to appropriate campuses and districts after determining performance standards. The adopted amendment has no locally maintained paperwork requirements.

The TEA determined that there is no direct adverse economic impact for small businesses and microbusinesses; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

The public comment period on the proposal began August 21, 2009, and ended September 21, 2009. No public comments were received.

The amendment is adopted under the Texas Education Code, §39.025(c-1), which requires the commissioner to designate an

alternate assessment instrument to be administered to eligible students in lieu of an assessment instrument administered under the TEC, §39.025, as it existed before September 1, 1999.

The amendment implements the Texas Education Code, §39.025(c-1).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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

TRD-200904305
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Effective date: October 18, 2009
Proposal publication date: August 21, 2009
For further information, please call: (512) 475-1497

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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 adopts an amendment to §1.43, concerning Reexamination, without changes to the proposed text as published in the May 22, 2009, issue of the *Texas Register* (34 TexReg 3134) and will not be republished.

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.

No comments were received regarding adoption of the amendments.

The amendment is adopted pursuant to §1051.202, Texas Occupations Code, which provides the Texas Board of Architectural Examiners with authority to promulgate rules to implement Chapter 1051, including rules relating to the registration examination.

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 September 28, 2009.

TRD-200904344
Cathy L. Hendricks, RID, ASID/IIDA
Executive Director
Texas Board of Architectural Examiners
Effective date: October 18, 2009
Proposal publication date: May 22, 2009
For further information, please call: (512) 305-9040

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SUBCHAPTER I. DISCIPLINARY ACTION

22 TAC §1.161, §1.162

The Texas Board of Architectural Examiners (Board) adopts amendments to §1.161, concerning Purpose and Scope, and §1.162, concerning Computation of Time, without changes to the proposed text as published in the May 22, 2009, issue of the *Texas Register* (34 TexReg 3134) and will not be republished.

The 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 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.

No comments were received regarding adoption of the amendments.

The amendments are adopted 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.

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 September 28, 2009.

TRD-200904345

Cathy L. Hendricks, RID, ASID/IIDA
Executive Director
Texas Board of Architectural Examiners
Effective date: October 18, 2009
Proposal publication date: May 22, 2009
For further information, please call: (512) 305-9040

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22 TAC §1.163

The Texas Board of Architectural Examiners adopts the repeal of §1.163, concerning Ex Parte Communication, without changes to the proposal as published in the May 22, 2009, issue of the *Texas Register* (34 TexReg 3135) and will not be republished.

This rule was redundant of prohibitions already found at §2001.061 of the Texas Government Code. This section will be reserved for expansion.

No comments were received regarding adoption of the repeal.

The repeal is adopted 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.

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 September 28, 2009.

TRD-200904346
Cathy L. Hendricks, RID, ASID/IIDA
Executive Director
Texas Board of Architectural Examiners
Effective date: October 18, 2009
Proposal publication date: May 22, 2009
For further information, please call: (512) 305-9040

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22 TAC §1.164, §1.165

The Texas Board of Architectural Examiners adopts amendments to §1.164, concerning Initiating a Contested Case, and §1.165, concerning Informal Disposition of a Contested Case, without changes to the proposed text as published in the May 22, 2009, issue of the *Texas Register* (34 TexReg 3136) and will not be republished.

The 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 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 (TPIA) and does not waive any rights to information as permitted by TPIA.

The changes to §1.165 simplify the overall language and would make two modifications to the present rule. Subsection (d) as adopted 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 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 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, 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.

No comments were received regarding adoption of the amendments

The amendments are adopted 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.

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 September 28, 2009.

TRD-200904347
Cathy L. Hendricks, RID, ASID/IIDA
Executive Director
Texas Board of Architectural Examiners
Effective date: October 18, 2009
Proposal publication date: May 22, 2009
For further information, please call: (512) 305-9040

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22 TAC §1.167

The Texas Board of Architectural Examiners adopts amendments to §1.167, concerning Publication of Disciplinary Action, without changes to the proposed text as published in the May

22, 2009, issue of the *Texas Register* (34 TexReg 3137) and will not be republished.

The amendment 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.

No comments were received regarding adoption of the amendments.

The amendments are adopted 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.

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 September 28, 2009.

TRD-200904348
Cathy L. Hendricks, RID, ASID/IIDA
Executive Director
Texas Board of Architectural Examiners
Effective date: October 18, 2009
Proposal publication date: May 22, 2009
For further information, please call: (512) 305-9040

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22 TAC §§1.170 - 1.175

The Texas Board of Architectural Examiners (Board) adopts amendments to §1.170, concerning Referrals from the Texas Department of Licensing and Regulation (TDLR); §1.171, concerning Responding to Request for Information; §1.172, concerning Continuing Violation; §1.173, concerning Violation By One Not an Architect; §1.174, concerning Complaint Process, and §1.175, concerning Evaluation of Evidence by Expert, without changes to the proposed text as published in the May 22, 2009, issue of the *Texas Register* (34 TexReg 3137) and will not be republished.

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 adopts 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 expands 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 change will permit agency staff to request that a Registrant, candidate or applicant provide records and documents in response to a request.

The 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 is 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 adopts 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 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 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 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 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 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 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 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.

No comments were received regarding adoption of the amendments.

The amendments are adopted 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.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Cathy L. Hendricks, RID, ASID/IIDA
Executive Director
Texas Board of Architectural Examiners
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For further information, please call: (512) 305-9040

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22 TAC §1.177, §1.178

The Texas Board of Architectural Examiners adopts amendments to §1.177, concerning Administrative Penalty Schedule, and §1.178, concerning Reinstatement Following Suspension or Revocation, without changes to the proposed text as published in the May 22, 2009, issue of the *Texas Register* (34 TexReg 3141) and will not be republished.

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 adopts changes 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 adopted 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 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 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 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. Previously the amount was $350. A moderate violation may result in an administrative penalty of not more than $2,000. Previously a moderate violation was subject to a penalty of between $351 and $1,200. A major violation may not exceed $5,000. Many of the criteria, as well as the maximum administrative penalty amount of $5,000, 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 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 rule 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 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 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 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 require that accurate information be provided when sought under the authority of 22 TAC §1.171. The 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 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 changes to §1.177 attributable to increased compliance by those under the agency's jurisdiction.

The Board also changes §1.178 which addresses the reinstatement of a Registrant after his or her certificate of registration has been suspended or revoked. The 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 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.

No comments were received regarding adoption of the amendments.

The amendments are adopted pursuant to the Architects' Practice Act, Texas Occupations Code Annotated §§1051.001 - 1051.701.

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 September 28, 2009.

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Executive Director
Texas Board of Architectural Examiners
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For further information, please call: (512) 305-9040

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CHAPTER 3. LANDSCAPE ARCHITECTS
SUBCHAPTER C. EXAMINATION

22 TAC §3.43

The Texas Board of Architectural Examiners adopts an amendment to §3.43, concerning Reexamination, without changes to the proposed text as published in the May 22, 2009, issue of the *Texas Register* (34 TexReg 3144) and will not be republished.

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 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.

No comments were received regarding adoption of the amendments.

The amendment is adopted pursuant to §1051.202, Texas Occupations Code, which provide the Texas Board of Architectural Examiners with authority to promulgate rules to implement Chapter 1052, including rules relating to the registration examination.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Executive Director
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SUBCHAPTER I. DISCIPLINARY ACTION

22 TAC §3.161, §3.162

The Texas Board of Architectural Examiners adopts amendments to §3.161, concerning Purpose and Scope, and §3.162, concerning Computation of Time, without changes to the proposed text as published in the May 22, 2009, issue of the *Texas Register* (34 TexReg 3144) and will not be republished.

The 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 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 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.

No comments were received regarding adoption of the amendments.

The amendments are adopted pursuant to the Landscape Architects' Practice Act, Texas Occupations Code Annotated, §§1052.003 - 1052.251 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.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Executive Director
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22 TAC §3.163

The Texas Board of Architectural Examiners adopts the repeal of §3.163, concerning Ex Parte Communication, without changes to the proposal as published in the May 22, 2009, issue of the *Texas Register* (34 TexReg 3145) and will not be republished.

This rule was redundant of prohibitions already found at §2001.061 of the Texas Government Code. This section will be reserved for expansion.

No comments were received regarding adoption of the repeal.

The repeal is adopted 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.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Executive Director
Texas Board of Architectural Examiners
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22 TAC §3.164, §3.165

The Texas Board of Architectural Examiners adopts amendments to §3.164, concerning Initiating a Contested Case, and §3.165, concerning Informal Disposition of a Contested Case, without changes to the proposed text as published in the May 22, 2009, issue of the *Texas Register* (34 TexReg 3146) and will not be republished.

The 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 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 (TPIA) and does not waive any rights to information as permitted by TPIA.

The 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 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, 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.

No comments were received regarding adoption of the amendments.

The amendments are adopted pursuant to Texas Occupations Code Annotated, §1051.202 which authorizes the Board to adopt reasonable rules to administer and enforce Subtitle B of the Architect's Practice Act.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Executive Director
Texas Board of Architectural Examiners
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For further information, please call: (512) 305-9040

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22 TAC §3.167

The Texas Board of Architectural Examiners adopts amendments to §3.167, concerning Publication of Disciplinary Action, without changes to the proposed text as published in the May 22, 2009, issue of the *Texas Register* (34 TexReg 3147) and will not be republished.

The amendment 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.

No comments were received regarding adoption of the amendments.

The amendments are adopted 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.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Texas Board of Architectural Examiners
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For further information, please call: (512) 305-9040

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22 TAC §§3.170 - 3.175

The Texas Board of Architectural Examiners adopts amendments to §3.170, concerning Referrals from the Texas Department of Licensing and Regulation; §3.171, concerning Responding to Request for Information; §3.172, concerning

Continuing Violation; §3.173, concerning Violation By One Not an Architect; §3.174, concerning Complaint Process, and §3.175, concerning Evaluation of Evidence by Expert, without changes to the proposed text as published in the May 22, 2009, issue of the *Texas Register* (34 TexReg 3147) and will not be republished.

Section 3.170 requires Architects to submit certain plans and specifications to the Texas Department of Licensing and Regulation (TDLR) for accessibility review not later than the fifth day of 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 and Supp. 2008).

The Board adopts 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 the 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 expands 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 change will permit agency staff to request that a Registrant, Candidate or Applicant provide records and documents in response to a request.

The 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 is 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 adopts 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 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 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 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 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 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 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 to investigation and refer a matter for prosecution.

Section 3.175 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 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.

No comments were received regarding adoption of the amendments.

The amendments are adopted pursuant to the Landscape Architects' Practice Act, Texas Occupations Code Annotated, §1052.202 which authorizes the Board to adopt reasonable rules as necessary to administer and enforce the Landscape Architects' Practice Act.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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

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Cathy L. Hendricks, RID, ASID/IIDA
Executive Director
Texas Board of Architectural Examiners
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For further information, please call: (512) 305-9040

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22 TAC §3.177, §3.178

The Texas Board of Architectural Examiners adopts amendments to §3.177, concerning the Administrative Penalty Schedule and §3.178, concerning Reinstatement Following Suspension or Revocation without changes to the proposed text as published in the May 22, 2009, issue of the *Texas Register* (34 TexReg 3151) and will not be republished.

The Texas Board of Architectural Examiners (Board) is responsible for enforcing the Landscape Architects' Practice Act, Texas Occupations Code Annotated §§1052.001 - 1052.252 (West 2004 and 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 landscape architect. Id., §1052.251(1), §1052.251(3). 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., §1052.403, §1052.452(c).

The Board adopts 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 changes to §3.178 will implement statutory language which permits the Board to assess "all fees and costs incurred by the Board as a result of any proceeding that led to the denial, revocation or suspension [of the certificate of registration]." Texas Occupations Code Annotated §1052.403(1) (West 2004 and 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 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 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 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 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 and $1,200. A major violation may not exceed $5,000. Many of the criteria, as well as the maximum administrative penalty amount of $5,000, reflect statutory language contained at Texas Occupations Code Annotated §§1052.451 -- 1052.452. 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 rules, 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 be 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 rule 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 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 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 landscape architectural plans in violation of the Landscape 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 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 changes to §3.177 and that acquisition of information in response to Board inquiry made under authority of §3.177 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 §3.171. The rule change would place a failure to timely respond within the administrative penalty schedule as "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 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 changes to §3.177 attributable to increased compliance by those under the agency's jurisdiction.

The Board also changes §3.178 which addresses the reinstatement of a Registrant after his or her certificate of registration has been suspended or revoked. The change is based upon the statutory language found in Texas Occupations Code Annotated §1051.403(1) (West 2004 and Supp. 2008) (Board may assess "all fees and costs incurred by the Board as a result of any proceeding that led to the denial, revocation or suspension [of the certificate of registration].") The 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 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.

No comments were received regarding adoption of the amendments.

The amendments are adopted pursuant to the Landscape Architects' Practice Act, Texas Occupations Code Annotated §§1052.001 - 1052.252.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Executive Director
Texas Board of Architectural Examiners
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For further information, please call: (512) 305-9040

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CHAPTER 5. INTERIOR DESIGNERS
SUBCHAPTER C. EXAMINATION

22 TAC §5.53

The Texas Board of Architectural Examiners adopts an amendment to §5.53, concerning Reexamination, without changes to the proposed text as published in the May 22, 2009, issue of the *Texas Register* (34 TexReg 3154) and will not be republished.

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 preexisting passing grades when the 5-year deadline was initially adopted.

No comments were received regarding adoption of the amendments.

The amendment is adopted 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.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER I. DISCIPLINARY ACTION

22 TAC §5.171, §5.172

The Texas Board of Architectural Examiners adopts amendments to §5.171, concerning Purpose and Scope, and §5.172, concerning Computation of Time, without changes to the proposed text as published in the May 22, 2009, issue of the *Texas Register* (34 TexReg 3155) and will not be republished.

The 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 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.

No comments were received regarding adoption of the amendments.

The amendments are adopted 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 which authorizes the Texas Board of Architectural Examiners to promulgate rules in order to administer and enforce the Interior Designers' Title Act.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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22 TAC §5.173

The Texas Board of Architectural Examiners adopts the repeal of §5.173, concerning Ex Parte Communication, without changes to the proposal as published in the May 22, 2009, issue of the *Texas Register* (34 TexReg 3155) and will not be republished.

This rule was redundant of prohibitions already found at §2001.061 of the Texas Government Code. This section will be reserved for expansion.

No comments were received regarding adoption of the repeal.

The repeal is adopted 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.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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22 TAC §5.174, §5.175

The Texas Board of Architectural Examiners adopts amendments to §5.174, concerning Initiating a Contested Case, and §5.175, concerning Informal Disposition of a Contested Case, without changes to the proposed text as published in the May 22, 2009, issue of the *Texas Register* (34 TexReg 3156) and will not be republished.

The changes to §5.174 simplify the overall language and would make two modifications to the present rule. Subsection (d) as adopted 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 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.

No comments were received regarding adoption of the amendments.

The amendments are adopted 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.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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22 TAC §5.177

The Texas Board of Architectural Examiners adopts amendments to §5.177, concerning Publication of Disciplinary Action, without changes to the proposed text as published in the May 22, 2009, issue of the *Texas Register* (34 TexReg 3157) and will not be republished.

The amendment 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.

No comments were received regarding adoption of the amendments.

The amendments are adopted 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.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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22 TAC §§5.180 - 5.185

The Texas Board of Architectural Examiners adopts amendments to §5.180, concerning Referrals from the Texas Department of Licensing and Regulation; §5.181, concerning Responding to Request for Information; §5.182, concerning Continuing Violation; §5.183, concerning Violation By One Not an Interior Designer; §5.184, concerning Complaint Process, and §5.185, concerning Evaluation of Evidence by Expert, without changes to the proposed text as published in the May 22, 2009, issue of the *Texas Register* (34 TexReg 3158) and will not be republished.

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 adopts 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 expands 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 change will permit agency staff to request that a registrant, candidate or applicant provide records and documents in response to a request.

The changes permit a failure to respond to be treated as a distinct disciplinary infraction from the underlying matter being investi-

gated, 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 is 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 adopts 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 §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 hearing the 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 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 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 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 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.

No comments were received regarding adoption of the amendments.

The amendments are adopted 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 Interior Designers' Title Act.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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22 TAC §5.187, §5.188

The Texas Board of Architectural Examiners adopts amendments to §5.187, concerning the Administrative Penalty Schedule, and §5.188, concerning Reinstatement Following Suspension or Revocation, without changes to the proposed text as published in the May 22, 2009, issue of the *Texas Register* (34 TexReg 3161) and will not be republished.

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 adopts changes to the present administrative penalty schedule for violations of the Interior Designer Title Act as set forth in §5.187 and to amend §5.188. The adopted 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 §1053.251 (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 adopted 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 adopted 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 adopted 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. Previously the amount was $350. A moderate violation may result in an administrative penalty of not more than $2,000. Previously a moderate violation was subject to a penalty of between $351 and $1,200. A major violation may not exceed $5,000. Many of the criteria, as well as the maximum administrative penalty amount of $5,000 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 adopted 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 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 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 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 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 changes §5.188 which addresses the reinstatement of a registrant after his or her certificate of registration has been suspended or revoked. The 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 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.

The amendments are adopted pursuant to the Architects' Practice Act, Texas Occupations Code Annotated, §§1051.001 - 1051.701 and do not affect any other statutes.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 2. TEXAS PARKS AND WILDLIFE DEPARTMENT

CHAPTER 65. WILDLIFE

SUBCHAPTER N. MIGRATORY GAME BIRD PROCLAMATION

31 TAC §§65.318, 65.320, 65.321

The Texas Parks and Wildlife Commission (commission) adopts amendments to §§65.318, 65.320, and 65.321, concerning the Late Season Migratory Game Bird Proclamation. Section 65.318 is adopted with changes to the proposed text as published in the July 17, 2009, issue of the *Texas Register* (34 TexReg 4720). Section 65.320 and §65.321 are adopted without changes and will not be republished.

The change to §65.318 shortens the season for mottled ducks by five days in all zones in response to federal requirements. As proposed, the season for mottled ducks would have begun on October 24, 2009 in the High Plains Mallard Management Unit (HPMMU) and on October 31, 2009 in both the North Duck Zone and the South Duck Zone. The rule as adopted allows the harvest of mottled ducks beginning on November 2, 2009 in the HPMMU and on November 5, 2009 in the North Duck Zone and the South Duck Zone.

The United States Fish and Wildlife Service (Service) issues annual frameworks for the hunting of migratory game birds. The states may be more restrictive than the federal frameworks allow, but may not be less restrictive. The Service is concerned about perceived instability in mottled duck populations in Texas and has directed Texas to reduce mottled duck harvest by at least 20 per cent. The Texas Parks and Wildlife Department (department) has determined that the most effective and least disruptive method to achieve the reduction is to prohibit the take of mottled ducks during the first five days of the season. The majority of mottled ducks are harvested early in the season. Prohibiting early harvest will allow the 20 per cent harvest reduction to occur in the shortest amount of time and disrupt hunters the least. Because harvest rates decline as the season goes on, removing hunting opportunity at any time other than the beginning of the season would necessitate the removal of more days. The department also believes that removing the first five days of hunting opportunity also reduces the likelihood of violations due to hunter confusion.

The change to §65.318 also alters season dates for sandhill cranes in Zone C. As proposed, the season for sandhill cranes in Zone C would have opened on January 26, 2010. The department selected the opening date in order to be certain that hunting activities would not disturb migrating whooping cranes. After consulting with the Service and department biologists, the department has determined that an additional week of opportunity can be safely provided, allowing the full 37 days of crane hunting allowed under the federal frameworks while not jeopardizing whooping crane populations.

The amendment to §65.318, concerning Open Seasons and Bag and Possession Limits--Late Season Species, adjusts the season dates for late-season species of migratory game birds (ducks, mergansers, coots, geese, and sandhill cranes) and adjusts the youth-only waterfowl season to account for calendar-shift. The amendment is necessary to provide the public with the continued opportunity to hunt migratory game birds.

The amendment to §65.318 eliminates the "Hunters Choice" (HC) structure in favor of a more conventional bag limit and increases the bag limit for wood ducks from two to three.

For the last decade, the Service has been concerned about breeding populations of canvasback and pintail ducks. From 2004 to 2006, the Service did not authorize full-season hunting opportunity for those two species, electing to require states to impose a truncated "season within a season" instead. In 2006, the Service required several states, including Texas, to implement the HC structure. Under the HC structure, the daily bag limit for ducks was reduced from six to five, with an aggregate daily bag limit of one mallard hen, pintail, canvasback, or dusky duck (mottled duck, black duck, Mexican duck, or their hybrids). The purpose of the Hunter's Choice structure was to allow for season-long harvest of canvasbacks and pintails in order to eliminate compliance and enforcement confusion and allow more hunting time for waterfowl hunters who seek those species. As of this year, the Hunter's Choice is no longer mandatory. The Service issues frameworks that establish the earliest day hunting can start, the latest day that hunting can take place, and the total number of days of hunting allowed. The Service's 2009-2010 frameworks for late-season species allow the season-long harvest of pintail and canvasback ducks;

therefore, the department is reinstating a six-bird daily bag limit, composed of five mallards (no more than two of which may be hens), three wood ducks, two scaup, two red-headed ducks, one pintail, one canvasback, and one mottled, black, or Mexican duck. The federal frameworks also allow an increase in the bag limit for wood ducks from two to three; however, as previously noted, the season for mottled ducks is one week shorter than proposed.

Otherwise, the amendment as adopted establishes season dates to account for calendar-shift and preserves parallel season structures between duck and goose seasons.

The amendment to §65.320, concerning Extended Falconry Season--Late Season Species, adjusts season dates for the take of early-season species of migratory game birds by means of falconry to reflect calendar shift.

The amendment to §65.321, concerning Special Management Provisions, adjusts the dates for the conservation season on light geese to account for calendar shift.

The amendments are generally necessary to implement commission policy to provide the greatest hunter opportunity possible, consistent with hunter and landowner preference for starting dates and segment lengths, under frameworks issued by the Service.

The amendment to §65.318 will function by establishing the seasons and bag limits for the hunting of late-season species of migratory game birds.

The amendment to §65.320 will function by establishing the season length and bag limits for the take of late-season species of migratory game birds by means of falconry.

The amendment to §65.321 will function by establishing the seasons and bag limits for the hunting of light geese during the light goose conservation season.

The department received 28 comments opposing adoption of the portion of the proposed amendment to §65.318 that replaced the Hunter's Choice bag limit structure with a six-bird bag limit. Of those 28 commenters, 18 elaborated a specific reason or rationale for opposing adoption. Those comments follow, accompanied by the department's response to each.

One commenter opposed adoption and stated that the Hunter's Choice structure should be retained because different species of ducks are in different parts of the state at different times and because species identification is problematic. The department agrees that the Hunter's Choice structure provided some protection against accidental take of canvasback and pintail ducks by allowing the take of one canvasback or pintail each day of the entire season (as opposed to the "season within a season" structure); however, the department also responds that it is incumbent upon all hunters to verify that a given bird may be lawfully taken, no matter what the bag composition is. The department has chosen to eliminate the Hunter's Choice structure because the Service has restored full-season opportunity for canvasbacks and pintails and public comment overwhelmingly indicates a preference for the traditional six-bird structure. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the Hunter's Choice has helped increase pintail numbers, is less confusing than the "season within a season" for certain species, and should be retained for a minimum of ten years. The department disagrees that the traditional six-bird structure will exert a negative impact on pintail or any other species. The department also responds that the only "season within a season" implication at this time concerns mottled ducks, for which there is a five-day delay, which the department believes will not be confusing to hunters, and that public comment overwhelmingly indicates a preference for the traditional six-bird structure. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the Hunter's Choice eliminated the need for "season within a season" structures. The department agrees with the comment, but notes that effective this year, Hunter's Choice is no longer mandated by the Service. Since public comment overwhelmingly indicates a preference for the traditional six-bird structure, rather than the Hunter's Choice structure, the department has elected to move away from the Hunter's Choice structure. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the Hunter's Choice structure should be left in place to protect pintails, canvasbacks, and mottled ducks, but that the bag limit should be increased to six birds. The department disagrees with the comment and responds that the Hunter's Choice buffered harvest impacts on target species by implementing a reduced (five-bird) bag limit while still allowing season-long opportunity for all species. Because the Service has restored full-season opportunity for canvasbacks and pintails, the Hunter's Choice structure is no longer necessary. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the Hunter's Choice prevents new hunters from making species identification mistakes. The department disagrees with the comment and responds that species misidentification is not believed to be a major factor in population declines of sensitive species, that it is incumbent upon hunters to determine whether a given bird is lawful to take. The department has determined that because the Service has restored full-season opportunity for canvasbacks and pintails, the Hunter's Choice structure is no longer necessary, and public comment overwhelmingly indicates a preference for the traditional six-bird structure. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the Hunter's Choice protects birds while allowing hunters to take birds when it is convenient. The department disagrees that the Hunter's Choice is any more effective at protecting sensitive species than other harvest management strategies and responds that for the 2009-2010 season, the only issue affecting convenience will be that mottled ducks cannot be harvested during the first five days of the season. No changes were made as a result of the comment.

One commenter opposed adoption and stated that elimination of the Hunter's Choice will result in the waste of pintails and canvasbacks. The department disagrees with the comment and responds that canvasback and pintail populations have recovered to the point that federal frameworks allow full-season hunting. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the Hunter's Choice maximized opportunity. The department disagrees with the comment and responds that the Hunter's Choice did not effectively alter opportunity, it buffered the harvest of pintails and canvasbacks by reducing the aggregate bag limit. No changes were made as a result of the comment.

Three commenters opposed adoption and stated that a five-duck bag limit is sufficient. The department disagrees with the comments and responds that it is commission policy to implement the most liberal hunter opportunity possible under federal frameworks and that a six-duck bag limit is not believed to have a negative impact on duck population. No changes were made as a result of the comments.

Three commenters opposed adoption and stated that the bag limit for red-headed ducks should be increased. The department disagrees with the comments and responds that rules as adopted implement the maximum bag limits for red-headed ducks allowed under the federal frameworks. No changes were made as a result of the comments.

One commenter opposed adoption and stated that the bag limit for wood ducks should remain at two per day so that the species could spread farther west. The department disagrees with the comment and responds that wood duck populations are constrained more by habitat than by harvest. Therefore, a two per day bag limit would not likely have an appreciable impact on the spread of wood duck populations further west. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the bag limit for scaup should be reduced and a "season within a season" should be implemented for mottled ducks and black ducks. The department disagrees with the comment and responds that the commission policy is to adopt the most liberal provisions allowable under federal frameworks. With respect to mottled and black ducks, the rules as adopted reflect the federal mandate to reduce mottled duck harvest by 20 per cent. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the daily bag limit for mallard hens should be one. The department disagrees with the comment and responds that commission policy is to offer the maximum opportunity allowable under the federal frameworks, consistent with sound biological management. The department believes that there are no biological concerns at the present time with respect to mallards that warrant a reduction in bag limits. No changes were made as a result of the comment.

The department received 144 comments supporting adoption of the portion of the proposed amendment to §65.318 that replaced the Hunter's Choice bag limit structure with a six-bird bag limit.

The department received 63 comments opposing adoption of the portion of the proposed amendment to §65.318 that established the seasons and bag limits for ducks. Of those 63 commenters, 52 elaborated a specific reason or rationale for opposing adoption. Those comments follow, accompanied by the department's response to each.

Thirty-seven commenters opposed adoption and stated that the season should open later to allow more hunting in January. The department disagrees with the comments and responds that the season dates as adopted were based on nesting studies showing that early-nesting females have better nest success than late-nesting females. The department believes that allowing ducks to form pair bonds on wintering areas should enhance the possibility of better nest success on the breeding grounds. Therefore, the department has adopted seasons that eliminate hunting pressure during the last week of the framework. The department also notes that the seasons as adopted opens one week later than deer season. No changes were made as a result of the comments.

One commenter opposed adoption and stated that the department should take the maximum number of days allowed under the federal frameworks. The department agrees with the comment and responds that the seasons as adopted contain the maximum number of hunting days allowed under the federal frameworks. No changes were made as a result of the comment.

One commenter opposed adoption and stated that there are no studies proving that late-season hunting prevents or impacts the formation of pair bonds prior to migration and that running the season to the end of January would likely have a statistically insignificant impact on the percentage of pair bonding. The department disagrees with the comment and responds that while there are no studies definitively correlating late-season hunting pressure to bonding failure, there are studies showing that the earlier pair bonding occurs, the higher the likelihood of reproductive success. The department's approach is to err on the side of caution. No changes were made as a result of the comment.

One commenter opposed adoption and stated that nesting success is much more a result of habitat conditions on the breeding grounds than whether pair bonds are developed on wintering areas. The department disagrees with the comment and responds that there are a number of variables (habitat conditions, weather, water availability, bonding, etc.) that affect a definitive understanding of the biology of nesting success. Clearly, habitat conditions on the breeding grounds are critical to nesting success; however, it is axiomatic that the number of ducks making it to the breeding grounds is irrelevant if they do not form pair bonds and reproduce. The department believes that a reduction in hunting pressure late in the season will enhance pair bonding and nesting success, and there is no doubt that neither will be harmed by such a reduction. No changes were made as a result of the comment.

One commenter opposed adoption and stated that there should be three season segments and two two-week splits. The department disagrees with the comment and responds that the federal frameworks do not allow Texas to have more than two season segments without prior approval from the Service. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the season as adopted will result in fewer birds harvested and an overall decrease in value to the hunter. The department agrees that there could be a slight reduction in total harvest and responds that the concept of "value" is not a factor used by the department when establishing season lengths or bag limits. The department considers hunter and landowner preference insofar as they do not conflict with the tenets of sound biological management. As stated previously, the department believes that the seasons as adopted will contribute to greater nesting success without causing hardship for hunters. No changes were made as a result of the comment.

One commenter opposed adoption and stated that unless the season runs to the end of January, it is impossible to enjoy concurrent trout fishing and waterfowl hunting in South Texas. The department disagrees with the commenter and responds that although the department continues to strive to ensure greater hunting and fishing opportunity, the unpredictable nature of fish and wildlife resources makes it impossible to establish seasons that create optimum concurrent opportunity for both waterfowl and trout, and for that reason the department does not attempt to do so. No changes were made as a result of the comment.

One commenter opposed adoption and stated that a week should be removed from the front of the first season segment and added to the end of the second segment in the North Zone. The department disagrees with the comment for reasons discussed earlier with respect to nesting success. No changes were made as a result of the comment.

Two commenters opposed adoption and stated that splits should not be concurrent. The department disagrees with the comments and responds that it is commission policy to attempt to create opportunity during time periods when most of the public is most able to take advantage of it. For duck seasons, the department believes it is important to provide opportunity during the holiday season and for as many weekends as possible. Under the federal frameworks, Texas is allowed 74 days of opportunity between September 26, 2009 and January 31, 2010. The purpose of a split is to allow an opportunity for ducks to congregate and recover from hunting pressure. Conventional thinking is that splits ideally should be at least two weeks in duration. Concurrent splits are, therefore, necessary because staggered splits would take hunting opportunity away from the holidays and weekends. No changes were made as a result of the comments.

One commenter opposed adoption and stated that there should be four duck zones. The department disagrees with the comment and responds that Texas is allowed two duck zones and the High Plains Mallard Management Unit under the federal frameworks. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the first season segment should open the week after deer season opens and run until December 19. The department disagrees with the comment and responds that hunter preference is for later opportunity, especially if the season does not run to the end of the framework. The Service's framework and sound biological management enable the department to accommodate this preference. No changes were made as a result of the comment.

Two commenters opposed adoption and stated that opening day should be November 7 in the North Zone. The department disagrees with the comments and responds that unless days were removed from the split, opening the season on November 7 would result in a reduction of hunting opportunity from the 74 days allowed under the federal frameworks, especially since the season as adopted does not run to the end of the framework. The department believes the length of the split as adopted is the minimum length of time necessary to allow ducks to congregate and recover from hunting pressure. No changes were made as a result of the comments.

One commenter opposed adoption and stated that there should be no split in the North Zone. The department disagrees with the comment and responds that the purpose of a split is to allow an opportunity for ducks to recover from hunting pressure and rally. Conventional thinking holds that splits ideally should be at least two weeks in duration. No changes were made as a result of the comment.

The department received 106 comments supporting adoption of the portion of the proposed amendment to §65.318 that established the seasons and bag limits for ducks.

The department received 21 comments opposing adoption of the portion of the proposed amendment to §65.318 that established the seasons and bag limits for geese. Of those 63 commenters, 52 elaborated a specific reason or rationale for opposing adoption. Those comments follow, accompanied by the department's response to each.

Three commenters opposed adoption and stated that opening day is too early. The department disagrees with the comment and responds that the season structure as adopted takes advantage of the migratory chronology of geese, which tend to arrive in Texas in huntable numbers in early November. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the department should adopt the maximum season length allowable under the federal frameworks for Canada geese in the Eastern Zone. The department disagrees with the comment and responds that delaying the Conservation season until the expiration of all 107 days of Canada goose hunting would effectively defeat the purpose of the Conservation order, which is to harvest large numbers of snow geese in order to protect Canadian breeding grounds from the effects of overpopulation. The optimum time for the harvest of light geese in large numbers is mid- to late-January. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the season for white-fronted geese in the Eastern Zone should open one week later. The department disagrees with the comment and responds that the season structure as adopted takes advantage of the migratory chronology of white-fronted geese, which tend to arrive in Texas in huntable numbers in early November. The department also responds that hunters prefer to be able to hunt ducks concurrently with white-fronted geese. No changes were made as a result of the comment.

One commenter opposed adoption and stated that all goose seasons should be longer because geese are a hazard to aviation. The department disagrees with the comment and responds that goose seasons in the Western Zone run for the 107-day maximum allowed under the federal frameworks; however, goose seasons in the Eastern Zone are reduced to either 86 or 72 days in order to accommodate the Light Goose Conservation Season. The department also responds that the commission establishes seasons and bag limits on the basis of biological considerations and does not have authority to regulate on the basis of aviation safety. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the season in the Eastern Zone should run later. The department disagrees with the comment and responds that the closing dates as adopted were chosen to optimize the impact of the light goose conservation order. In order to take advantage of the conservation order, the state is required by federal frameworks to close all other seasons for migratory birds. Therefore, allowing any season to remain open beyond January 25 in the Eastern Zone would effectively defeat the purpose of the Conservation order, which is to harvest large numbers of snow geese in order to protect Canadian breeding grounds from the effects of overpopulation. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the season for white-fronted geese in the Eastern Zone should be October 31, 2009 - January 24, 2010 in order to avoid hunter confusion. The department disagrees with the comment and responds that the season for white-fronted geese in Eastern Zone, as adopted, opens on October 31 and utilizes the entire 72 days allowed under the federal frameworks. The season is established to coincide with the first arrivals of huntable numbers of white-fronted geese. Delaying the opener in order to mitigate identification problems would decrease opportunity, since the season would be shorter. The department also responds that it is incumbent upon all hunters to identify any given bird to ensure that it may

be lawfully taken. No changes were made as a result of the comment.

One commenter opposed adoption and stated that all goose seasons should run from October 31, 2009 - February 7, 2010. The department disagrees with the comment and responds that under the federal frameworks, the state cannot exceed 72 days of hunting opportunity for white-fronted geese in the Eastern Zone or 95 days of hunting opportunity for dark geese in the Western Zone; therefore, the all goose seasons cannot run from October 31, 2009 - February 7, 2010. No changes were made as a result of the comment.

Two commenters opposed adoption and stated that the season for Canada geese should run until the end of January. The department disagrees with the comment and responds that the closing dates as adopted for Canada geese were chosen to optimize the impact of the light goose conservation order. In order to take advantage of the conservation order, the state is required by federal frameworks to close all other seasons for migratory birds. Therefore, allowing any season to remain open beyond January 25 in the Eastern Zone would effectively defeat the purpose of the Conservation order, which is to harvest large numbers of snow geese in order to protect Canadian breeding grounds from the effects of overpopulation. No changes were made as a result of the comment.

Five commenters opposed adoption and stated that the seasons for light and dark geese should be concurrent. The department disagrees with the comments and responds that in the Western Zone, seasons are concurrent; however, in the Eastern Zones the federal frameworks allow 107 days of opportunity for light geese, but either 72 or 86 days of hunting opportunity (depending on the bag limit selected) for white-fronted geese. Therefore, the seasons for light and dark geese seasons cannot be concurrent. No changes were made as a result of the comments.

One commenter opposed adoption and stated that because there are so many resident Canada geese, the season in the Eastern Zone should be longer and there should be a higher bag limit. The department disagrees with the comment and responds that the ending date of the season as adopted, as discussed previously, is necessary to meaningfully participate in the light goose conservation season. Starting the light goose conservation season any later would effectively defeat the purpose of the conservation season. The bag limit for Canada geese as adopted is the maximum allowed under the federal frameworks. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the bag limit for light geese should be increased during the regular season. The department disagrees with the comment and responds that the bag limit as adopted for light geese during the regular season is the maximum allowed under the federal frameworks. No changes were made as a result of the comment.

The department received 102 comments supporting adoption of the portion of the proposed amendment to §65.318 that established seasons and bag limits for geese.

The department received 11 comments opposing adoption of the portion of the proposed amendment to §65.318 that established the seasons and bag limits for sandhill cranes. Of those 11 commenters, 10 elaborated a specific reason or rationale for opposing adoption. Those comments follow, accompanied by the department's response to each.

One commenter opposed adoption and stated that the season in Zone B should run later because the birds do not arrive until late in the season. The department disagrees with the comment and responds that hunter preference has traditionally been to open the season as soon as possible following the migration of endangered whooping cranes and to close the season concurrently with Zone A. The Service's framework and sound biological management enable the department to accommodate this preference. No changes were made as a result of the comment.

Three commenters opposed adoption and stated that the season in Zone C should be the maximum length allowable under the federal frameworks. The department agrees with the comments and has made changes accordingly.

One commenter opposed adoption and stated that the season in Zone C should be longer and the bag limit should be the same as the rest of the state. The department agrees that the season should be longer and has made changes accordingly; however, the bag limit in Zone C is the maximum allowed under federal frameworks. No changes to bag limits were made as a result of the comment.

One commenter opposed adoption and stated that the season in Zone C should be concurrent with duck season. The department disagrees with the comment and responds that the sandhill crane in the South Zone cannot be concurrent with duck season because the opening day must be delayed in order to protect endangered whooping cranes as they migrate to their wintering grounds. The federal Endangered Species Act requires states to limit any human activity considered hazardous to endangered species, including recreational hunting of similar-appearing migratory game birds. A significant number of whooping cranes, which have characteristics similar to sandhill cranes, are typically still in migration to the Aransas National Wildlife Refuge through the beginning of December. Also, the maximum season length in Zone C is 37 days. No changes were made as a result of the comment.

One commenter opposed adoption and stated that Zones A and B should have identical season dates, running for November 7, 2009 to February 7, 2010. The department disagrees with the comment and responds that the season in Zone B must be delayed in order to allow for the migration of endangered whooping cranes. The federal Endangered Species Act requires states to limit any human activity considered hazardous to endangered species, including recreational hunting of similar-appearing migratory game birds. A significant number of whooping cranes, which have characteristics similar to sandhill cranes, are typically still in migration to the Aransas National Wildlife Refuge through the beginning of December. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the season in Zone B should start on November 13 or November 20. The department disagrees with the comment and responds that the opening day in Zone B as adopted is necessary in order to allow for the migration of endangered whooping cranes. The federal Endangered Species Act requires states to limit any human activity considered hazardous to endangered species, including recreational hunting of similar-appearing migratory game birds. A significant number of whooping cranes, which have characteristics similar to sandhill cranes, are typically still in migration to the Aransas National Wildlife Refuge through the beginning of December. No changes were made as a result of the comment.

One commenter opposed adoption and stated that there should be no closed areas in the state. The department disagrees with the comment and responds that the closed areas in Texas are closed by federal law and the department does not have the authority to allow sandhill crane hunting in those areas. No changes were made as a result of the comment.

One commenter opposed adoption and stated that hunters should not have to apply for or pay a service charge to obtain a federal sandhill crane permit. The department disagrees with the comment and responds that the purpose of the federal sandhill crane permit is to obtain a stratified sampling frame for surveying crane hunters in the state. If every hunter obtains a stamp automatically when purchasing a license, the sampling frame will contain hunters who do not hunt cranes, which makes statistical analysis of hunting patterns difficult if not impossible. The service charge is applicable to any transaction, not just to sandhill crane permits, and is necessary for the department to recoup the cost of operating the automated licensing system. No changes were made as a result of the comment.

The department received 85 comments supporting adoption of the portion of the proposed amendment to §65.318 that established seasons and bag limits for sandhill cranes.

The department received 19 comments opposing adoption of the portion of the proposed amendment to §65.318 that established the seasons and bag limits for the youth-only waterfowl season. Of those 19 commenters, 14 elaborated a specific reason or rationale for opposing adoption. Those comments follow, accompanied by the department's response to each.

Three commenters opposed adoption and stated that youth-only season should take place between season segments so that opening day is available to all hunters. The department disagrees with the comment and responds that splits are intended to function as respite periods to give birds an opportunity to rest and congregate. Opening a two-day season in the middle of a split would confound the purpose of the split. No changes were made as a result of the comment.

One commenter opposed adoption and stated that there should be no youth season for ducks. The department disagrees with the comment and responds that federal law provides for a youth-only season for waterfowl, including ducks, and that it is the policy of the commission not only to provide the most opportunity possible, but to encourage the participation of youth in hunting activities whenever possible. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the season as proposed is too early. The department disagrees with the comment and responds that the dates for youth-only waterfowl hunting cannot be placed during segments, the splits between segments, or following the closure of duck season. Placing the youth-only days during open segments would disrupt large numbers of hunters. Placing the youth-only days during the split between segments would defeat the purpose of the split, which is to allow ducks to rest. Placing the youth-only days at the end of the season would defeat the purpose of closing duck season a week before the end of the framework, which is to encourage pair-bonding and increase reproductive success. Therefore, the department has determined that the weekend prior to the opening of duck season is the ideal time to locate the youth-only days. No changes were made as a result of the comment.

One commenter opposed adoption and stated that youth hunters should be exempted from license requirements. The department disagrees with the comment and responds that the youth license requirements are beyond the scope of this rulemaking. The department offers a reduced-price license for persons 17 and under, but cannot waive license fees for youth without incurring significant revenue loss. No changes were made as a result of the comment.

One commenter opposed adoption and stated that youth season should be between segments or at the end of the season so that youth could concentrate on hunting rather than setting up for the regular season. The department disagrees with the comment and responds that placing the youth-only days during the split between segments would defeat the purpose of the split, which is to allow ducks to rest. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the youth season is inopportune for persons who do not have custody of children during that weekend. The department, although sympathetic, disagrees with the comment and responds that the youth-only dates cannot be located elsewhere without significant disruption of hunter opportunity. No changes were made as a result of the comment.

Three commenters opposed adoption and stated that there should be more youth-only days. The department disagrees with the comment and responds that additional youth-only days would count against the total hunting days allowed under the federal frameworks and would, therefore, deny rather than provide opportunity. No changes were made as a result of the comments.

One commenter opposed adoption and stated that the season is too early and will discourage youth because there are no birds available at that time. The department, although sympathetic, disagrees with the comment and responds that the youth-only dates cannot be located elsewhere without significant disruption of hunter opportunity. Although the peak of duck migration occurs later in the year, the youth-only season cannot be placed during a season segment, during a split between season segments, or following the end of the regular season. Placing the youth-only season during a season segment would reduce overall opportunity because adults would be unable to hunt. Placing the youth-only days during the split between segments would defeat the purpose of the split, which is to allow ducks to rest. Placing the youth-only days at the end of the season would defeat the purpose of closing duck season a week before the end of the framework, which is to encourage pair-bonding and increase reproductive success. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the youth season should follow the regular season. The department disagrees with the comment and responds that placing the youth-only days at the end of the season would defeat the purpose of closing duck season a week before the end of the framework, which is to encourage pair-bonding and increase reproductive success. No changes were made as a result of the comment.

The department received 100 comments supporting adoption of the portion of the proposed amendment to §65.318 that established the youth-only waterfowl season.

The department received three comments opposing adoption of the proposed amendment to §65.320, which established the special extended falconry season. None of the commenters provided a reason or rationale for opposition. The department disagrees with the comments and responds that it is commission

policy to adopt the most liberal seasons and bag limits possible under the federal frameworks. No changes were made as a result of the comments.

The department received 29 comments supporting adoption of the proposed amendment to §65.320, regarding the special extended falconry season.

The department received 12 comments opposing adoption of the proposed amendment to §65.321, which established the seasons and bag limits for the special light goose conservation season. Of those 12 commenters, 10 elaborated a specific reason or rationale for opposing adoption. Those comments follow, accompanied by the department's response to each.

Two commenters opposed adoption and stated that the special light goose conservation season should be eliminated. The department disagrees with the comment and responds that Texas must do its part in the interstate and international effort to curtail light goose populations in order to prevent habitat degradation on their Arctic breeding grounds. No changes were made as a result of the comments.

One commenter opposed adoption and stated that the season should begin in February. The department disagrees with the comment and responds that by February, large numbers of light geese have begun to migrate and the opportunity to make a significant impact on populations has passed. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the season in both zones should open on January 25 and close on March 28. The department disagrees with the comment and responds that opening the season on January 25 in the Western Zone would result in the unacceptable elimination of significant opportunity for the harvest of dark geese. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the rules should prohibit ground-raking and other unethical methods. The department disagrees with the comment and responds that the commission policy is to provide for the most liberal hunting opportunity possible. The department also responds that it is the responsibility of each hunter to ensure that the methods he or she employs do not result in exceeding the daily or possession limits. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the conservation season should not begin until the maximum number of hunting days allowable under the federal frameworks for Canada geese has been allowed. The department disagrees with the comment and responds that Texas must do its part in the interstate and international effort to curtail light goose populations in order to prevent habitat degradation on their Arctic breeding grounds. The conservation season cannot take place until all other migratory bird seasons have been closed. Hunting Canada geese to the end of the framework would, therefore, preclude opening the conservation season until well after the migration of light geese has begun, which defeats the purpose of the conservation order. No changes were made as a result of the comment.

Two commenters opposed adoption and stated that the conservation season should begin earlier to take advantage of larger number of birds. The department disagrees with the comment and responds that hunter preference for other species of waterfowl precludes the opening of the conservation season any earlier, since all other seasons by federal law would have to be closed in order to implement the conservation season. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the conservation season should be concurrent with the regular goose season. The department disagrees with the comment and responds that by federal law, the conservation season cannot take place until all other migratory bird seasons are closed. No changes were made as a result of the comment.

Two commenters opposed adoption and stated that the conservation season in the western and eastern zones should be concurrent because the birds are abundant. The department disagrees with the comments and responds that the hunting opportunity for dark geese in the Western Zone is far more significant than that for light geese. The department, therefore, allows the hunting of dark geese in the Western Zone for the full 107 days allowed under the federal frameworks. No changes were made as a result of the comments.

The department received 103 comments supporting adoption of the proposed amendment.

No groups or associations commented in favor of or against adoption of the proposed rules.

The amendments are adopted under Parks and Wildlife Code, Chapter 64, which authorizes the Commission and the Executive Director to provide the open season and means, methods, and devices for the hunting and possessing of migratory game birds.

§65.318. Open Seasons and Bag and Possession Limits--Late Season.

Except as specifically provided in this section, the possession limit for all species listed in this section shall be twice the daily bag limit.

(1) Ducks, mergansers, and coots. The daily bag limit for ducks is six, which may include no more than five mallards (only two of which may be hens); three wood ducks; two scaup (lesser scaup and greater scaup in the aggregate); two redheads; one pintail; one canvasback; and one "dusky" duck (mottled duck, Mexican like duck, black duck and their hybrids). For all other species not listed, the bag limit shall be six. The daily bag limit for coots is 15. The daily bag limit for mergansers is five, which may include no more than two hooded mergansers.

(A) High Plains Mallard Management Unit:

(i) all species other than mottled ducks: October 24 - 25, 2009 and October 30, 2009 - January 24, 2010.

(ii) mottled ducks: November 2, 2009 - January 24, 2010.

(B) North Zone:

(i) all species other than mottled ducks--October 31 - November 29, 2009 and December 12, 2009 - January 24, 2010.

(ii) mottled ducks: November 5 - 29, 2009 and December 12, 2009 - January 24, 2010.

(C) South Zone:

(i) all species other than mottled ducks: October 31 - November 29, 2009 and December 12, 2009 - January 24, 2010.

(ii) mottled ducks: November 5 - 29, 2009 and December 12, 2009 - January 24, 2010.

(2) Geese.

(A) Western Zone.

(i) Light geese: November 7, 2009 - February 7, 2010. The daily bag limit for light geese is 20, and there is no possession limit.

(ii) Dark geese: November 7, 2009 - February 7, 2010. The daily bag limit for dark geese is five, which may not include more than four Canada geese or more than one white-fronted goose.

(B) Eastern Zone.

(i) Light geese: October 31, 2009 - January 24, 2010. The daily bag limit for light geese is 20, and there is no possession limit.

(ii) Dark geese:

(I) White-fronted geese: October 31, 2009 - January 10, 2010. The daily bag limit for white-fronted geese is two.

(II) Canada geese: October 31, 2009 - January 24, 2010. The daily bag limit for Canada geese is three.

(3) Sandhill cranes. A free permit is required of any person to hunt sandhill cranes in areas where an open season is provided under this proclamation. Permits will be issued on an impartial basis with no limitation on the number of permits that may be issued.

(A) Zone A: November 7, 2009 - February 7, 2010. The daily bag limit is three. The possession limit is six.

(B) Zone B: November 27, 2009 - February 7, 2010. The daily bag limit is three. The possession limit is six.

(C) Zone C: December 19, 2009 - January 24, 2010. The daily bag limit is two. The possession limit is four.

(4) Special Youth-Only Season. There shall be a special youth-only waterfowl season during which the hunting, taking, and possession of geese, ducks, mergansers, and coots is restricted to licensed hunters 15 years of age and younger accompanied by a person 18 years of age or older, except for persons hunting by means of falconry under the provisions of §65.320 of this chapter (relating to Extended Falconry Season--Late Season Species). Bag and possession limits in any given zone during the season established by this paragraph shall be as provided for that zone by paragraph (1) of this section. Season dates are as follows:

(A) High Plains Mallard Management Unit: October 17 - 18, 2009;

(B) North Zone: October 24 - 25, 2009; and

(C) South Zone: October 24 - 25, 2009.

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 September 24, 2009.

TRD-200904253
Ann Bright
General Counsel
Texas Parks and Wildlife Department
Effective date: October 14, 2009
Proposal publication date: July 17, 2009
For further information, please call: (512) 389-4775

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PART 17. TEXAS STATE SOIL AND WATER CONSERVATION BOARD

CHAPTER 529. FLOOD CONTROL SUBCHAPTER A. OPERATION AND MAINTENANCE GRANT PROGRAM

31 TAC §§529.1 - 529.8

The Texas State Soil and Water Conservation Board (State Board) adopts new §§529.1 - 529.8, concerning the administration of a state-funded grant program to assist soil and water conservation districts in performing operation and maintenance of flood control dams. Sections 529.1 - 529.3 are adopted with changes to the proposed text as published in the July 31, 2009, issue of the *Texas Register* (34 TexReg 5040). Sections 529.4 - 529.8 are adopted without changes and will not be republished.

Nearly 2,000 floodwater retarding structures, or dams, have been built over the last 60 years within the State of Texas. The primary purpose of the structures is to protect lives and property by reducing the velocity of floodwaters, and thereby releasing flows at a safer rate. These are earthen dams that exist on private property, and were designed and constructed by the United States Department of Agriculture - Natural Resources Conservation Service (USDA-NRCS). They were built with the understanding that the private property owner would provide the land, the federal government would provide the technical design expertise and the funding to construct them, and then units of local government would be responsible for maintaining them into the future.

Local sponsors of the dams were required before a federal project was begun. Local sponsors signed a watershed agreement which outlined the duties and responsibilities of the federal and local sponsors. In general, local sponsors are required to obtain and enforce easements, conduct operation and maintenance (O&M) inspections, maintain the structures, and implement land treatment measures in the watershed. Soil and water conservation districts (SWCD) are one of the local sponsors in all watershed projects. Other local sponsors include counties, cities, and Water Control and Improvement Districts (WCIDs).

Due to the passage of time and difficulty in raising adequate funds locally, many SWCDs and other sponsors approached the State Board and expressed their concerns over the amount of needed O&M on flood control dams. In recognition that these dams will continue to serve as a critical protection for our state's infrastructure, private property, and lives, the State Board proposes a grant program to assist local SWCDs and other sponsors in carrying out their responsibilities regarding O&M with funding appropriated by the Texas Legislature for the 2010-2011 biennium.

New §529.1, Statutory Authority and Policy Statement, would explain the agency's intent and authority for administering an O&M Grant Program through local SWCDs.

New §529.2, Definitions, would provide a list of terms and their definitions for the purposes of new Chapter 529.

New §529.3, Administration of Funds, would establish general fiscal provisions that would apply to the program, explain the program's sources of funding, establish provisions for the allocation reimbursement of funds to local SWCDs, identify which activities would be eligible for reimbursement, establish that the pro-

gram would require a 10-percent non-state funded matching provision, establish and characterize the types of "in-kind" contributions that may be used to satisfy the 10-percent non-state match requirement, and allow for the reimbursement of local SWCD administrative costs.

New §529.4, Applicability, would establish that only eligible SWCDs will be provided an allocation of funding for performing O&M activities, but would provide a mechanism that allows for other local sponsors of flood control dams to receive an eligible SWCD's allocation if the SWCD provides a written request to transfer the allocation.

New §529.5, Allocation of Funds, would establish the criteria under which the State Board would make funding allocations, explain that prioritization of O&M activities would be conducted by local sponsors, explain that the State Board will notify eligible SWCDs of funding allocations in writing, establish that the State Board would adjust allocations within a fiscal year based on needs and the availability of funds, establish that allocations are effective for a fixed period of time within a fiscal year, explain that the State Board may execute a contract with an eligible SWCD for the performance of O&M activities, and provide for the allocation of funding to eligible SWCDs to address emergency situations.

New §529.6, Solicitation of Bids by Eligible SWCDs, would establish that bids are required for SWCD purchases that exceed $50,000 in accordance with provisions of Section 271.024 of the Local Government Code.

New §529.7, Reimbursements and Reporting Non-State Funded Match, would require that requests for reimbursement must be submitted on forms provided by the State Board, O&M agreements between local sponsors, as defined by §529.2, must exist and be submitted to the State Board prior to reimbursement, establish the conditions under which the State Board would consider making payment, require that in-kind contributions be reported on reimbursement requests, establish that the program is only a reimbursement based program, and that the State Board may allow for the purchasing of easements at their discretion. New §529.7 would also establish that eligible SWCDs must certify that the activities that are requested to be reimbursed were performed to the SWCD's satisfaction prior to submitting the request to the State Board.

New §529.8, Technical Standards for O&M Activities, would establish that the State Board may adopt technical standards for certain O&M activities which must be attained in order for reimbursement to be approved.

One written comment was received regarding adoption of the new rule. The comment pertained to clarification of terms and O&M agreement applicability. The following changes address those concerns:

§529.2(5) was amended to be accurate by deleting §529.2(5)(A) - (D) and inserting new §529.2(5)(A) - (D) with the correct titles of the Federal Legislation authorizing the construction of the flood control dams being considered by this rule.

§529.2(8) was amended to clarify by restating that the Natural Resources Conservation Service (NRCS) "was" formerly known as the Soil Conservation Service (SCS) rather than defining NRCS as "including the agency" formerly known as SCS.

§529.2(19) was amended to clarify by inserting the words "or Work Plan" after the term Watershed project plan, the term being defined.

§529.3(e) was amended to clarify that reimbursement requests for O&M activities may be paid by the State Board up to 100-percent if the flood control dam on which the activities were performed is a part of a watershed project where the original O&M agreement did not include at least one sponsor empowered by the State of Texas to levy taxes, rather than saying watershed projects that did not include an O&M with at least on sponsor empowered by the State of Texas to levy taxes on June 19, 2009.

The new rules are adopted under the Agriculture Code of Texas, title 7, Chapter 201, §201.020, which authorizes the State board to adopt rules that are necessary for the performance of its functions under the Agriculture Code.

§529.1. Statutory Authority and Policy Statement.

Pursuant to §201.001(d), Agriculture Code, the Texas State Soil and Water Conservation Board is designated by the Texas Legislature as the state agency responsible for conserving soil and related resources of this state. Within this context, the State Board is charged with controlling and preventing soil erosion, controlling floods, preventing the impairment of dams and reservoirs, assisting in maintaining the navigability of rivers and harbors, and thereby protecting and promoting the health, safety, and general welfare of the people of this state. Consistent with this authority, it is the policy of the Texas State Soil and Water Conservation Board to administer a grant program through local soil and water conservation districts that provides financial assistance for operation and maintenance activities on United States Department of Agriculture Natural Resources Conservation Service assisted flood control dams. In accordance with this purpose, §§529.1 - 529.8 of this subchapter (relating to Operation and Maintenance Grant Program) are adopted.

§529.2. Definitions.

The following words and terms, when used in this chapter, have the following meanings:

(1) Allocation--An amount of funding for a fiscal year specified and withheld by the State Board for an eligible soil and water conservation district for the reimbursement of operation and maintenance activities on flood control dams.

(2) Biennium--The period of time beginning September 1 of every odd numbered year and ending on August 31 twenty-four months later; a biennium includes two fiscal years as defined by this subchapter.

(3) Eligible soil and water conservation district (SWCD)--An SWCD that is listed as a sponsor on an O&M agreement for a watershed project.

(4) Fiscal year--The 12-month period of time beginning September 1 of a year and ending on August 31 of the following year.

(5) Flood control dam--Floodwater retarding structures, also commonly referred to as flood control structures, watershed structures, flood prevention or "FP" sites, and certain grade stabilization structures included in the National Inventory of Dams built by the federal government under one of the four following federal authorizations:

(A) Public Law 78-534, Section 13 of the Flood Control Act of 1944;

(B) Public Law 156-67, the pilot watershed program authorized under the heading Flood Prevention of the Department of Agriculture Appropriation Act of 1954;

(C) Public Law 83-566, the Watershed Protection and Flood Prevention Act of 1954; and

(D) Subtitle H of Title XV of the Agriculture and Flood Act of 1981, commonly known as the Resource Conservation and Development Program.

(6) In-kind match--Non-monetary contributions of services, equipment, or other items of value reported to the State Board by eligible SWCDs for the purpose of satisfying all or a portion of a non-state funded matching requirement for reimbursement of an O&M activity. In-kind match may not be qualified if the source is contributing the in-kind match because it was enabled to do so directly through state appropriations.

(7) National Inventory of Dams--The U.S. Army Corps of Engineers' list of dams first authorized by the National Dam Inspection Act (Public Law 92-367) of 1972.

(8) Natural Resources Conservation Service (NRCS)--An agency of the United States Department of Agriculture which was formerly known as the Soil Conservation Service.

(9) Operation and maintenance (O&M)--The act of performing a specific set of activities associated with maintaining optimal physical conditions and functioning of a flood control dam. O&M is not an activity defined as structural repair. The State Board may adopt technical standards, as defined by this subchapter, for certain O&M activities which must be met prior to reimbursement being approved. Specific O&M activities include:

(A) removal of woody brush or other undesirable vegetation from dam embankments, spillways, and plunge basins;

(B) fence and/or gate installation to prevent the grazing of desirable vegetation and/or surface disturbance of dam embankments, spillways, and plunge basins;

(C) fence and/or gate repair to prevent the grazing of desirable vegetation and/or surface disturbance of dam embankments, spillways, and plunge basins;

(D) fence and/or gate removal for the purpose of installing new fencing and/or gate(s) to prevent grazing of desirable vegetation and/or surface disturbance of dam embankments, spillways, and plunge basins;

(E) establishment of desirable vegetation, including the fertilization of existing desirable vegetation, intended to stabilize the surface of dam embankments and spillways;

(F) repairing soil erosion damage on dam embankments and spillways resulting from lack of vegetative cover;

(G) clearing debris from principal and auxiliary spillway inlets;

(H) maintenance of and/or replacement of valves and trash guards;

(I) replacement of gate valve and stem on principal spillway;

(J) minor earth shaping and establishment of vegetation to repair a slope slide on a dam embankment;

(K) repair of wave erosion requiring minor earthwork and establishment of vegetation;

(L) repair of minor erosion from livestock and wildlife trailing on dam embankments or spillways;

(M) repair of erosion from vehicles on dam embankments or spillways;

(N) replacement of deteriorated corrugated metal pipe ends (tail pipes);

(O) repair of erosion in auxiliary (emergency) spillway from minor storm damage or livestock/wildlife trailing; and

(P) any other activity approved by the State Board at their discretion if it is not defined as structural repair in this chapter; activities in this category must be approved by the State Board prior to performance of the activity to ensure reimbursement.

(10) O&M agreement--A written agreement pertaining to a specific flood control dam or dams within a watershed project, taking into consideration the powers and jurisdictional boundaries of sponsors, that specifies each sponsors' responsibilities for financing and performing O&M inspections and activities.

(11) O&M technical standard--An established norm or requirement in the form of a formal document establishing uniform engineering or technical criteria, methods, processes, and/or practices adopted by the State Board for a specific O&M activity. O&M activities for which the State Board has adopted an O&M technical standard must be performed in accordance with the technical standard prior to reimbursement being made.

(12) Reimbursement request--A request for reimbursement of a percentage of the costs associated with the performance of O&M activities.

(13) Soil and water conservation district (SWCD)--A governmental subdivision of this state and a public body corporate and politic, organized pursuant to Chapter 201 of the Agriculture Code.

(14) Sponsor--Any entity or individual that is a signatory to a watershed project plan, watershed agreement, or O&M agreement.

(15) State Board--The Texas State Soil and Water Conservation Board organized pursuant to Chapter 201 of the Agriculture Code.

(16) Texas Commission on Environmental Quality--The state agency created under Title 2, Subtitle A, Chapter 5 of the Texas Water Code (formerly the Texas Natural Resource Conservation Commission).

(17) Watershed agreement--A legal document that records the responsibilities of the sponsors and NRCS for implementing a watershed project plan relating to contributions of funding, the acquisition of land rights, construction, O&M, project administration, management of affected lands, as well as responsibilities regarding permitting and water and mineral rights.

(18) Watershed project--A geographic area delineated by the boundaries of a watershed within which a series of flood control dams have been constructed or are planned to be constructed by NRCS to prevent and/or minimize floodwater damage to lives and property.

(19) Watershed project plan (or Work Plan)--A plan developed by local sponsors with the assistance of NRCS for a watershed project that includes descriptions of the watershed, problems to be addressed, works of improvement to be installed, costs of installed works, project benefits, cost-benefit analyses, financing information, and general requirements for O&M.

§529.3. Administration of Funds.

(a) General Fiscal Provisions. Eligible SWCDs must comply with any applicable provisions within the *Manual of Fiscal Operations for Soil and Water Conservation Districts* at all times. The *Manual of Fiscal Operations for Soil and Water Conservation Districts* is approved and periodically amended by the State Board and is available on

the State Board's website; hardcopies of this manual may be requested from the State Board.

(b) Sources of funding. Any funding available for O&M grants during a fiscal year will be determined by the State Board out of general revenue appropriated by the Texas Legislature. The amount of funding available for O&M grants will be determined by the State Board for a fiscal year. Other sources of funding may be used for O&M grants by the State Board if applicable and when available. Funds will be allocated by the State Board to eligible SWCDs for use during the fiscal year for which the funds were appropriated, unless the State Board has executed a contract with an eligible SWCD that allows for liquidation of the obligated amount over a period of time that extends beyond the fiscal year.

(c) Allocation and reimbursement. Funds will be administered through an allocation and reimbursement process as specified in §529.5 of this subchapter (relating to Allocation of Funds) and §529.7 of this subchapter (relating to Reimbursements and Reporting Non-State Funded Match).

(d) Activities eligible for reimbursement. Funds may only be used to reimburse eligible SWCDs and subcontractors of their choosing for costs associated with the performance of O&M activities as defined by this subchapter on flood control dams. Eligible SWCDs desiring reimbursement of any activity not specifically listed as an O&M activity in §529.2(9) of this subchapter must contact the State Board prior to initiating the activity for approval. Other activities for which the State Board may reimburse eligible SWCDs and subcontractors include the purchasing of pesticides by the eligible SWCD for use by the SWCD or a subcontractor during the course of carrying out an O&M activity, the purchasing of easements, the administrative costs of eligible SWCDs associated with O&M activities, and any other O&M-related activities that are approved by the State Board at their discretion.

(e) Non-state funded matching requirement. All O&M reimbursement requests will be paid by the State Board at 90-percent of the total reimbursement request amount. Ten (10) percent of the total reimbursement request amount must be paid through funds not originating from state appropriations. Reimbursement requests for O&M activities may be paid by the State Board up to 100-percent if the flood control dam on which the activities were performed is a part of a watershed project where the original O&M agreement did not include at least one sponsor empowered by the State of Texas to levy taxes.

(f) In-kind match contributions. All or a portion of the non-state funded matching requirement may be satisfied through "in-kind" contributions. In-kind contributions must be reported to the State Board on a reimbursement request form at the time the form is submitted to the State Board. In-kind match performed prior to the start of the current biennium is not eligible for use as non-state funded match. In-kind match reported in excess of the required amount for a single reimbursement request may be recorded by the State Board for use by eligible SWCDs on future reimbursement requests within the current biennium. In-kind match may not be carried forward into a new biennium. All aspects of reimbursement requests, including the legitimacy of reported in-kind match, are subject to review and approval by the State Board. In-kind match will be reported at rates approved by the State Board.

(g) Standardized rates for in-kind contributions of O&M activities. A standardized set of rates for certain O&M activities will be adopted by the State Board for use in determining the value of in-kind contributions. Standardized rates adopted by the State Board will be made available to eligible SWCDs upon notification of allocation.

(h) Administrative costs of eligible SWCDs. Eligible SWCDs may request a payment for compensation of their administrative costs in an amount not to exceed five (5) percent of the reimbursed amount. Payments for administrative costs must be reported on a reimbursement request at the time of its submission to the State Board.

(i) Utilizing O&M grant funds for structural repair on flood control dams. The State Board, at their discretion, may consider approving the use of O&M funds for structural repair. All requests to use O&M grant funds for structural repair must specify the type of structural repair intended to be performed and must be submitted in writing to the State Board. All requests to use O&M grant funds for structural repair are subject to review and approval by the State Board. Copies of quotations and bid documents must be provided to the State Board upon request. If concurrence from the NRCS and/or TCEQ must be obtained for the specific repair activity, such concurrence must be obtained and provided in writing to the State Board prior to submitting the request for the use of O&M grant funds for structural repair.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 24, 2009.

TRD-200904257
Mel Davis
Special Projects Coordinator
Texas State Soil and Water Conservation Board
Effective date: October 14, 2009
Proposal publication date: July 31, 2009
For further information, please call: (254) 773-2250 x252

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TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 3. TAX ADMINISTRATION
SUBCHAPTER F. MOTOR VEHICLE SALES TAX

34 TAC §3.61

The Comptroller of Public Accounts adopts amendments to §3.61, concerning credit for motor vehicle sales or use tax paid to another state, without changes to the proposed text as published in the August 7, 2009, issue of the *Texas Register* (34 TexReg 5323).

This rule is amended to reflect changes to emission surcharge provisions per House Bill 1365, 78th Legislature, 2003. The Texas motor vehicle sales or use tax credit for sales or use tax legally imposed and paid to another state does not apply to the Texas Emissions Reduction Plan surcharge.

This rule is also amended to clarify that the sales or use tax paid to another state includes any political subdivision of that state, but does not include any other special taxes, such as a foreign country's tax, custom or duty tax, or import tax. It also is amended to indicate what documentation is required by the purchaser to claim the credit.

No comments were received regarding adoption of the amendments.

The amendments are adopted under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

This amended section implements Tax Code, §152.003 and §152.0215.

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 September 23, 2009.

TRD-200904248
Martin Cherry
General Counsel
Comptroller of Public Accounts
Effective date: October 13, 2009
Proposal publication date: August 7, 2009
For further information, please call: (512) 475-0387

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34 TAC §3.68

The Comptroller of Public Accounts adopts an amendment to §3.68, concerning United States and foreign military personnel stationed in Texas, without changes to the proposed text as published in the August 7, 2009, issue of the *Texas Register* (34 TexReg 5323).

This amendment implements House Bill 481, 80th Legislature, 2007, which added Transportation Code, §520.031(d), to allow a title transferee who is an active duty member of the military or National Guard up to 60 days, rather than the standard 20 days, to register a used motor vehicle with the county tax assessor-collector.

No comments were received regarding adoption of the amendment.

This amendment is adopted under Tax Code, §111.002 and §111.0022, which provide 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 amendment implements Transportation Code, §520.031(d), and Tax Code, Chapter 152.

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 September 23, 2009.

TRD-200904249
Martin Cherry
General Counsel
Comptroller of Public Accounts
Effective date: October 13, 2009
Proposal publication date: August 7, 2009
For further information, please call: (512) 475-0387

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PART 5. TEXAS COUNTY AND DISTRICT RETIREMENT SYSTEM

CHAPTER 103. CALCULATIONS OR TYPES OF BENEFITS

34 TAC §103.10

The Texas County and District Retirement System adopts an amendment to §103.10, concerning the distribution of a survivor benefit under Government Code, §844.407. This amendment is adopted without changes to the proposed text as published in the August 14, 2009, issue of the *Texas Register* (34 TexReg 5488).

The adopted amendment changed the benefit to be actuarially equivalent to the deceased member's accrued benefit and authorized the board to prescribe the forms and manner in which the benefit may be paid. Under this authority the board authorized certain payments to be made as lump sums.

No comments were received regarding the adoption of this amendment.

The amendment is adopted 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, and Government Code, §844.407(d) which gives the board authority to specify the form and manner in which a survivor annuity may be paid.

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 September 21, 2009.

TRD-200904209
W. James Nabholz, III
General Counsel
Texas County and District Retirement System
Effective date: October 11, 2009
Proposal publication date: August 14, 2009
For further information, please call: (512) 637-3355

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 1. TEXAS DEPARTMENT OF PUBLIC SAFETY

CHAPTER 28. DNA, CODIS, FORENSIC ANALYSIS, AND CRIME LABORATORIES

SUBCHAPTER F. CODIS USER LABORATORIES

37 TAC §28.93

The Texas Department of Public Safety adopts an amendment to §28.93, concerning Policy, Procedure, and Rule Compliance,

without changes to the proposed text as published in the July 10, 2009, issue of the *Texas Register* (34 TexReg 4626).

Adoption of amendment to §28.93 is necessary in order to reduce the number of documents that DNA laboratories are required to submit to the Department of Public Safety (DPS) every two years. DPS does not need the fifty plus page Quality Assurance Audit Document, but merely needs the final determination report by the Federal Bureau of Investigation that the DNA laboratory audited met all of the quality assurance requirements for forensic DNA testing laboratories.

No comments were received regarding adoption of the amendment.

The amendment is adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; and Texas Government Code, §411.0205(b)(1), which states the director by rule shall establish an accreditation process for crime laboratories and other entities conducting forensic analyses of physical evidence for use in criminal proceedings.

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 September 25, 2009.

TRD-200904268
Steven C. McCraw
Director
Texas Department of Public Safety
Effective date: October 15, 2009
Proposal publication date: July 10, 2009
For further information, please call: (512) 424-2135

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PART 11. TEXAS JUVENILE PROBATION COMMISSION

CHAPTER 341. TEXAS JUVENILE PROBATION COMMISSION STANDARDS

SUBCHAPTER D. TREATMENT AND SAFETY

37 TAC §341.15

The Texas Juvenile Probation Commission (TJPC) adopts the repeal of §341.15, relating to treatment and safety. The repeal is adopted without changes to the proposal as published in the June 19, 2009, issue of the *Texas Register* (34 TexReg 4080) and will not be republished.

TJPC adopts this repeal in an effort not to overlap with the recent adoption of new sections in Chapters 350 and 358, relating to abuse, neglect and exploitation investigations.

No public comment was received regarding the proposal.

This repeal is adopted under §141.042 of the Texas Human Resource Code, which provides the Texas Juvenile Probation Commission with rulemaking authority.

No other code or article is affected by this 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 September 28, 2009.

TRD-200904376
Lisa A. Capers
Deputy Executive Director and General Counsel
Texas Juvenile Probation Commission
Effective date: October 18, 2009
Proposal publication date: June 19, 2009
For further information, please call: (512) 694-7894

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CHAPTER 343. STANDARDS FOR SECURE JUVENILE PRE-ADJUDICATION DETENTION AND POST-ADJUDICATION CORRECTIONAL FACILITIES

The Texas Juvenile Probation Commission (TJPC) adopts the repeal of Chapter 343, §§343.1 - 343.17, 343.30 - 343.37, 343.45 - 343.52, and 343.60 - 343.68, relating to standards for secure juvenile pre-adjudication detention and post-adjudication correctional facilities. The repeal is adopted without changes to the proposal as published in the June 19, 2009, issue of the *Texas Register* (34 TexReg 4081) and will not be republished.

TJPC adopts this repeal in an effort to adopt new sections that provide structural and substantive changes from the current standards.

No public comment was received regarding the proposal.

SUBCHAPTER A. DEFINITIONS

37 TAC §343.1

The repeal is adopted under §141.042 of the Texas Human Resource Code, which provides the Texas Juvenile Probation Commission with rulemaking authority.

No other code or article is affected by this 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 September 28, 2009.

TRD-200904380
Lisa A. Capers
Deputy Executive Director and General Counsel
Texas Juvenile Probation Commission
Effective date: January 1, 2010
Proposal publication date: June 19, 2009
For further information, please call: (512) 424-6710

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SUBCHAPTER B. PRE-ADJUDICATION AND POST-ADJUDICATION SECURE FACILITY STANDARDS

37 TAC §§343.2 - 343.17

The repeal is adopted under §141.042 of the Texas Human Resource Code, which provides the Texas Juvenile Probation Commission with rulemaking authority.

No other code or article is affected by this 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 September 28, 2009.

TRD-200904381
Lisa A. Capers
Deputy Executive Director and General Counsel
Texas Juvenile Probation Commission
Effective date: January 1, 2010
Proposal publication date: June 19, 2009
For further information, please call: (512) 424-6710

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SUBCHAPTER C. PRE-ADJUDICATION SECURE DETENTION FACILITY STANDARDS

37 TAC §§343.30 - 343.37

The repeal is adopted under §141.042 of the Texas Human Resource Code, which provides the Texas Juvenile Probation Commission with rulemaking authority.

No other code or article is affected by this 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 September 28, 2009.

TRD-200904382
Lisa A. Capers
Deputy Executive Director and General Counsel
Texas Juvenile Probation Commission
Effective date: January 1, 2010
Proposal publication date: June 19, 2009
For further information, please call: (512) 424-6710

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SUBCHAPTER D. POST-ADJUDICATION SECURE CORRECTIONAL FACILITY STANDARDS

37 TAC §§343.45 - 343.52

The repeal is adopted under §141.042 of the Texas Human Resource Code, which provides the Texas Juvenile Probation Commission with rulemaking authority.

No other code or article is affected by this 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 September 28, 2009.

TRD-200904383
Lisa A. Capers
Deputy Executive Director and General Counsel
Texas Juvenile Probation Commission
Effective date: January 1, 2010
Proposal publication date: June 19, 2009
For further information, please call: (512) 424-6710

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SUBCHAPTER E. RESTRAINTS

37 TAC §§343.60 - 343.68

The repeal is adopted under §141.042 of the Texas Human Resource Code, which provides the Texas Juvenile Probation Commission with rulemaking authority.

No other code or article is affected by this 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 September 28, 2009.

TRD-200904384
Lisa A. Capers
Deputy Executive Director and General Counsel
Texas Juvenile Probation Commission
Effective date: January 1, 2010
Proposal publication date: June 19, 2009
For further information, please call: (512) 424-6710

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CHAPTER 343. SECURE JUVENILE PRE-ADJUDICATION DETENTION AND POST-ADJUDICATION CORRECTIONAL FACILITIES

The Texas Juvenile Probation Commission (TJPC or Commission) adopts new Chapter 343 §§343.100, 343.102, 343.104, 343.106, 343.200, 343.202, 343.204, 343.206, 343.208, 343.210, 343.212, 343.214, 343.218, 343.220, 343.222, 343.224, 343.226, 343.228, 343.230, 343.232, 343.234, 343.236, 343.238, 343.240, 343.242, 343.244, 343.246, 343.248 - 343.250, 343.260, 343.262, 343.264, 343.266, 343.268, 343.270, 343.272, 343.274, 343.276, 343.278, 343.280, 343.282, 343.286, 343.288, 343.290, 343.300, 343.302, 343.304, 343.306, 343.308, 343.310, 343.312, 343.314, 343.316, 343.320, 343.322, 343.324, 343.326, 343.328, 343.330, 343.332, 343.334, 343.336, 343.338, 343.340, 343.342, 343.346, 343.348, 343.350, 343.352, 343.354, 343.356, 343.358, 343.360, 343.362, 343.364, 343.366, 343.368, 343.370, 343.372, 343.374, 343.376, 343.378, 343.380, 343.382, 343.384, 343.386, 343.400, 343.402, 343.404, 343.406, 343.408, 343.410, 343.412, 343.414, 343.416, 343.418, 343.420, 343.422, 343.424, 343.426, 343.428, 343.430, 343.432, 343.434, 343.436, 343.438, 343.440, 343.442, 343.444, 343.446, 343.448,

343.450, 343.452, 343.454, 343.456, 343.458, 343.460, 343.462, 343.464, 343.468, 343.470, 343.472, 343.474, 343.476, 343.478, 343.480, 343.482, 343.484, 343.486, 343.488 - 343.494, 343.496, 343.498, 343.600, 343.602, 343.604, 343.606, 343.608, 343.610, 343.612, 343.614, 343.616, 343.618, 343.620, 343.622, 343.624, 343.626, 343.628, 343.630, 343.632, 343.634, 343.636, 343.638, 343.640, 343.642, 343.644, 343.646, 343.648, 343.650, 343.652, 343.654, 343.656, 343.658, 343.660, 343.662, 343.664, 343.666, 343.668, 343.670 - 343.678, 343.680, 343.686, 343.688, 343.690, 343.700, 343.702, 343.704, 343.706, 343.708, 343.710, 343.712, 343.800, 343.802, 343.804, 343.806, 343.808, 343.810, 343.812, 343.816, and 343.818, relating to standards for secure juvenile pre-adjudication detention and post-adjudication correctional facilities. All sections, except §§343.100, 343.208, 343.288, 343.336, 343.338, 343.406, 343.446, 343.470, 343.600, 343.604, 343.620, 343.632, 343.660, 343.671, 343.800, 343.816, and 343.818, are adopted without changes to the proposed text as published in the June 19, 2009, issue of the *Texas Register* (34 TexReg 4082) and will not be republished. Sections §§343.100, 343.208, 343.288, 343.336, 343.338, 343.406, 343.446, 343.470, 343.600, 343.604, 343.620, 343.632, 343.660, 343.671, 343.800, 343.816, and 343.818 are adopted with changes to the proposed text and will be republished.

TJPC adopts these rules in an effort to ensure that the minimum standards for secure pre- and post-adjudication juvenile facilities reflect practices specific to federal constitutional requirements, relevant federal statutes, and national standards and related best practices models. Additionally, these standards are adopted to ensure that the Texas Juvenile Probation Commission's related standards monitoring expectations are clearly identified within the context of the Texas Administrative Code.

The Commission received public comment from Harris County recommending that in §343.208, the Texas Administrative Code Chapter 341 reference be changed to Chapter 345 to accurately reflect the citation of the Code of Ethic and Code of Conduct. The Commission revised the standard to reflect this recommendation.

The Commission received public comment from Harris County indicating that §343.260 did not reflect a statement made at a previous workgroup meeting. There was no recommendation; therefore, no changes were made to the standard.

The Commission received public comment from Harris County asking for clarification of §343.274 about the utilization of an informal process to resolve resident concerns as it relates to the resident discipline plan. The Commission explained that utilization is an option, however, if such a process is employed, that if follow the parameters set forth in this standard. There was no change to the standard.

The Commission received public comment from Harris County recommending that the classification assessment in §343.470 not be scored as was mentioned in a previous workgroup. The Commission revised the standard to exclude the score from the language.

The Commission received public comment from Harris County asking if "dayrooms" mentioned in §343.600 are considered appropriate for indoor exercise. The Commission confirmed that a dayroom can be used for that purpose. There was no recommendation; therefore, no changes were made to the standard.

The Commission received public comment from Grayson County recommending that a Licensed Vocational Nurse be added to the list of health care professionals in §343.100(28) that may perform medical treatment as well as clarify if an EMT, paramedic or nurse practitioner can order medical treatment. The Commission revised the standard to reflect this recommendation.

The Commission received a letter from the law firm of Ballard, Sparh, Andrews and Ingersoll insisting that TJPC no longer post the Texas Common Application form as their client holds a registered trademark for the name "Common Application." The Commission removed reference to this title and replaced it with the criteria required by the document formerly entitled the Texas Common Application.

SUBCHAPTER A. DEFINITIONS AND APPLICABILITY

37 TAC §§343.100, 343.102, 343.104, 343.106

The new sections are adopted under §141.042 of the Texas Human Resource Code, which provides the Texas Juvenile Probation Commission with rulemaking authority.

No other code or article is affected by this adoption.

§343.100. Definitions.

The following words and terms when used in this chapter shall have the following meanings, unless otherwise expressly defined within the chapter.

(1) Behavioral Health Assessment--A mental health assessment conducted by a Masters-level mental health professional with Texas State licensure (i.e., LPC, LMFT and LCSW) or a mental health paraprofessional that includes information from testing, review of background information and clinical interview(s). See the Commission's commentary of §343.600 of this chapter for a complete listing of the specific elements required to be addressed in this assessment.

(2) Chief Administrative Officer--Regardless of title, the person hired by a juvenile board who is responsible for oversight of the day-to-day operations of a juvenile probation department for a single county or a multi-county judicial district.

(3) Commission--The Texas Juvenile Probation Commission (TJPC).

(4) Common Activity Area--Area inside the facility to which residents have access and in which activities are conducted. This area includes, but is not limited to dayrooms, covered recreation areas, recreation rooms, education rooms, counseling rooms, testing rooms, visitation areas, and medical or dental rooms.

(5) Contraband--Any item not issued to employees for the performance of their duties and which employees have not obtained supervisory approval to possess. Contraband also includes any item given to a resident by an employee or other individual, which a resident is not authorized to possess or use. Specific items of contraband include, but are not limited to:

(A) firearms;

(B) knives;

(C) ammunition;

(D) drugs;

(E) intoxicants;

(F) pornography; and

(G) any unauthorized written or verbal communication brought into or taken from an institution for a resident, former resident, associate of or family members of a resident.

(6) Date and Time of Admission--The date and time a juvenile has been authorized for detention in a secure pre-adjudication detention facility by an individual who is authorized by the juvenile board in accordance with §53.02 of the Texas Family Code. If the decision to detain was made prior to the juvenile's arrival to the facility, the date and time of admission shall be the same as the date and time of entry.

(7) Date and Time of Entry--The date and time a juvenile has been presented by law enforcement or county juvenile probation officer to a pre-adjudication secure detention facility for processing and authorization of detention.

(8) Design Capacity--The number of people that can safely occupy a building or space as determined by the current architectural design and any building modifications, licensing, accreditation, regulatory authorities, and applicable building codes.

(9) Designee--The person authorized to perform a specific duty as assigned by the facility administrator.

(10) Detention--The temporary secure custody of a child as defined in and authorized by Title 3 of the Texas Family Code.

(11) Disciplinary Seclusion--The separation of a resident from other residents for disciplinary reasons, and the placement of the resident alone in an area from which egress is prevented for more than 90 minutes.

(12) Facility Administrator--The individual designated by the chief administrative officer or governing board of the facility who has the ultimate responsibility for managing and operating the facility. This definition includes the certified juvenile supervision officer who is designated in writing as the acting facility administrator during the absence of the facility administrator.

(13) Furlough--A period of time during which a resident is allowed to leave the facility premises and go into the community unsupervised for various purposes consistent with public interest.

(14) Hazardous Material--Any substance which is explosive, flammable, combustible, poisonous, corrosive, irritating or otherwise harmful and is likely to cause injury or death.

(15) Health Administrator--A person, who by virtue of education, experience or certification, is capable of assuming responsibility for arranging all levels of health care and ensuring quality and accessible health services for juveniles.

(16) Health Assessment--The process whereby the health status of an individual is evaluated, which may include questioning the patient regarding symptoms.

(17) Health Care Professional--A term that includes physicians, physician assistants, nurses, nurse practitioners, dentists, medical and nursing care assistants, emergency medical technicians (EMT), and others who, by virtue of their education, credentials and experience, are permitted by law to evaluate and care for patients.

(18) Health Service Authority--The agency, organization, entity or individual responsible for consulting and collaborating with the facility administrator and/or the health services coordinator to ensure a coordinated and adequate health care system is available to residents of the facility.

(19) Housing Area--An area within a secure juvenile facility that contains any single occupancy housing unit or units (SOHU) and/or multiple occupancy housing unit or units (MOHU).

(20) Housing Unit--A unit within the housing area that may be designed and constructed as either a single occupancy housing unit (SOHU) or a multiple occupancy housing unit (MOHU).

(21) Individual Resident Sleeping Quarter--A cell or room designed and constructed to securely house one resident.

(22) Intra-Jurisdictional Custodial Transfer--The transfer of a resident from a pre-adjudication secure detention facility into a post-adjudication secure correctional facility under the same administrative authority.

(23) Isolation--The separation of a resident from other residents and the placement of the resident alone in an area from which egress is prevented for assessment, medical, or protective purposes.

(24) Juvenile--A person who is under the jurisdiction of the juvenile court, confined in a juvenile justice facility, or participating in a juvenile justice program administered or operated under the authority of the juvenile board.

(25) Juvenile Supervision Officer--A person whose primary responsibility and essential function is the supervision of juveniles in a juvenile justice facility or a juvenile justice program operated by or under contract with the juvenile board.

(26) Material Safety Data Sheet (MSDS)--A document prepared by the supplier or manufacturer of a product clearly stating its hazardous nature, ingredients, precautions to follow, health effects and safe handling/storage information.

(27) Medical Entity--An agency or organization that is primarily composed of health care professionals.

(28) Medical Treatment--Medical care, including diagnostic testing (e.g., x-rays, laboratory testing, etc.), performed or ordered by a physician, physician assistant or performed by a licensed nurse practitioner, emergency medical technician (EMT), paramedic or licensed vocational nurse (LVN) according to their respective licensure.

(29) Mental Health Paraprofessional--An individual who is able to perform tasks requiring significant knowledge, but without having the license or certification to perform at a professional level, including students, interns, fellows, post-doctorates, or other approved students in an official training program in psychology or a related field under the supervision of an authorized mental health professional.

(30) Mental Health Professional--An individual who has met the educational requirements and is licensed or certified by one or more of the following governmental entities:

(A) the Texas State Board of Examiners of Psychologists;

(B) the Texas State Board of Examiners of Professional Counselors;

(C) the Texas State Board of Examiners of Marriage and Family Therapists;

(D) the Texas Department of State Health Services;

(E) the Texas Medical Board;

(F) the Texas State Board of Social Worker Examiners provided that the licensure is Licensed Clinical Social Work; or

(G) the Texas State Board of Social Worker Examiners provided that the licensure is Licensed Master Social Work accompanied with written recognition by the board for independent practice.

(31) Mental Health Screening--A process that includes a series of questions that are designed to identify a resident who is at an increased risk of having mental health disorders that warrant attention and a professional review.

(32) Military-Style Program--A program or component in a post-adjudication secure correctional facility for juvenile offenders that features military-style discipline and structure as an integral part of its treatment and rehabilitation program.

(33) Multiple Occupancy Housing Unit (MOHU)--A housing unit designed and constructed for multiple occupancy sleeping which is self-contained and includes appropriate sleeping, sanitation, and hygiene equipment or fixtures.

(34) Non-Program Hours--Time period when all scheduled resident activity for the entire resident population in the facility has ceased for the day.

(35) Physical Training Program--Any program that requires participants to engage in and perform structured physical training and activity. This does not include recreational team activities or activities related to the educational curriculum (i.e., physical education).

(36) Positive Screening--A scored result of a completed mental health screening instrument (i.e., MAYSI-2) recommending services requiring a primary service by a mental health professional as described on the MAYSI-2 reference card.

(37) Post-Adjudication Secure Correctional Facility ("Facility" or "Secure Facility")--A secure facility administered by a governing board that includes construction and fixtures designed to physically restrict the movements and activities of the residents and is intended for the treatment and rehabilitation of youth who have been adjudicated. Subchapters A, B, D and E of this chapter apply to all post-adjudication secure correctional facilities. A post-adjudication secure correctional facility does not include any non-secure residential program operating under the authority of a governing board.

(38) Pre-Adjudication Secure Detention Facility ("Facility" or "Secure Facility")--A secure facility administered by a governing board that includes construction and fixtures designed to physically restrict the movements and activities of juveniles or other individuals held in lawful custody in the facility and is used for the temporary placement of any juvenile or other individual who is accused of having committed an offense and is awaiting court action, an administrative hearing, or other transfer action. Subchapters A, B, C and E of this chapter apply to all pre-adjudication secure detention facilities. A pre-adjudication secure detention facility does not include a short-term detention facility as defined by §51.12(j) of the Texas Family Code.

(39) Premises--A building(s) together with its grounds or other appurtenances.

(40) Primary Control Room--A restricted or secure area from which entrance into and exit from a secure facility is controlled. The primary control room also contains the emergency, monitoring, and communications systems and is staffed 24 hours each day that residents are in the facility.

(41) Professionals--The following persons are considered professionals for limited purposes:

(A) teachers certified as educators by the State Board for Educator Certification including teachers certified by the State Board for Educator Certification with provisional or emergency certifications;

(B) educational aides or paraprofessionals certified by the State Board for Educator Certification;

(C) health care professionals licensed or certified by:

(i) the Texas Board of Nursing;

(ii) the Texas Medical Board;

(iii) the Texas Physician Assistant Board;

(iv) the Texas Department of State Health Services; or

(v) the Texas State Board of Dental Examiners;

(D) mental health professionals as defined in paragraph (30) of this section;

(E) qualified mental health professional as defined in paragraph (44) of this section;

(F) mental health paraprofessional as defined in paragraph (29) of this section;

(G) social workers licensed by the Texas Board of Social Worker Examiners;

(H) juvenile probation officers certified by the Texas Juvenile Probation Commission; and

(I) commissioned law enforcement personnel.

(42) Protective Isolation--The exclusion of a threatened resident from the group by placing the resident in an individual room that minimizes contact with the residents from a specific group.

(43) Program Hours--The time period of no less than ten hours when the resident population has scheduled activities and any shift changes that occur during the time period when the resident population has scheduled activities.

(44) Qualified Mental Health Professional--An individual employed by the local mental health authority or an entity who contracts as a service provider with the local mental health authority who meets the guidelines of the Texas Department of State Health Services.

(45) Rated Capacity--The maximum number of beds available in a facility that were architecturally designed as a housing unit.

(46) Resident--A juvenile or other individual that has been lawfully admitted into a juvenile pre-adjudication secure detention facility or a post-adjudication secure correctional facility.

(47) Room Restriction--The separation of a resident from other residents for behavior modification, and the placement of the resident alone in an area from which egress is prevented for 90 minutes or less.

(48) Secondary Screening--A triage process that is brief and designed to clarify if a resident is in need of intervention or a more comprehensive assessment and what type of intervention or assessment is needed.

(49) Serious Mental Illness--A professional diagnosis of the following disorders: psychoses, schizophrenia, bipolar with psychotic features, depression with psychotic features, severe post-traumatic stress disorder, and schizoaffective disorders.

(50) Single Occupancy Housing Unit (SOHU)--A housing unit designed and constructed with separate and secure individual resident sleeping quarters and includes appropriate sleeping, sanitation, and hygiene equipment or fixtures.

(51) Standard Screening Instrument--An instrument approved by the Commission that screens the juvenile's needs in the area of mental health.

(52) Volunteer--Individuals agreeing to perform services without compensation, who have regular or periodic supervised contact or unsupervised contact with juveniles under the direction of the pre-adjudication and post-adjudication secure juvenile facility.

(53) Youth-on-Youth Sexual Conduct--Two or more juveniles, regardless of age, who engage in deviate sexual intercourse, sexual contact, sexual intercourse, or sexual performance as those terms are defined in subparagraphs (A) - (D) of this paragraph:

(A) "Deviate sexual intercourse" means:

(i) any contact between any part of the genitals of one person and the mouth or anus of another person; or

(ii) the penetration of the genitals or the anus of another person with an object.

(B) "Sexual contact" means the following acts, if committed with the intent to arouse or gratify the sexual desire of any person:

(i) any touching by a person, including touching through clothing, of the anus, breast, or any part of the genitals of a person; or

(ii) any touching of any part of the body of a person, including touching through clothing, with the anus, breast, or any part of the genitals of a person.

(C) "Sexual intercourse" means any penetration of the female sex organ by the male sex organ.

(D) "Sexual performance" means acts of a sexual or suggestive nature performed in front of one or more persons, including simulated or actual sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse or lewd exhibition of the genitals, the anus, or any portion of the female breast below the top of the areola.

(E) A juvenile may not consent to the acts as defined in this paragraph under any circumstances. Consent may not be implied regardless of the age of the juvenile.

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 September 28, 2009.

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Deputy Executive Director and General Counsel
Texas Juvenile Probation Commission
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For further information, please call: (512) 424-6710

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SUBCHAPTER B. PRE-ADJUDICATION AND POST-ADJUDICATION SECURE FACILITY STANDARDS

37 TAC §§343.200, 343.202, 343.204, 343.206, 343.208, 343.210, 343.212, 343.214, 343.218, 343.220, 343.222, 343.224, 343.226, 343.228, 343.230, 343.232, 343.234, 343.236, 343.238, 343.240, 343.242, 343.244, 343.246, 343.248 - 343.250, 343.260, 343.262, 343.264, 343.266, 343.268, 343.270, 343.272, 343.274, 343.276, 343.278, 343.280, 343.282, 343.286, 343.288, 343.290, 343.300, 343.302, 343.304, 343.306, 343.308, 343.310, 343.312, 343.314, 343.316, 343.320, 343.322, 343.324, 343.326, 343.328, 343.330, 343.332, 343.334, 343.336, 343.338, 343.340, 343.342, 343.346, 343.348, 343.350, 343.352, 343.354, 343.356, 343.358, 343.360, 343.362, 343.364, 343.366, 343.368, 343.370, 343.372, 343.374, 343.376, 343.378, 343.380, 343.382, 343.384, 343.386

The new sections are adopted under §141.042 of the Texas Human Resource Code, which provides the Texas Juvenile Probation Commission with rulemaking authority.

No other code or article is affected by this adoption.

§343.208. Policy, Procedure, and Practice.

The governing board of the facility shall require that written policies and procedures exist governing the operation of all secure juvenile pre-adjudication detention and post-adjudication correctional facilities in the county. The policies, procedures, and practices of the facility shall include:

(1) a policy in the following areas strictly prohibiting:

(A) physical, sexual or emotional abuse, neglect or exploitation of a resident by any individual having contact with a resident of the facility;

(B) youth-on-youth sexual conduct between residents;

(C) violations of the juvenile supervision officer code of ethics and code of conduct as outlined in Chapter 345 of this title;

(D) violations of any professional code of ethics or conduct by any individual providing services to or having contact with residents of the facility; and

(2) a zero tolerance policy and practice regarding sexual abuse in accordance with the Prison Rape Elimination Act of 2003 that provides for administrative and/or criminal disciplinary sanctions.

§343.288. Disciplinary Seclusion.

(a) Disciplinary seclusion may be used when a resident commits a major rule violation or poses an imminent physical threat to self or others.

(b) A written disciplinary report which describes the resident's precipitating behavior and identifies the staff's response shall be completed promptly, but no later than the end of the shift on which the seclusion occurs. The report shall be submitted immediately to the facility administrator for review.

(c) Seclusion in excess of 24 hours shall be approved in writing by the facility administrator. The written approval of the facility administrator shall also be required for each subsequent 24-hour extension.

(d) The seclusion of a resident with a known diagnosis of a serious mental illness requires consultation with a mental health pro-

fessional prior to the authorization of any seclusion beyond a 24-hour period. If the seclusion occurs on a holiday or weekend and no mental health professional is available, the facility administrator or designee shall make a referral to a mental health professional and notify the mental health professional of the seclusion. The facility administrator shall consult with the mental health professional as soon as possible after the referral.

(e) During disciplinary seclusion, a juvenile supervision officer shall personally observe and record the resident's behavior at random intervals not to exceed 15 minutes.

(f) In addition to the requirements enumerated in subsections (a) - (c) and (e) of this section, the facility shall provide the secluded resident the disciplinary review mechanisms contained in §343.278 of this chapter.

§343.336. Prescription Medication.

(a) Use of Medication. Except upon the order of a physician, physician assistant, dentist or nurse practitioner, no stimulant, tranquilizer, or psychotropic drug shall be administered to residents.

(b) Medication Policy. The juvenile board or governing board of the facility shall adopt a policy concerning the administration of medication to residents. The policy shall specify which facility personnel are authorized to administer medication to residents.

(c) Non-prescription Medication. Only staff who have had appropriate training in the administration of medication shall administer non-prescription medication (i.e. over-the-counter medication). The medication shall be administered according to the product instructions unless otherwise instructed by the health services coordinator.

§343.338. Medical Isolation.

Medical isolation may be authorized as a health precaution at the direction of a health care professional or the facility administrator.

(1) The reasons for the medical isolation of a resident shall be documented and a copy placed in the resident's file.

(2) A resident that has been placed on medical isolation by a facility administrator shall be seen by a health care professional within 12 hours of the initial medical isolation.

(3) During medical isolation, a juvenile supervision officer shall personally observe and record the resident's behavior at random intervals not to exceed 15 minutes.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER C. SECURE PRE-ADJUDICATION DETENTION FACILITY STANDARDS

37 TAC §§343.400, 343.402, 343.404, 343.406, 343.408, 343.410, 343.412, 343.414, 343.416, 343.418, 343.420, 343.422, 343.424, 343.426, 343.428, 343.430, 343.432, 343.434, 343.436, 343.438, 343.440, 343.442, 343.444, 343.446, 343.448, 343.450, 343.452, 343.454, 343.456, 343.458, 343.460, 343.462, 343.464, 343.468, 343.470, 343.472, 343.474, 343.476, 343.478, 343.480, 343.482, 343.484, 343.486, 343.488 - 343.494, 343.496, 343.498

The new sections are adopted under §141.042 of the Texas Human Resource Code, which provides the Texas Juvenile Probation Commission with rulemaking authority.

No other code or article is affected by this adoption.

§343.406. Health Screening and Assessment.

(a) Health Screening. A health screening shall be conducted on each resident within two hours of admission by either a health care professional or an individual who has received specific training on administering the facility's health screening. The health screening instrument shall include:

(1) mental health problems;

(2) suicide risk assessment in accordance with the facility's suicide prevention plan;

(3) current state of health including:

(A) allergies;

(B) tuberculosis;

(C) other chronic conditions;

(D) sexually transmitted diseases;

(E) other infectious diseases;

(F) history of gynecological problems or pregnancies; and

(G) recent injuries at or near the time of arrest;

(4) current use of medication including type, dosage, and prescribing physician;

(5) visual observation of teeth and gums and notation of any obvious dental problems;

(6) vision problems;

(7) drug and alcohol use;

(8) physical or developmental disabilities;

(9) evidence of physical trauma;

(10) a determination of the need for medical detoxification from alcohol or other substances or mental health services; and

(11) the resident's weight.

(b) Referral for Assessment. If the health screening indicates that a resident is in need of further medical evaluation, the resident shall be referred to a health care professional for further assessment within 24 hours, excluding holidays and weekends, from the date and time of the completed screening.

(c) Mandatory Health Assessment. If a resident has not had a health assessment by a health care professional within the 12 months immediately preceding admission into the facility, the resident shall be given a health assessment by a health care professional within 30 calendar days after admission into the facility.

(d) Results of Screening and Assessment. The results of the health screening and health assessment shall be communicated to appropriate staff.

(e) Contagious or Infectious Disease. Any finding of the health screening that indicates a significant potential health risk to the staff or residents from a contagious or infectious disease shall be immediately reported to the facility administrator, and the affected resident shall be placed in medical isolation until proper medical clearance is obtained.

§343.446. Exceptions to General Levels of Supervision.
A resident shall be in the constant physical presence of a juvenile supervision officer with the exception of the following:

(1) Small Groups. No more than three residents may be supervised by a professional when the professional is working with the residents in a capacity that relates to the professional's licensure, certification, professional training, or education.

(2) Small Therapeutic Groups. A juvenile supervision officer shall provide constant visual supervision of any small group between four and eight residents when those residents are working with a qualified mental health professional, a mental health paraprofessional, or a mental health professional as defined in §343.100(30) of this chapter.

(3) Visitation. Private visitation between one resident and an attorney, authorized visitor, or clergy does not require the constant physical presence of a juvenile supervision officer.

§343.470. Eligibility Criteria--MOHU.
(a) A formalized and objective written classification assessment shall be completed prior to a resident being assigned to a MOHU. The classification assessment process shall minimally include a review and weighting of the following criteria:

(1) Physical health--A review of all available health documentation in the facility staffs' possession with an emphasis on assessing any diagnosed or suspected infectious or contagious diseases;

(2) Mental health--A review of all available mental health documentation in the facility staffs' possession with an emphasis on assessing mental health or mental illness diagnoses that could be exacerbated by, or that would not be conducive to, multiple occupancy housing settings;

(3) Sexual behavior--An assessment of the resident's potential to be sexually abused by other residents and his or her potential to be sexually abusive;

(4) Aggressive or assaultive behaviors--An assessment of resident's history of, or propensity for, aggressive (both verbal and physical) and assaultive behaviors. This assessment shall minimally include a review of the resident's formal referral history (both alleged and disposed charges) as well as institutional behavior records;

(5) Susceptibility to acts of peer abuse, harassment, and exploitation--This shall minimally include an assessment of a resident's physical stature, emotional maturity, enemies of record, and social functioning information;

(6) Institutional behavior or discipline records--This assessment shall include a review of a resident's behavior records for the current term of detention as well as any available behavior records from previous institutional custody periods provided by the assessing jurisdiction; and

(7) Special needs or circumstances that may compromise the resident's, or other MOHU residents' physical safety and successful service delivery processes.

(b) The completed classification assessment document shall include an objective assessment score or recommendation for or against a MOHU assignment, the date the assessment process was completed, the signature of the person completing the assessment, and the signature of the supervisory-level staff that reviewed and approved the assessment.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER D. SECURE POST-ADJUDICATION CORRECTIONAL FACILITY STANDARDS

37 TAC §§343.600, 343.602, 343.604, 343.606, 343.608, 343.610, 343.612, 343.614, 343.616, 343.618, 343.620, 343.622, 343.624, 343.626, 343.628, 343.630, 343.632, 343.634, 343.636, 343.638, 343.640, 343.642, 343.644, 343.646, 343.648, 343.650, 343.652, 343.654, 343.656, 343.658, 343.660, 343.662, 343.664, 343.666, 343.668, 343.670 - 343.678, 343.680, 343.686, 343.688, 343.690, 343.700, 343.702, 343.704, 343.706, 343.708, 343.710, 343.712

The new sections are adopted under §141.042 of the Texas Human Resource Code, which provides the Texas Juvenile Probation Commission with rulemaking authority.

No other code or article is affected by this adoption.

§343.600. Required Pre-Admission Records.

Prior to a resident's admission, the facility shall receive the following from the referring agency:

(1) except when the facility is operated by the referring agency, a detailed summary of the juvenile's history on the designated form provided by the Commission that includes, but is not limited to the following:

(A) the juvenile's demographic information;

(B) the referring agency's impression of the juvenile;

(C) a description of the juvenile's strengths;

(D) the juvenile's special needs, problems and behaviors;

(E) the juvenile's juvenile justice history;

(F) the juvenile's placement history;

(G) the juvenile's substance abuse history;

(H) the juvenile's history of abuse and neglect;

(I) family or parental involvement with the juvenile and history;

(J) the juvenile's educational history;

(K) a description of the juvenile's physical health and disabilities;

(L) a description of the juvenile's mental health;

(M) the referring agency's recommendation on the level of care;

(N) a copy of the juvenile's birth certificate; and

(O) other pertinent information;

(2) a psychological evaluation, or behavioral health assessment (as defined in the CRM), completed within 365 calendar days prior to the resident's admission date;

(3) a signed disposition order or TYC commitment order;

(4) a current immunization record;

(5) a medical examination that was completed within 30 calendar days prior to the resident's admission date;

(6) documentation that a tuberculosis test was administered and results were received no more than 365 calendar days prior to the resident's admission date;

(7) a dental evaluation that was completed within 30 calendar days prior to the resident's admission date;

(8) services needed for the disabled;

(9) primary language of the resident and the resident's parent, legal guardian or custodian; and

(10) school records.

§343.604. Health Screening and Assessment.

(a) Health Screening. A health screening shall be conducted on each resident within two hours of admission by either a health care professional or an individual who has received specific training on administering the facility's health screening. The health screening instrument shall include:

(1) mental health problems;

(2) suicide risk in accordance with the facility's suicide prevention plan;

(3) current state of health including:

(A) allergies;

(B) tuberculosis;

(C) other chronic conditions;

(D) sexually transmitted diseases;

(E) other infectious diseases; and

(F) history of gynecological problems or pregnancies;

(4) current use of medication including type, dosage, and prescribing physician;

(5) visual observation of teeth and gums and notation of any obvious dental problems;

(6) vision problems;

(7) drug and alcohol use;

(8) physical and developmental disabilities;

(9) evidence of physical trauma; and

(10) a determination of the need for medical detoxification from alcohol or other substances or mental health intervention.

(b) Referral for Assessment. If the health screening indicates that a resident is in need of further medical evaluation, the resident shall be referred to a health care professional for further assessment within 24 hours, excluding holidays and weekends, from the date and time of the completed screening.

(c) Results of Screening and Assessment. The results of the health screening and health assessment shall be communicated to appropriate staff.

(d) Contagious or Infectious Disease. Any finding of the health screening that indicates a significant potential health risk to the staff or residents from a contagious or infectious disease shall be reported immediately to the facility administrator, and the affected resident shall be placed in medical isolation until proper medical clearance is obtained.

(e) Intra-Jurisdictional Custodial Transfer. For intra-jurisdictional custodial transfer of residents, the only items required for the health screening at admission into a post-adjudication secure correctional facility are items enumerated in subsection (a)(2) and (9) of this section.

§343.620. Release Procedures.

Prior to the release of each resident from the facility, the authorized officer shall:

(1) verify the identity of the person receiving custody;

(2) verify the release authorization documents;

(3) secure a signed release by the individual receiving the resident's personal property;

(4) provide information to a parent, legal guardian, or custodian regarding:

(A) all medication prescribed while the resident was in the facility that the resident is currently taking, and the name and contact information of the prescribing physician;

(B) any pending medical, mental health, or dental appointments; and

(C) any present concerns regarding the resident; and

(5) secure a receipt signed by person receiving custody.

§343.632. Level of Supervision--SOHU.

(a) Program Hours. While residents are located in a SOHU, they shall be in the constant physical presence of a juvenile supervision officer unless they are placed in their individual sleeping quarters during shift change, in which case, a juvenile supervision officer shall observe and document each resident's behavior at random intervals not to exceed 15 minutes.

(b) Non-Program Hours. During non-program hours, in a SOHU, a juvenile supervision officer shall visually observe each resident at random intervals not to exceed 15 minutes.

(c) Juvenile supervision officers shall document each visual observation made. The documentation shall include the time of the observation and generally describe the resident's behavior.

§343.660. Toilet Facilities--MOHU.

All MOHUs shall contain at least one operable toilet above floor level for every 12 beds in male housing units and one for every eight beds in female housing units.

(1) For facilities constructed after March 1, 1996, the ratio shall be one toilet for every six beds in the housing unit.

(2) Urinals may be substituted for up to one-half of the toilets in housing units permanently designed as all-male units.

§343.671. Educational Curriculum.

Students shall be provided coursework that is aligned with the Texas Essential Knowledge and Skills (also known as the TEKS test), in accordance with rules adopted by the TEA.

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 September 28, 2009.

TRD-200904374
Lisa A. Capers
Deputy Executive Director and General Counsel
Texas Juvenile Probation Commission
Effective date: January 1, 2010
Proposal publication date: June 19, 2009
For further information, please call: (512) 424-6710

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SUBCHAPTER E. RESTRAINTS

37 TAC §§343.800, 343.802, 343.804, 343.806, 343.808, 343.810, 343.812, 343.816, 343.818

The new sections are adopted under §141.042 of the Texas Human Resource Code, which provides the Texas Juvenile Probation Commission with rulemaking authority.

No other code or article is affected by this adoption.

§343.800. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless otherwise expressly defined within the chapter.

(1) Approved Personal Restraint Technique--A professionally trained, curriculum-based, and competency-based restraint technique that uses a person's physical exertion to completely or partially constrain another person's body movement without the use of mechanical restraints. Personal restraint techniques shall first be approved for use by the Commission.

(2) Approved Mechanical Restraint Devices--A professionally manufactured and commercially available mechanical device designed to aid in the restriction of a person's bodily movement. Mechanical restraint devices shall first be approved by the Commission. The following are Commission-approved mechanical restraint devices:

(A) Ankle Cuffs--A metal band designed to be fastened around the ankle to restrain free movement of the legs;

(B) Handcuffs--Metal devices designed to be fastened around the wrist to restrain free movement of the hands and arms;

(C) Plastic Cuffs--Plastic devices designed to be fastened around the wrists or legs to restrain free movement of hands, arms or legs;

(D) Restraint Bed--A professionally manufactured and commercially available bed, or integrated bed attachment(s), specifically designed to facilitate safe human restraint applications.

(E) Restraint Chair--A professionally manufactured and commercially available restraint apparatus specifically designed for safe human restraint. The device's design facilitates the almost complete immobilization of a subject in an upright sitting position by restricting the subject's extremities, upper leg area, and torso through the application of soft-restraints. The apparatus may be fixed or wheeled for re-location;

(F) Waist Belt--A cloth, leather, or metal band designed to be fastened around the waist used to secure the arms to the sides or front of the body; and

(G) Wristlets--A cloth or leather band designed to be fastened around the wrist, which may be secured to a waist belt or used in a non-ambulatory mechanical restraint.

(3) Chemical Restraint--The application of a chemical agent on a resident or residents.

(4) Four-Point Restraint--The use of approved mechanical restraint devices applied to each of a resident's wrists and ankles to secure a resident in a supine position to a restraint bed.

(5) Mechanical Restraint--The application of an approved mechanical restraint device which restricts or aids in the restriction of the movement of the whole or a portion of an individual's body to control physical activity.

(6) Non-Ambulatory Mechanical Restraint--A method of prohibiting a resident's ability to stand upright and walk with the use of a combination of approved mechanical restraint devices, cuffing techniques and the subject's body positioning. The four-point restraint and a restraint chair are examples of acceptable non-ambulatory mechanical restraints.

(7) Personal Restraint--The application of physical force alone, restricting the free movement of the whole or a portion of an individual's body to control physical activity.

(8) Physical Escort--Touching or holding a resident with a minimum use of force for the purpose of directing the resident's movement from one place to another. A physical escort is not considered a personal restraint.

(9) Protective Devices--Professionally manufactured devices used for the protection of residents or staff that do not restrict the movement of a resident. Protective devices are not considered mechanical restraint devices.

(10) Restraint--The application of an approved personal restraint technique, an approved mechanical restraint device, or a chemical restraint to an individual so as to restrict the individual's freedom of movement or to modify the individual's behavior.

(11) Riot--A situation in which three or more persons in the facility intentionally participate in conduct that constitutes a clear and present danger to persons or property and substantially obstructs the performance of facility operations or a program therein. Rebellion is a form of riot.

(12) Soft Restraints--Non-metallic wristlets and anklets used as stand-alone restraint devices or in conjunction with a restraint bed or restraint chair. These devices are designed to reduce the incidence of skin, nerve, and muscle damage to the restrained subject's extremities.

§343.816. Chemical Restraints.

In addition to the requirements found in §§343.802, 343.804, and 343.806 of this chapter, the use of chemical restraints shall be governed by the following criteria:

(1) chemical restraints shall only be used in response to episodes of resident riot and only then when other forms of approved restraints are deemed to be inappropriate or ineffective;

(2) the use of chemical restraints shall receive incident-specific authorization from the facility administrator. Standing orders authorizing chemical restraints are prohibited;

(3) chemical restraints are restricted to professionally manufactured and commercially available defense sprays and vaporizing agents containing either Oleoresin Capsicum (i.e., OC pepper sprays) or Orthochlorobenzalmalonoitrile (i.e., tear gas);

(4) chemical restraint deployment devices shall be stored in a locked area, and the issuance of these devices to juvenile supervision officers shall not commence until the facility administrator's authorization has been provided;

(5) chemical restraints shall not be used on a resident when he or she is in a personal or mechanical restraint, or otherwise under control;

(6) immediately following the use of a chemical restraint, the exposed resident shall be visually or physically examined by a health care professional and provided treatment if necessary; and

(7) chemical agent compatible neutralizers or decontaminants shall be readily available for use on residents who have been exposed to chemical restraints.

§343.818. Preventative Mechanical Restraints.

For resident, staff, and public safety purposes, a resident may be placed in ankle cuffs, handcuffs, wristlets or a waist belt absent the imminent threat requirements enumerated in §343.802(d) of this chapter. These types of preventative mechanical restraints are authorized under the following circumstances:

(1) Intra-facility relocation. Mechanical restraints may be used when moving a resident from point to point within a secure facility. The mechanical restraint devices shall be removed upon completion of the resident's relocation;

(2) Vehicular transport. A resident shall not be secured to:

(A) any part of the vehicle; or

(B) another resident;

(3) Off-site activities. Mechanical restraints may be used when a resident is required to leave the secure confines of the facility; or

(4) The routine, preventative mechanical restraint applications used in this section are exempt from the documentation requirements contained in §343.806 of this chapter, except when the resident's cooperation is compelled through the use of a personal or chemical restraint; when the resident receives an injury in relation to the restraint event or restraint devices; or when the resident's behavior escalates to the imminent threat criteria listed in §343.802(d) of this chapter.

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 September 28, 2009.

TRD-200904375

Lisa A. Capers
Deputy Executive Director and General Counsel
Texas Juvenile Probation Commission
Effective date: January 1, 2010
Proposal publication date: June 19, 2009
For further information, please call: (512) 424-6710

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CHAPTER 348. JUVENILE JUSTICE ALTERNATIVE EDUCATION PROGRAMS
SUBCHAPTER A. PROGRAM OPERATIONS

37 TAC §348.16, §348.17

The Texas Juvenile Probation Commission (TJPC) adopts the repeal of §348.16 and §348.17 relating to program operations. All sections are adopted without changes as published in the June 19, 2009, issue of the *Texas Register* (34 TexReg 4111) and will not be republished.

TJPC adopts this repeal in an effort to not to overlap with newly adopted standards in Chapters 350 and 358 related to abuse, neglect and exploitation investigations.

No public comment was received.

This repeal is adopted under §141.042 of the Texas Human Resource Code, which provides the Texas Juvenile Probation Commission with rulemaking authority.

No other code or article is affected by these new standards.

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 September 28, 2009.

TRD-200904377
Lisa A. Capers
Deputy Executive Director and General Counsel
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Proposal publication date: June 19, 2009
For further information, please call: (512) 694-7894

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CHAPTER 349. GENERAL ADMINISTRATIVE STANDARDS
SUBCHAPTER F. ABUSE, EXPLOITATION AND NEGLECT INVESTIGATIONS

37 TAC §§349.42 - 349.51

The Texas Juvenile Probation Commission (TJPC) adopts the repeal of §§349.42 - 349.51, relating to abuse, exploitation and neglect investigations. The repeal is adopted without changes to the proposal as published in the June 19, 2009, issue of the *Texas Register* (34 TexReg 4112) and will not be republished.

TJPC adopts this repeal in an effort not to overlap with the recent adoption of new sections in Chapters 350 and 358, relating to abuse, neglect and exploitation investigations.

No public comment was received regarding the proposal.

The repeal is adopted under §141.042 of the Texas Human Resource Code, which provides the Texas Juvenile Probation Commission with rulemaking authority.

No other code or article is affected by this 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 September 28, 2009.

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Lisa A. Capers
Deputy Executive Director and General Counsel
Texas Juvenile Probation Commission
Effective date: October 18, 2009
Proposal publication date: June 19, 2009
For further information, please call: (512) 424-6710

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CHAPTER 351. STANDARDS FOR SHORT-TERM DETENTION FACILITIES
SUBCHAPTER B. SHORT-TERM DETENTION FACILITY STANDARDS

37 TAC §351.3

The Texas Juvenile Probation Commission (TJPC) adopts the repeal of §351.3, relating to short-term detention facility standards. The repeal is adopted without changes to the proposal as published in the June 19, 2009, issue of the *Texas Register* (34 TexReg 4112) and will not be republished.

TJPC adopts this repeal in an effort not to overlap with the recent adoption of new sections in Chapters 350 and 358, relating to abuse, neglect and exploitation investigations.

No public comment was received regarding the proposal.

The repeal is adopted under §141.042 of the Texas Human Resource Code, which provides the Texas Juvenile Probation Commission with rulemaking authority.

No other code or article is affected by this 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 September 28, 2009.

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Lisa A. Capers
Deputy Executive Director and General Counsel
Texas Juvenile Probation Commission
Effective date: October 18, 2009
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For further information, please call: (512) 424-6710

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TITLE 43. TRANSPORTATION

PART 1. TEXAS DEPARTMENT OF TRANSPORTATION

CHAPTER 17. VEHICLE TITLES AND REGISTRATION
SUBCHAPTER B. MOTOR VEHICLE REGISTRATION

43 TAC §17.21, §17.23

The Texas Department of Transportation (department) adopts amendments to §17.21, Definitions, and §17.23, Temporary Registration Permits, both concerning motor vehicle registration. The amendments to §17.21 and §17.23 are adopted without changes to the proposed text as published in the July 10, 2009, issue of the *Texas Register* (34 TexReg 4627) and will not be republished.

EXPLANATION OF ADOPTED AMENDMENTS

The amendments are the result of changes made to Transportation Code, §648.001 and Transportation Code, §648.101, by House Bill 782, 81st Legislature, 2009, which relate to registration exemptions for certain foreign commercial motor vehicles.

Amendments to §17.21, Definitions, add the definition of "foreign commercial vehicles" to specify that the vehicle must be owned by a person domiciled in or who is a citizen of another country. This definition is the same as that contained in Transportation Code, §648.001(4), as amended by House Bill 782.

Amendments to §17.23(h) re-title the subsection from "Exemptions" to "Border commercial zones" and implement changes that were made to Transportation Code, §648.101 by House Bill 782.

Amendments to §17.23(h)(1) state the general rule that a vehicle in a border commercial zone must display a valid Texas registration if the vehicle is owned by a person who owns a leasing facility or leasing terminal in Texas and leases the vehicle to a foreign motor carrier. This paragraph is added as a result of Transportation Code, §648.101(e), as added by House Bill 782, and is not subject to the exemptions provided elsewhere in §17.23(h).

Amendments to §17.23(h)(2), relating to an exemption for the transportation of cargo by brief trips across the border into or from a border commercial zone, remove the exemption for a person who controls, rather than owns, the vehicle and limit the exemption to a vehicle that is registered and licensed as required by the country in which the owner is domiciled or is a citizen. These changes are made in accordance with Transportation Code, §648.101(a), as amended by House Bill 782.

New §17.23(h)(3) exempts a foreign commercial motor vehicle in a border commercial zone from registration if a valid reciprocity agreement between Texas and another state of the United States or a Canadian province exempts currently registered vehicles owned by a resident of this state from registration in the other state or province. These changes are made in accordance with Transportation Code, §648.101(c), as amended by House Bill 782.

COMMENTS

No comments on the proposed amendments were received.

STATUTORY AUTHORITY

The amendments are adopted under Transportation Code, §201.101, which provides the Texas Transportation Commission

with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §648.002 which authorizes the commission to adopt rules to carry out Transportation Code, Chapter 684.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapter 684, Subchapter C.

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 September 25, 2009.

TRD-200904263
Bob Jackson
General Counsel
Texas Department of Transportation
Effective date: October 15, 2009
Proposal publication date: July 10, 2009
For further information, please call: (512) 463-8683

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 §81.116(a)

The formula for estimating turnout for the 2010 primary elections is:

$$A \times B + C = D$$

Where: A = the percentage of voter turnout for governor or another statewide race in the 2006 party primary (percentage is the sum of all votes cast for all candidates for governor or other statewide office in the 2006 primary divided by the number of registered voters).

B = the number of registered voters as of October 2009.

C = 25% of the number resulting when you multiply A x B.

D = Preliminary Estimated 2010 Turnout.

Figure: 1 TAC §81.117

Number of Election Workers Per Voting Precinct
(Includes one judge and one alternate judge who serves as a clerk)

Estimated Turnout Per Polling Location	Paper Ballot/Optical Scan (primary voting method)	Electronic Voting System (primary voting method)
200 or fewer	3	3
201 - 400	5	4
401 - 700	6	5
701 - 1,100	8	6
1,101 or more	12	8

Figure: 1 TAC §81.123(f)

Administrative Personnel

Number of Polls	Costs Allowed Thru March 31	Additional Month for Runoff
10 or less	$300	$75
11-25	$1,500	$375
26-50	$3,000	$750
51-140	$12,000	$3,000
141-325	$24,000	$6,000
326-500	$40,000	$10,000
Over 501	$52,000	$13,000

Figure: 1 TAC §81.125(a)

Number of Direct Record Electronic (DRE) Units, and/or Precinct Ballot Counters

Estimated Voter Turnout Per Voting Precinct	DRE Units	Precinct Ballot Counters
300 or fewer	2	1
301 - 450	3	1
451 - 600	4	1
601 - 900	6	1
For each additional: 300 voters	2	0

Figure: 1 TAC §81.149(c)

Number of Election Workers Per Joint-Voting Precinct
(Includes two co-judges and two alternate judges who serve as a clerk)

Estimated Turnout Per Joint-Polling Location	Paper Ballot/Optical Scan (primary voting method)	Electronic Voting System (primary voting method)
200 or fewer	4	4
201 - 400	6	5
401 - 700	7	6
701 - 1,100	9	7
1,101 or more	13	9

Figure: 1 TAC §81.152(a)

The formula for estimating turnout for the 2010 joint primary elections is:

$$(A \times B) + C + D = E$$

Where: A = the percentage of voter turnout for governor or another statewide race in the 2006 party primary (percentage is the sum of all votes cast for all candidates for governor or other statewide office in the 2006 primary divided by the number of registered voters).

B = the number of registered voters as of October 2009.

C = 25% of the number resulting when you multiply A x B.

D = Other party's estimated turnout figure.

E = Preliminary Estimated 2010 Turnout for Joint-Primary Election.

Figure: 30 TAC Chapter 101--Preamble

Estimated Cost of MECT allowances	$500 - $3,000 per allowance per year or $75,000 - $150,000 per allowance for perpetuity
Estimated Cost of Emission Reduction Credits	$3,000 - $100,000 per ton per year
Estimated Cost of Discrete Emission Reduction Credits	$1,000 to $10,000 per ton

Figure: 30 TAC §101.394(a)(1)(A)

$$S = \frac{LA}{\sum_{i=1}^{n} LAi} \times AC^{1}$$

Where:

S = the greater of 5.0 tons or the allocation for the site.

i = each site located in Harris County and subject to this division.

n = the total number of sites subject to this division.

LA = the level of activity baseline for a site, calculated as the annual level of activity for any 12 consecutive months during the period of 2000 - 2004 for the site, as certified by the executive director.

AC^{1} = 3,106.3 tons per year of highly-reactive volatile organic compounds less the total amount allocated to those sites receiving a minimum of 5.0 tons.

Figure: 30 TAC §101.394(a)(1)(B)

$$S = AC^1 \times (\text{Industry Sector Share}) \times (\text{Facility Share})$$

Where:

S = the greater of 10.0 tons or the allocation for the site.

Industry Sector Share = Total actual average emissions for the industry sector baseline emissions period divided by the total actual average emissions for all participating sites' baseline emissions period.

Facility Share = The sum of the total average actual emissions for non-flare facilities and uncontrolled emissions for flares, as well as heaters, boilers, and furnaces combusting highly-reactive volatile organic compound (HRVOC) streams, for the baseline emissions period divided by the total uncontrolled actual average emissions for the industry sector baseline emission period.

AC^1 = the amount of HRVOC tons defined in (1) - (5) of this figure less the total amount allocated to those sites receiving a minimum of 10.0 tons.

(1) For 2011 - 2013, AC^1 = 3,201.5 tons;

(2) For 2014, AC^1 = 2,856.4 tons;

(3) For 2015, AC^1 = 2,683.8 tons;

(4) For 2016, AC^1 = 2,511.2 tons; and

(5) For 2017 and all subsequent calendar-year control periods, AC^1 = 2,338.6 tons.

Figure: 30 TAC §101.399(i)(4)

$$A = \frac{1}{11.57} \sum (R_i \times E_i)$$

Where:

A = yearly allocation of highly-reactive volatile organic compound allowances.

R_i = the reactivity of each speciated volatile organic compound reduced as specified in California Code of Regulations, Title 17, Chapter 1, §94700, concerning MIR Values for Compounds, as amended.

E_i = the actual emissions reduced, in tons per year, of each speciated volatile organic compound.

Figure: 30 TAC §115.440(b)(10)

$$PP_C = \sum_{i=1}^{n} \frac{\frac{W_i}{MW_i} \times VP_i}{\frac{W_w}{MW_w} + \sum_{e=1}^{n} \frac{W_e}{MW_e} + \sum_{i=1}^{n} \frac{W_i}{MW_i}}$$

Where:

PP_c = the VOC composite partial pressure of a solution at 20 degrees Celsius, millimeters of mercury (mm Hg);

W_i = the weight of VOC i, grams (g);

MW_i = the molecular weight of VOC i, g/g-mole;

VP_i = the vapor pressure of VOC i at 20 degrees Celsius, mm Hg;

W_w = the weight of water, g;

MW_w = the molecular weight of water, g/g-mole;

W_e = the weight of non-water exempt compound e, g; and

MW_e = the molecular weight of non-water exempt compound e, g/g-mole.

Figure: 31 TAC §523.3(j)(3)(B)

SITE ASSESSMENT TOOL				
	POTENTIAL FOR PERSISTENT ODOR NUISANCE			
FACTOR	**LOW**	**MEDIUM**	**HIGH**	**SCORE**
Birds Per Flock	<100,000 = 1 pt	100K-165K = 20 pts	>165K = 30 pts	
Maximum Length of Flocks	<42 days = 1 pt	42-49 days = 10 pts	>49 days = 30 pts	
Litter Application Planned On-Farm	No = 0 pts	N/A	Yes = 30 pts	
Number of Neighbors	1 = 3 pts	2 = 5 pts	>2 = 10 pts	
Topography Influence*	None = 0 pts	Medium = 5 pts	High = 10 pts	
Number of Incinerators	None = 0 pts	1 = 5 pts	>1 = 10 pts	
Vegetation (as odor buffer)*	Heavy = 1 pt	Medium = 3 pts	None = 5 pts	
Property Line Distance	>300' = 0 pts	150-300' = 3 pts	<150' = 5 pts	

*Vegetation (as buffer between proposed facility and any neighbor to filter dust and dilute odors)

None: no significant vegetation capable of dispersing or deflecting odors

Medium: scattered or intermittent brushy herbaceous vegetation and trees with under-, mid-, and overstories.

Heavy: continuous 3-tiered forested woody vegetation

*Topography Influence

None: topography is level, upslope from proposed facility, or hill/ridge separates proposed facility and any neighbors.

Medium: topography is downslope from proposed facility toward any neighbor, but no valley.

High: topography forms downslope valley from proposed facility toward any neighbor.

Figure: 37 TAC §359.100(c)

MEMORANDUM OF UNDERSTANDING

Between
The Texas Commission of Law Enforcement Officer Standards and Education and
The Texas Juvenile Probation Commission

I.
Parties

The parties to this Memorandum of Understanding (MOU) are the Texas Commission on Law Enforcement Officer Standards and Education, a regulatory agency of the state of Texas, hereinafter called the "Commission" and the Texas Juvenile Probation Commission, a regulatory agency of the state of Texas, hereinafter referred to as "TJPC".

II.
Background and Purpose

WHEREAS, the Texas Juvenile Probation Commission represents that juvenile probation officers are not "peace officers" as defined under Section 1701.001 of the Texas Occupations Code and Article 2.12 of the Code of Criminal Procedure, respectively; and

WHEREAS, the 81st Texas Legislature enacted Section 142.006 of the Human Resources Code to authorize juvenile probation officers to carry a firearm in the course of their duties and sets forth other specific qualifying requirements; and

WHEREAS, Section 1701.258 of the Occupations Code was amended to require the Texas Commission of Law Enforcement Officer Standards and Education and the Texas Juvenile Probation Commission to adopt a MOU to establish a basic training program in the use of firearms by juvenile probation officers; and

WHEREAS, this agreement, entered into pursuant to Section 1701.258 of the Texas Occupations Code, represents a mutual understanding and sets forth each agency's respective responsibilities in developing a basic training program and fulfilling the related statutory mandates; and

NOW THEREFORE, know all men by these presents; that in consideration of mutual covenants, agreements and benefits of both parties, it is agreed as follows:

III.
Responsibilities of Both Parties

By entering this agreement, the Commission and TJPC agree to:

1. Establish a program to provide instruction in:

    a. legal limitations on the use of firearms and on the powers and authority of juvenile probation officers;

    b. range firing and procedure, and firearms safety and maintenance; and

    c. other topics determined by the Commission and the Texas Juvenile Probation Commission to be necessary for the responsible use of firearms by juvenile probation officers.

IV.
Specific Roles and Responsibilities of Each Party (Commission)

The Commission, as a signatory to this memorandum, agrees to:

1. Coordinate the development of a training curriculum in the use of firearms by juvenile probation officers based upon the training needs assessment conducted by TJPC and/or a designated representative;

2. Administer and conduct the training program and issue a certificate of firearms proficiency to each juvenile probation officer the Commission determines has successfully completed the program, contingent upon the authorization of the local chief juvenile probation officer of the department that employs the juvenile probation officer;

3. Ensure that each local chief juvenile probation officer submit a report of training and other required documentation for each course conducted in accordance with the Commission's rules; and

4. Establish, at its discretion, reasonable and necessary fees for the administration of the training program.

V.
Specific Roles and Responsibilities of Each Party (TJPC)

TJPC, as a signatory to this memorandum, agrees to:

1. Coordinate the development of the juvenile probation officer training curriculum based upon the training needs assessment conducted by TJPC and/or a designated representative.

2. Conduct a juvenile probation officer training needs assessment to be utilized by the Commission in the development of the firearms curriculum; and

3. Provide technical assistance to the Commission during the development of the training curriculum.

VI.
Psychological Assessment and Criminal History Background Check

In compliance with the terms of this memorandum of understanding, each chief administrative officer that authorizes participation in the juvenile probation officer firearms proficiency training program shall:

1. Ensure that all officers making application for the certificate of firearms proficiency training program undergo a psychological assessment administered in accordance with the requirements of the Commission; and

2. Conduct a complete criminal history search submitted through the Texas Department of Public Safety Fingerprint Applicant Services of Texas (FAST) system to determine whether the applicant meets the minimum eligibility requirements to participate in the firearms training program established by the Commission.

VII.
Administrative Department Suspension and Officer Disqualification

The Commission and TJPC, to the extent possible, further agree to the following:

1. The Commission may suspend the local juvenile probation department's administrative number with the Commission if the local juvenile probation department is found to be unsatisfactory under the risk assessment process, as defined by Chapter 1701, Occupations Code and Section 215.5 and 215.13 of the Commission's rules. The Commission shall reinstate the administrative number upon reasonable evidence that the local juvenile probation department has made the necessary changes as directed by the Commission;

2. The Commission shall regularly provide notification to TJPC regarding all juvenile probation departments and/or chief juvenile probation officers whose identifying number has been administratively suspended under the Commission's rules; and

3. Notwithstanding the provisions of Section 1701.258 and the terms of this agreement, TJPC reserves the right to disqualify a juvenile probation officer who has been issued a certificate of firearms proficiency by the Commission, in accordance with the provisions set forth in Section 142.006 of the Human Resources Code.

4. The TJPC shall regularly provide notification to the Commission of any action by TJPC to disqualify a juvenile probation officer who has been issued a certificate of firearms proficiency by the Commission, in accordance with the provisions set forth in Section 142.006 of the Human Resources Code.

VIII.
Effective Date

This Memorandum of Understanding is effective on the date of the last agency signature and has no expiration date. Amendments will be made as deemed necessary and agreed to by the signing parties or as mandated by statute.

IX.
Execution of Agreement

For the faithful performance of the terms of this Memorandum of Understanding, the parties hereto in their capacities execute this agreement, affix their signatures and bind themselves.

Texas Commission of Law Enforcement Officer Standards and Education

By: _____
TIM BRAATEN
EXECUTIVE DIRECTOR

Date: _____

Texas Juvenile Probation Commission

By: _____
VICKI SPRIGGS
EXECUTIVE DIRECTOR

Date: _____

Figure: 43 TAC §2.106(a)(3)(F)

Ecoregion	Area of Disturbance
Piney Woods	3 acres
Oak Woods and Prairies	2 acres
Blackland Prairie	1 acre
Gulf Coast Prairies and Marshes	2 acres
Coastal Sand Plain	1 acre
South Texas Brush	1 acre
Edwards Plateau	1 acre
Llano Uplift	1 acre
Rolling Plains	1 acre
High Plains	1 acre
Trans Pecos	1 acre

Figure: 43 TAC §2.109(c)(4)(A)

Habitat Category	Riparian	Upland Trees	Brush	Maintained ROW	Other	Unique Vegetation/Habitat
Value/acre	$4,002	$2,668	$1,334	$166	$666	To be determined under §2.110(d)

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.

Austin-San Antonio Intermunicipal Commuter Rail District

Request for Qualifications

The Austin-San Antonio Rail District (Rail District) seeks statements of qualifications from professional legal firms to provide the Rail District with **freight rail negotiation services** to assist the Rail District with negotiations and agreements with freight railroads regarding operations, use, real estate matters, and right-of-way acquisition. The Request for Qualifications (RFQ) is available on the Rail District website: www.asarail.org. Responses to the RFQ must be received by the Rail District no later than **2:00 p.m. CDT, October 22, 2009** to be considered.

TRD-200904254
Ross Milloy
President
Austin-San Antonio Intermunicipal Commuter Rail District
Filed: September 24, 2009

♦ ♦ ♦

Cancer Prevention and Research Institute of Texas

Request for Applications

Evidence-Based Prevention Programs and Services Synopsis

The Cancer Prevention and Research Institute of Texas (CPRIT) seeks grant applications from qualified organizations located in the State of Texas that would provide services aimed toward prevention and reduction of the risk of cancer, early detection, and improving the lives of those living with the disease. These projects would provide services that are based on scientific evidence of their effectiveness in prevention of cancer or improvement in quality of life. CPRIT expects measurable outcomes of supported activities that demonstrate impact on incidence, mortality, or morbidity or interim measures related to the outcomes. Successful applicants are eligible for a grant award of up to $1 million for up to 24 months. A request for applications is available online at www.cprit.state.tx.us. Applications will be accepted beginning at 7:00 a.m. Central Time on Thursday, October 15, 2009, and must be submitted via the CPRIT Application Receipt System (www.CPRITGrants.org). Only applications submitted at this portal will be considered eligible for evaluation. Applications are due on or before 3:00 p.m. Central Time on Thursday, November 13, 2009. CPRIT will not accept late applications or applications that are not submitted via the portal.

TRD-200904411
William "Bill" Gimson
Executive Director
Cancer Prevention and Research Institute of Texas
Filed: September 29, 2009

♦ ♦ ♦

Request for Applications

Health Promotion, Public Education, and Community Outreach Synopsis

The Cancer Prevention and Research Institute of Texas (CPRIT) seeks grant applications from qualified organizations located in the State of Texas for public education and outreach efforts that have the potential to demonstrate change in the behaviors that can prevent or reduce the risk of cancer. CPRIT seeks projects and partnerships that will apply evidence based strategies in novel ways, leverage resources and can demonstrate measurable outcomes in personal behaviors leading to prevention, risk reduction, early detection of cancer and improve the quality of life for survivors. Successful applicants are eligible for a grant award of up to $300,000 for up to 24 months. A request for applications is available online at www.cprit.state.tx.us. Applications will be accepted beginning at 7:00 a.m. Central Time on Thursday, October 15, 2009, and must be submitted via the CPRIT Application Receipt System (www.CPRITGrants.org). Only applications submitted at this portal will be considered eligible for evaluation. Applications are due on or before 3:00 p.m. Central Time on November 13, 2009. CPRIT will not accept late applications or applications that are not submitted via the portal.

TRD-200904412
William "Bill" Gimson
Executive Director
Cancer Prevention and Research Institute of Texas
Filed: September 29, 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 September 18, 2009, through September 24, 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 September 30, 2009. The public comment period for this project will close at 5:00 p.m. on October 30, 2009.

FEDERAL AGENCY ACTIONS:

Applicant: Benny W. Sharpe; Location: The project is located in a .377-acre non-tidal pond on the Bolivar Peninsula located on Lots 28 and 29 in the Gulf Port Village Subdivision, in Crystal Beach, Galveston County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled: Flake, Texas. Approximate UTM Coordinates

in NAD 83 (meters): Zone 15; Easting 335774 Northing: 3255980; Latitude: 29.42243 Longitude: -94.6928. Project Description: The applicant proposes to fill a 100-foot-wide by 164-foot-long pond with approximately 4,278 cubic yards of sand. The purpose of the project is to provide building sites for homes. The proposed fill will be 7 feet deep and match the elevation of the surrounding upland area. No wetlands are located on the property. No compensatory mitigation is proposed. Avoidance of the pond would prohibit development of the lot into building sites. CCC Project No.: 09-0247-F1. Type of Application: U.S.A.C.E. permit application #SWG-2009-00842 is being evaluated under §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 of 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-200904418
Larry L. Laine
Chief Clerk/Deputy Land Commissioner, General Land Office
Coastal Coordination Council
Filed: September 30, 2009

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Comptroller of Public Accounts

Announcement of Available Grant Funds

The Comptroller of Public Accounts (Comptroller) announces the availability of Energy Efficiency and Conservation Block Grant (EECBG) Funds that were appropriated by the American Recovery and Reinvestment Act (ARRA), Public Law 111-5 to the U.S. Department of Energy (DOE). Under Energy Independence and Security Act of 2007 (EISA) (42 U.S.C. 17151 et seq), DOE makes block grants to states as well as large cities and counties pursuant to a formula set forth in the federal EISA statute. Pursuant to Chapter 447, §447.003, Texas Government Code; and Chapter 2305, §2305.011, Texas Government Code, the Comptroller, on behalf of the State of Texas, has received a block grant of $45 million and is making these funds available to all cities and counties in Texas that did not receive a direct grant from DOE. In addition to publishing this announcement, the Comptroller mailed letters dated September 22, 2009 directly to 1127 cities and 244 counties identifying the anticipated amount of funds made available to these communities. The information contained in this Announcement and the letters as well as additional details regarding this program are available at: www.secostimulus.org under the Energy Efficiency and Conservation Block Grant Funds banner.

The Comptroller invites all Texas cities and counties that are not receiving a direct allocation from DOE under EISA and ARRA to participate in the Energy Efficiency and Conservation Block Grants as identified in this Announcement and the letter dated September 22, 2009.

Allocation. In an effort to ensure that the 1,127 cities and 244 counties in Texas that are not receiving direct dollars from DOE are able to benefit from this funding, the funds being made available are being distributed pursuant to a formula based on population. The total amount of funds available for distribution has been divided into population tiers, based on population at city and county level, with a corresponding amount of funds as set forth in the following table:

	Population	Block Grant Allocation		Population	Block Grant Allocation
Cities	0 - 5,000	$20,000.00	**Counties**	0 - 5,000	$20,000.00
	5,001 - 10,000	$35,000.00		5,001 - 10,000	$35,000.00
	10,001 - 20,000	$50,000.00		10,001 - 20,000	$50,000.00
	20,001 - 35,000	$75,000.00		20,001 - 45,000	$75,000.00
				45,001 - 100,000	$100,000.00
				100,001 - 150,000	$120,000.00
				150,001 - 200,000	$150,000.00

In the event that there are eligible communities that choose not to accept the funds, the Comptroller may reallocate those dollars to the cities and counties that have notified the Comptroller of their intent to participate.

Purposes. These funds may be used by cities and counties for Building energy audits and retrofits; Installation of distributed energy technologies; Installation of energy-efficient traffic signals and street lighting; or Installation of renewable energy technologies on government buildings, all as further explained in Energy Efficiency and Conservation Block Grant Eligible Activities posted at the www.secostimulus.org web site and as provided in the September 22, 2009 letter.

Participation. In order to receive an allocation, each eligible city or county shall submit: 1) a mandatory Notice of Intent form signed by the authorized representative which must be submitted no later than November 6, 2009, 2:00 p.m. CZT; and 2) a resolution of the entities governing body no later than November 22, 2009, 2:00 p.m. CZT. The Notice of Intent must be signed and notarized by an official of that entity. For those submitting a timely Notice of Intent and Resolution, the Comptroller will provide an application and accompanying instructions that will identify the application requirements, application review criteria, and greater detail regarding the use of EECBG funds.

Submission and Contact Information: The mandatory Notice of Intent and Resolution shall be submitted Stimulus Program, Comptroller of Public Accounts, at: 111 E. 17th St., Room 810, Austin, Texas 78774, (512) 463-7392. Notices of Intent received after November 6, 2009 at 2:00 p.m. CZT may be considered in the sole discretion of the Comptroller. Applicants shall be solely responsible for verifying timely receipt of the Notice of Intent.

Schedule of events: Announcement Packets - letter dated September 22, 2009, after 10:00 a.m. CZT; Mandatory signed and notarized Notice of Intent Due - November 6, 2009, 2:00 p.m. CZT; Official Resolution by Governing Body Due - November 22, 2009; Applications and Final Allocation letters mailed - December 5, 2009, 2:00 p.m. CZT; Application Due - postmarked no later than December 22, 2009.

TRD-200904415

William Clay Harris
Assistant General Counsel, Contracts
Comptroller of Public Accounts
Filed: September 30, 2009

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Notice of Request for Proposals

Pursuant to Chapters 403; 2254, Subchapter A; and 2305, §2305.036, Texas Government Code, the Comptroller of Public Accounts (Comptroller), State Energy Conservation Office (SECO) announces its Request for Proposals (RFP #195e) and invites proposals for technical training and certification in renewable energy fields from community and junior colleges for the Energy Education Program (Program). The Comptroller reserves the right to award more than one contract under the RFP. If a contract award is made under the terms of this RFP, Contractor will be expected to begin performance of the contract on or about December 4, 2009, or as soon thereafter as practical.

Contact: Parties interested in submitting a proposal should contact William Clay Harris, Assistant General Counsel, Contracts, Comptroller of Public Accounts, in the Issuing Office at: 111 E. 17th St., Room 201, Austin, Texas 78774, (512) 305-8673, to obtain a complete copy of the RFP. The Comptroller will mail copies of the RFP only to those parties specifically requesting a copy. The RFP will be available for pick-up at the above referenced address on Friday, October 9, 2009, after 10:00 a.m. Central Zone Time (CZT) and during normal business hours thereafter. The Comptroller will also make the entire RFP available electronically on the Electronic State Business Daily (ESBD) at: http://esbd.cpa.state.tx.us after 10:00 a.m. CZT on Friday, October 9, 2009.

Questions and Non-Mandatory Letters of Intent: All written inquiries, questions, and Non-mandatory Letters of Intent to propose must be received at the above-referenced address not later than 2:00 p.m. (CZT) on Friday, October 16, 2009. Prospective proposers are encouraged to fax non-mandatory Letters of Intent and Questions to (512) 463-3669 to ensure timely receipt. Non-mandatory Letters of Intent must be addressed to William Clay Harris, Assistant General Counsel, Contracts, and must contain the information as stated in the corresponding Section of the RFP and be signed by an official of that entity. On or about Friday, October 23, 2009, the Comptroller expects to post responses to questions on the ESBD. Late Non-mandatory Letters of Intent and Questions will not be considered under any circumstances. Respondents shall be solely responsible for verifying timely receipt of Non-Mandatory Letters of Intent and Questions in the Issuing Office.

Closing Date: Proposals must be delivered in the Issuing Office to the attention of the Assistant General Counsel, Contracts, no later than 2:00 p.m. (CZT), on Friday, November 6, 2009. Late Proposals will not be considered under any circumstances. Respondents shall be solely responsible for verifying time receipt of Proposals in the Issuing Office.

Evaluation Criteria: Proposals will be evaluated under the evaluation criteria outlined in the RFP. The Comptroller will make the final decision. The Comptroller reserves the right to accept or reject any or all proposals submitted. The Comptroller is not obligated to execute a contract on the basis of this notice or the distribution of any RFP. The Comptroller shall not pay for any costs incurred by any entity in responding to this Notice or to the RFP.

The anticipated schedule of events pertaining to this solicitation is as follows: Issuance of RFP - October 9, 2009, after 10:00 a.m. CZT; Non-Mandatory Letters of Intent and Questions Due - October 16, 2009, 2:00 p.m. CZT; Official Responses to Questions posted - October 23, 2009; Proposals Due - November 6, 2009, 2:00 p.m. CZT; Contract Execution - December 4, 2009, or as soon thereafter as practical; Commencement of Services - December 4, 2009.

TRD-200904416
William Clay Harris
Assistant General Counsel, Contracts
Comptroller of Public Accounts
Filed: September 30, 2009

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Office of Consumer Credit Commissioner

Notice of Rate Ceilings

The Consumer Credit Commissioner of Texas has ascertained the following rate ceilings by use of the formulas and methods described in §§303.003, 303.005, and 303.009, Texas Finance Code.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 10/05/09 - 10/11/09 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 10/05/09 - 10/11/09 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-200904398
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: September 29, 2009

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Texas Commission on Environmental Quality

Agreed Orders

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) in accordance with Texas Water Code (the Code), §7.075. Section 7.075 requires that before the commission may approve the AOs, the commission shall allow the public an opportunity to submit written comments on the proposed AOs. Section 7.075 requires that notice of the proposed orders and the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **November 9, 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 November 9, 2009.** Written comments may also be sent by facsimile machine to the enforcement coordinator at (512) 239-2550. The commission enforce-

ment 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: Affiliated Foods, Inc.; DOCKET NUMBER: 2009-0128-AIR-E; IDENTIFIER: RN100694819; LOCATION: Amarillo, Randall County; TYPE OF FACILITY: bakery and printing plant; RULE VIOLATED: 30 Texas Administrative Code (TAC) §116.110(a) and Texas Health and Safety Code (THSC), §382.0518(a) and §382.085(b), by failing to obtain authorization for a source of air emissions; PENALTY: $3,000; ENFORCEMENT COORDINATOR: Suzanna Walrath, (512) 239-2134; REGIONAL OFFICE: 3918 Canyon Drive, Amarillo, Texas 79109-4933, (806) 353-9251.

(2) COMPANY: Tjitte Tuinier dba Allrounder Dairy and Allrounder Dairy 2; DOCKET NUMBER: 2009-0724-AGR-E; IDENTIFIER: RN102286325 and RN102336807; LOCATION: Hopkins County; TYPE OF FACILITY: dairy operations; RULE VIOLATED: 30 TAC §321.36(1) and Texas Pollutant Discharge Elimination System (TPDES) Concentrated Animal Feeding Operations (CAFO) General Permit Numbers TXG920121 and TXG920952 Part III.A.10.(c), by failing to properly dispose of carcasses; 30 TAC §321.46(a)(7)(A) and TPDES CAFO General Permit Numbers TXG920121 and TXG920952 Part III.A.2.(a), by failing to update facility maps; 30 TAC §321.46(a)(4) and TPDES CAFO General Permit Numbers TXG920121 and TXG920952 Part III.A.1.(b), by failing to revise the pollution prevention plan; 30 TAC §321.46(d)(4) and (10), TPDES CAFO General Permit Number TXG920121 Part IV.A.5.(b), and TPDES CAFO General Permit Numbers TXG920121 and TXG920952 Part IV.A.2.(a), by failing to maintain on site records of annual soil analysis reports and all weekly wastewater levels; 30 TAC §321.36(c) and §321.38(c) and TPDES CAFO General Permit Number TXG920121 Part III.A.6.(b), by failing to design, construct, operate, and maintain the control structure to contain all manure, litter, and process wastewater, including runoff and precipitation; and 30 TAC §321.37(d), TPDES CAFO General Permit Number TXG920952 Part IIIA.5(a), and the Code §26.121(a)(1), by failing to prevent the discharge of wastewater from the CAFO production area; PENALTY: $15,083; ENFORCEMENT COORDINATOR: Evette Alvarado, (512) 239-2573; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-510.

(3) COMPANY: ANACONDA DISPOSAL, LLC; DOCKET NUMBER: 2009-0838-MSW-E; IDENTIFIER: RN105720007; LOCATION: San Antonio, Bexar County; TYPE OF FACILITY: unauthorized disposal site; RULE VIOLATED: 30 TAC §330.15(c), by failing to prevent the unauthorized storage and disposal of municipal solid waste (MSW); PENALTY: $2,500; ENFORCEMENT COORDINATOR: Clinton Sims, (512) 239-6933; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(4) COMPANY: City of Canadian; DOCKET NUMBER: 2009-1021-MWD-E; IDENTIFIER: RN101613313; LOCATION: Hemphill County; TYPE OF FACILITY: wastewater treatment plant; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number WQ0014259001, Final Effluent Limitations and Monitoring Requirements Number 1, and the Code, §26.121(a), by failing to comply with permit effluent limits for total ammonia nitrogen (NH_3N); 30 TAC §305.125(1) and §319.5(b) and TPDES Permit Number WQ0014259001, Monitoring and Reporting Requirements Number 1, by failing to monitor for each parameter at the frequency specified in the permit; and 30 TAC §305.125(17) and TPDES Permit Number WQ0014259001, Sludge Provisions, by failing to submit the annual sludge report; PENALTY: $4,400; ENFORCEMENT COORDINATOR: Steve Villatoro, (512) 239-4930; REGIONAL OFFICE: 3918 Canyon Drive, Amarillo, Texas 79109-4933, (806) 353-9251.

(5) COMPANY: City of Celeste; DOCKET NUMBER: 2009-1044-MWD-E; IDENTIFIER: RN101919439; LOCATION: Hunt County; TYPE OF FACILITY: wastewater treatment plant; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number WQ0010146001, Effluent Limitations and Monitoring Requirements Numbers 1 and 6, and the Code, §26.121(a)(1), by failing to comply with permitted effluent limits for dissolved oxygen and five-day biochemical oxygen demand; PENALTY: $10,400; ENFORCEMENT COORDINATOR: Heather Brister, (254) 751-0335; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(6) COMPANY: Chevron Phillips Chemical Company, LP; DOCKET NUMBER: 2009-0893-AIR-E; IDENTIFIER: RN102320850; LOCATION: Borger, Hutchinson County; TYPE OF FACILITY: petrochemical plant; RULE VIOLATED: 30 TAC §101.201(a)(1) and THSC, §382.085(b), by failing to report an emissions event within 24 hours after the discovery; and 30 TAC §116.715(a), New Source Review Flexible Permit Number 21918, Special Condition (SC) Number 1, and THSC, §382.085(b), by failing to prevent unauthorized emissions; PENALTY: $6,994; ENFORCEMENT COORDINATOR: Kirk Schoppe, (512) 239-0489; REGIONAL OFFICE: 3918 Canyon Drive, Amarillo, Texas 79109-4933, (806) 353-9251.

(7) COMPANY: Davis Gas Processing, Inc.; DOCKET NUMBER: 2009-0734-AIR-E; IDENTIFIER: RN100245182; LOCATION: near McCamey, Crockett County; TYPE OF FACILITY: gas plant; RULE VIOLATED: 30 TAC §122.146(2) and THSC, §382.085(b), by failing to submit a permit compliance certification in a timely manner; 30 TAC §116.110(a) and §122.121, Permit Number 3024, SC Numbers 5B and C, and THSC, §382.085(b), by failing to obtain authorization prior to operation; 30 TAC §116.115(c), Permit Number 8816, SC Number 11, Permit Number 3024, SC Number 5, and THSC, §382.085(b), by failing to maintain records of repairs and replacements; 30 TAC §116.115(c), Permit Number 8816, SC Number 12, and THSC, §382.085(b), by failing to maintain records adequate to demonstrate compliance with requirements to conduct fugitive monitoring for components in volatile organic compounds service; and 30 TAC §122.145(2)(A) and THSC, §382.085(b), by failing to report all instances of deviations in the August 11, 2007 to February 10, 2008 and the February 11, 2008 to August 10, 2008 semi-annual deviation reports; PENALTY: $36,085; ENFORCEMENT COORDINATOR: John Muennink, (361) 825-3100; REGIONAL OFFICE: 622 South Oakes, Suite K, San Angelo, Texas 76903-7035, (325) 655-9479.

(8) COMPANY: DCP Midstream, LP; DOCKET NUMBER: 2009-0647-AIR-E; IDENTIFIER: RN102229572; LOCATION: Midland County; TYPE OF FACILITY: natural gas processing plant; RULE VIOLATED: 30 TAC §101.20(2), 40 Code of Federal Regulations (CFR) §63.6640(a), and THSC, §382.085(b), by failing to demonstrate that Engines 35 and 36 were operating within the limitations established during performance testing; PENALTY: $2,460; ENFORCEMENT COORDINATOR: Terry Murphy, (512) 239-5025; REGIONAL OFFICE: 3300 North A Street, Building 4-107, Midland, Texas 79705-5406, (432) 570-1359.

(9) COMPANY: DCP Midstream, LP; DOCKET NUMBER: 2009-0809-AIR-E; IDENTIFIER: RN100210822; LOCATION: near Falfurrias, Jim Wells County; TYPE OF FACILITY: natural gas processing; RULE VIOLATED: 30 TAC §116.615(2), Air Permit Number 74738, General Conditions, and THSC, §382.085(b), by failing to prevent unauthorized emissions; and 30 TAC §101.201(a)(1) and THSC, §382.085(b), by failing to report Incident Number 118447 within 24 hours after discovery; PENALTY: $10,139; Supplemental Environ-

mental Project (SEP) offset amount of $5,069 applied to Texas Association of Resource Conservation and Development Areas, Inc. - Clean School Buses; ENFORCEMENT COORDINATOR: Rebecca Johnson, (713) 767-3500; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5839, (361) 825-3100.

(10) COMPANY: Oscar de Luna; DOCKET NUMBER: 2009-1516-WOC-E; IDENTIFIER: RN105774319; LOCATION: Willacy County; TYPE OF FACILITY: wastewater licensing; RULE VIOLATED: 30 TAC §30.5(a), by failing to obtain a required occupational license; PENALTY: $210; ENFORCEMENT COORDINATOR: Kirk Schoppe, (512) 239-0489; REGIONAL OFFICE: 1804 West Jefferson Avenue, Harlingen, Texas 78550-5247, (956) 425-6010.

(11) COMPANY: Steve Clabaugh dba Discount Materials; DOCKET NUMBER: 2008-1818-MSW-E; IDENTIFIER: RN105228365; LOCATION: Midland, Midland County; TYPE OF FACILITY: mulch and compost recycling; RULE VIOLATED: 30 TAC §328.60(a), by failing to obtain a scrap tire storage site registration; and 30 TAC §37.921 and §328.5(d) and TCEQ Agreed Order Docket Number 2007-1159-MSW-E, Ordering Provision 2.a., by failing to demonstrate financial assurance for closure, post closure, and corrective action; PENALTY: $6,643; ENFORCEMENT COORDINATOR: Danielle Porras, (512) 239-2602; REGIONAL OFFICE: 3300 North A Street, Building 4-107, Midland, Texas 79705-5406, (432) 570-1359.

(12) COMPANY: Kendal Dodson; DOCKET NUMBER: 2009-0584-LII-E; IDENTIFIER: RN103224374; LOCATION: Arlington, Tarrant County; TYPE OF FACILITY: landscape business; RULE VIOLATED: 30 TAC §344.24(a), by failing to comply with local requirements, ordinances, and regulations designed to protect the public water supply (PWS); PENALTY: $500; ENFORCEMENT COORDINATOR: Michael Meyer, (512) 239-4492; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(13) COMPANY: Easher Corporation; DOCKET NUMBER: 2009-0880-IWD-E; IDENTIFIER: RN102342672; LOCATION: Gordon, Palo Pinto County; TYPE OF FACILITY: truck stop and restaurant; RULE VIOLATED: 30 TAC §305.65 and §305.125(2) and the Code, §26.121(a)(1), by failing to maintain authorization for the discharges of wastewater; PENALTY: $3,060; ENFORCEMENT COORDINATOR: Carlie Konkol, (361) 825-3100; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(14) COMPANY: Juan Gervacio Gonzalez; DOCKET NUMBER: 2009-0811-LII-E; IDENTIFIER: RN105725519; LOCATION: Granbury, Hood County; TYPE OF FACILITY: landscape irrigation systems; RULE VIOLATED: 30 TAC §305.5(a) and §344.30(a)(1), Texas Occupations Code, §1903.251, and the Code, §37.003, by failing to hold an irrigator license prior to selling, designing, consulting, installing, maintaining, altering, repairing, or servicing an irrigation system; PENALTY: $1,325; ENFORCEMENT COORDINATOR: Keith Frank, (512) 239-1203; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(15) COMPANY: Grecoair, Inc.; DOCKET NUMBER: 2009-0753-PST-E; IDENTIFIER: RN102827920; LOCATION: El Paso, El Paso County; TYPE OF FACILITY: aircraft painting and refurbishing; RULE VIOLATED: 30 TAC §334.50(d)(1)(B)(ii) and the Code, §26.3475(c)(1), by failing to provide release detection for the underground storage tank (UST) system; 30 TAC §334.72(3), by failing to report a suspected release to the agency within 24 hours of discovery; and 30 TAC §334.74, by failing to investigate a suspected release of regulated substances within 30 days of discovery; PENALTY: $10,015; ENFORCEMENT COORDINATOR: Elvia Maske, (512) 239-0789; REGIONAL OFFICE: 401 East Franklin Avenue, Suite 560, El Paso, Texas 79901-1212, (915) 834-4949.

(16) COMPANY: Halliburton Energy Services, Inc.; DOCKET NUMBER: 2009-0923-IWD-E; IDENTIFIER: RN101720241; LOCATION: Harris County; TYPE OF FACILITY: wastewater treatment plant; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number 04624, Effluent Limitations and Monitoring Requirements Numbers 1 and 4, and the Code, §26.121(a), by failing to comply with permit effluent limits for pH, NH_3N, total suspended solids (TSS), and flow; PENALTY: $8,520; ENFORCEMENT COORDINATOR: Jorge Ibarra, (817) 588-5800; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(17) COMPANY: Doug Holder; DOCKET NUMBER: 2009-1480-OSI-E; IDENTIFIER: RN103911996; LOCATION: Fort Worth, Tarrant County; TYPE OF FACILITY: on site sewage licensing; RULE VIOLATED: 30 TAC §30.5(a), by failing to obtain a required occupational license; PENALTY: $210; ENFORCEMENT COORDINATOR: Kirk Schoppe, (512) 239-0489; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(18) COMPANY: Juma Pallets, Inc.; DOCKET NUMBER: 2009-0977-MLM-E; IDENTIFIER: RN105497606; LOCATION: El Paso, El Paso County; TYPE OF FACILITY: wood pallet repair and refurbishing company; RULE VIOLATED: 30 TAC §111.201 and §330.15(c) and THSC, §382.085(b), by failing to comply with the general prohibition on outdoor burning and to prevent the unauthorized disposal of MSW; and 30 TAC §281.25(a)(4) and 40 CFR §122.26(c), by failing to obtain authorization under a TPDES Multi-Sector Industrial General Permit to discharge storm water associated with wood pallet repair and refurbishing; PENALTY: $3,188; ENFORCEMENT COORDINATOR: Jennifer Graves, (956) 425-6010; REGIONAL OFFICE: 401 East Franklin Avenue, Suite 560, El Paso, Texas 79901-1212, (915) 834-4949.

(19) COMPANY: Kingsbridge Municipal Utility District; DOCKET NUMBER: 2009-1003-PWS-E; IDENTIFIER: RN102684727; LOCATION: Sugar Land, Fort Bend County; TYPE OF FACILITY: PWS; RULE VIOLATED: 30 TAC §290.45(b)(1)(D)(iv) and THSC, §341.0315(c), by failing to provide a minimum elevated storage capacity of 100 gallons per connection upon reaching a connection count of 2,500 connections or obtain commission approval of an alternate method of pressure maintenance for the facility; PENALTY: $1,500; ENFORCEMENT COORDINATOR: Rebecca Clausewitz, (210) 490-3096; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(20) COMPANY: Land O'Lakes Purina Feed, LLC; DOCKET NUMBER: 2009-0733-AIR-E; IDENTIFIER: RN102458338; LOCATION: Hereford, Deaf Smith County; TYPE OF FACILITY: animal feed additive manufacturing plant; RULE VIOLATED: 30 TAC §116.110(a) and THSC, §382.0518(a) and §382.085(b), by failing to obtain air permit authorization prior to constructing and operating an animal feed additive manufacturing plant; PENALTY: $3,360; ENFORCEMENT COORDINATOR: Suzanne Walrath, (512) 239-2134; REGIONAL OFFICE: 3916 Canyon Drive, Amarillo, Texas 79109-4933, (806) 353-9251.

(21) COMPANY: MC Equities, LLC; DOCKET NUMBER: 2009-1167-PWS-E; IDENTIFIER: RN101281939; LOCATION: Harris County; TYPE OF FACILITY: PWS; RULE VIOLATED: 30 TAC §290.45(b)(1)(D)(v), by failing to provide emergency power that will deliver water at a rate of 0.35 gallons per minute (gpm) per connection; PENALTY: $267; ENFORCEMENT COORDINATOR: Tel Croston, (512) 239-5717; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(22) COMPANY: MEL STEVENSON & ASSOCIATES, INC. dba Spec Building Materials; DOCKET NUMBER: 2009-0928-PST-E; IDENTIFIER: RN105487805; LOCATION: San Antonio, Bexar County; TYPE OF FACILITY: commercial and residential roofing business; RULE VIOLATED: 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; 30 TAC §334.8(c)(5)(A)(i) and the Code, §26.3467(a), by failing to make available to a common carrier a valid, current delivery certificate; 30 TAC §334.50(b)(1)(A) and the Code, §26.3475(c)(1), by failing to ensure that the UST is monitored in a manner which will detect a release; 30 TAC §334.50(b)(2)(A) and the Code, §26.3475(a), by failing to provide release detection for the piping associated with the UST system; 30 TAC §334.50(b)(2)(A)(i)(III) and the Code, §26.3475(a), by failing to test the line leak detectors at least once per year for performance and operational reliability; 30 TAC §334.8(c)(5)(C), by failing to ensure that a legible tag, label, or marking with the tank number is permanently applied upon or affixed to either the top of the fill tube or to a nonremovable point in the immediate area of the fill tube for each regulated UST; 30 TAC §334.51(b)(2)(C) and the Code, §26.3475(c)(2), by failing to equip each tank with a valve or other device designed to automatically shut off the flow of regulated substances in the tank when the liquid level in the tank reaches no higher than 95% capacity; 30 TAC §334.42(i), by failing to inspect all sumps including the dispenser sumps, manways, overspill containers, or catchment basins associated with the UST system; and 30 TAC §334.45(c)(3)(A), by failing to install an emergency shutoff valve on each pressurized delivery or product line and ensure that it is securely anchored at the base of the dispenser; PENALTY: $8,373; ENFORCEMENT COORDINATOR: Judy Kluge, (817) 588-5800; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(23) COMPANY: City of Olney; DOCKET NUMBER: 2009-1114-MWD-E; IDENTIFIER: RN101610335; LOCATION: Young County; TYPE OF FACILITY: wastewater treatment plant; RULE VIOLATED: 30 TAC §305.125(5) and TPDES Permit Number WQ0010050001, Operational Requirements Number 4, by failing to maintain adequate safeguards to prevent the discharge of untreated or inadequately treated wastewater during electrical power failures; and 30 TAC §305.125(5) and TPDES Permit Number WQ0010050001, Operational Requirements Number 1, by failing to ensure that the facility and all of its systems of collection, treatment, and disposal are properly operated and maintained; PENALTY: $3,885; ENFORCEMENT COORDINATOR: Heather Brister, (254) 751-0335; REGIONAL OFFICE: 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (325) 698-9674.

(24) COMPANY: Rio Water Supply Corporation; DOCKET NUMBER: 2009-0972-PWS-E; IDENTIFIER: RN101456689; LOCATION: Rio Grande City, Starr County; TYPE OF FACILITY: PWS; RULE VIOLATED: 30 TAC §290.45(b)(2)(F) and THSC, §341.0315(c), by failing to provide a service pump capacity that provides each pump station or pressure plane with two or more pumps that have a total capacity of two gpm per connection or that have a total capacity of at least 1,000 gpm and the ability to meet peak hourly demands; 30 TAC §290.46(e)(3)(C), by failing to employ at least two operators who hold a Class "C" or higher license; 30 TAC §290.46(r), by failing to operate the facility to maintain a minimum pressure of 35 pounds per square inch throughout the distribution system; 30 TAC §290.46(d)(2)(B) and §290.110(b)(4) and THSC, §341.0315(c), by failing to maintain a minimum chloramine residual of at least 0.5 milligrams per liter; and 30 TAC §290.46(m)(6), by failing to maintain pumps, motors, valves, and other mechanical devices in good working condition; PENALTY: $2,600; ENFORCEMENT COORDINATOR: Epifanio Villarreal, (361) 825-3100; REGIONAL OFFICE: 1804 West Jefferson Avenue, Harlingen, Texas 78550-5247, (956) 425-6010.

(25) COMPANY: City of San Benito; DOCKET NUMBER: 2009-0626-MWD-E; IDENTIFIER: RN103935599; LOCATION: Cameron County; TYPE OF FACILITY: wastewater treatment plant; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number WQ0014454001, Interim Effluent Limitations and Monitoring Requirements Number 1, and the Code, §26.121(a), by failing to comply with permit effluent limits for TSS, NH_3N, fecal coliform, and carbonaceous biochemical oxygen demand; and 30 TAC §305.125(1) and §319.5(b) and TPDES Permit Number WQ0014454001, Monitoring and Reporting Requirements Number 1, by failing to collect and analyze samples for *E. coli* bacteria; PENALTY: $21,790; SEP offset amount of $17,432 applied to The Rensselaerville Institute - "Self-Help Rio Grande"; ENFORCEMENT COORDINATOR: Steve Villatoro, (512) 239-4930; REGIONAL OFFICE: 1804 West Jefferson Avenue, Harlingen, Texas 78550-5247, (956) 425-6010.

(26) COMPANY: Texas Petroleum Group, LLC dba TPG 255 05; DOCKET NUMBER: 2009-0835-PST-E; IDENTIFIER: RN102227592; LOCATION: Houston, Harris County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.50(b)(1)(A) and (d)(4)(A)(ii)(II) and the Code, §26.3475(c)(1), by failing to monitor USTs for releases; PENALTY: $3,750; ENFORCEMENT COORDINATOR: Danielle Porras, (512) 239-2602; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(27) COMPANY: TOTAL PETROCHEMICALS USA, INC.; DOCKET NUMBER: 2009-0749-AIR-E; IDENTIFIER: RN100212109; LOCATION: La Porte, Harris County; TYPE OF FACILITY: petrochemical plant; RULE VIOLATED: 30 TAC §116.115(c), Air Permit Number 3908B, SC Number 1, and THSC, §382.085(b), by failing to prevent unauthorized emissions; PENALTY: $20,000; SEP offset amount of $8,000 applied to Barbers Hill Independent School District - Alternative Fueled Vehicle and Equipment Program; ENFORCEMENT COORDINATOR: Roshondra Lowe, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(28) COMPANY: US CAPITAL INVESTMENTS, LLC DBA Shell on Western; DOCKET NUMBER: 2009-0834-PST-E; IDENTIFIER: RN101532075; LOCATION: Fort Worth, Tarrant County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §115.245(2) and THSC, §382.085(b), by failing to verify proper operation of the Stage II equipment; PENALTY: $4,846; ENFORCEMENT COORDINATOR: Michael Meyer, (512) 239-4492; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(29) COMPANY: City of Valley View; DOCKET NUMBER: 2009-0629-MWD-E; IDENTIFIER: RN101524338; LOCATION: Cooke County; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.65 and §305.125(2) and the Code, §26.121(a), by failing to maintain authorization for the discharge of wastewater; PENALTY: $15,470; SEP offset amount of $12,376 applied to providing first-time wastewater service to at least two low-income residents with failing or inadequately designed septic systems; ENFORCEMENT COORDINATOR: Merrilee Hupp, (512) 239-4490; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(30) COMPANY: Wright City Water Supply Corporation; DOCKET NUMBER: 2009-1262-PWS-E; IDENTIFIER: RN101238459; LOCATION: Smith County; TYPE OF FACILITY: PWS; RULE VIOLATED: 30 TAC §290.113(f)(4) and THSC, §341.0315(c), by

failing to comply with the maximum contaminant level for total trihalomethanes; PENALTY: $424; ENFORCEMENT COORDINATOR: Amanda Henry, (713) 767-3500; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

TRD-200904400
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: September 29, 2009

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Enforcement Orders

A default order was entered regarding Nelco Distributing Company dba Nelco Corner, Docket No. 2005-1223-PST-E on September 11, 2009 assessing $4,200 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Barham Richard, Staff Attorney at (512) 239-0600, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Creek Park Corporation, Docket No. 2007-0410-MWD-E on September 11, 2009 assessing $16,380 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Kari Gilbreth, Staff Attorney at (512) 239-1320, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Carrizo Waste, Inc., Docket No. 2007-2011-MWD-E on September 11, 2009 assessing $45,800 in administrative penalties with $44,600 deferred.

Information concerning any aspect of this order may be obtained by contacting Kari Gilbreth, Staff Attorney at (512) 239-1320, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Master Medical Equipment, Inc. dba The Living Stone, Docket No. 2008-0178-WQ-E on September 11, 2009 assessing $2,100 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Tammy Mitchell, Staff Attorney at (512) 239-0736, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Petroleum Wholesale, L.P. dba Sunmart 168, Docket No. 2008-0503-PST-E on September 11, 2009 assessing $6,600 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Benjamin Thompson, Staff Attorney at (512) 239-0600, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Petroleum Wholesale, L.P., Docket No. 2008-0512-PST-E on September 11, 2009 assessing $2,375 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Peipey Tang, Staff Attorney at (512) 239-0600, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Samuel Fachorn, Docket No. 2008-0578-MLM-E on September 11, 2009 assessing $3,142 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Tommy Henson, Staff Attorney at (512) 239-0946, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Elsa, Docket No. 2008-0915-PWS-E on September 11, 2009 assessing $10,782 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Peipey Tang, Staff Attorney at (512) 239-0600, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Destructors, Inc., Docket No. 2008-1012-AIR-E on September 11, 2009 assessing $60,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Anna Treadwell, Staff Attorney at (512) 239-0974, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Devon Development Corporation, Docket No. 2008-1018-WQ-E on September 11, 2009 assessing $1,050 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Peipey Tang, Staff Attorney at (512) 239-0600, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Genesis Quality Aggregates, Ltd., Docket No. 2008-1026-MLM-E on September 11, 2009 assessing $5,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Tommy Henson, Staff Attorney at (512) 239-0946, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Tuan Nguyen dba AM Food Mart, Docket No. 2008-1374-PST-E on September 11, 2009 assessing $3,937 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Anna Treadwell, Staff Attorney at (512) 239-0974, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Crescent NJK Corporation dba Grapevine Cleaners, Docket No. 2008-1432-DCL-E on September 11, 2009 assessing $1,270 in administrative penalties with $254 deferred.

Information concerning any aspect of this order may be obtained by contacting Danielle Porras, Enforcement Coordinator at (512) 239-2602, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Ocean2Ocean, Docket No. 2008-1496-EAQ-E on September 11, 2009 assessing $48,450 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Becky Combs, Staff Attorney at (512) 239-6939, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Cacharel Texas Hawaii, Ltd., Docket No. 2008-1648-MWD-E on September 11, 2009 assessing $20,924 in administrative penalties with $4,184 deferred.

Information concerning any aspect of this order may be obtained by contacting Tom Jecha, Enforcement Coordinator at (512) 239-2576, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Strawn, Docket No. 2008-1652-PWS-E on September 11, 2009 assessing $810 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Stephen Thompson, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Jesus Guzman, Jr., Docket No. 2008-1739-PST-E on September 11, 2009 assessing $3,500 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Jacquelyn Boutwell, Staff Attorney at (512) 239-5846, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Flying J Inc., Docket No. 2008-1835-AIR-E on September 11, 2009 assessing $1,240 in administrative penalties with $248 deferred.

Information concerning any aspect of this order may be obtained by contacting Audra Benoit, Enforcement Coordinator at (409) 899-8799, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of San Marcos, Docket No. 2008-1842-EAQ-E on September 11, 2009 assessing $2,140 in administrative penalties with $428 deferred.

Information concerning any aspect of this order may be obtained by contacting Lauren Smitherman, Enforcement Coordinator at (512) 239-5223, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Four D. Construction, Inc., Docket No. 2008-1851-WQ-E on September 11, 2009 assessing $3,120 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Becky Combs, Staff Attorney at (512) 239-6939, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Almeda, Inc. dba Downtown Tiger Mart, Docket No. 2008-1875-PST-E on September 11, 2009 assessing $6,296 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Xavier Guerra, Staff Attorney at (210) 403-4016, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Glazer's Wholesale Drug Company, Inc., Docket No. 2009-0026-PST-E on September 11, 2009 assessing $11,159 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Mike Fishburn, Staff Attorney at (512) 239-0635, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Exxon Mobil Corporation, Docket No. 2009-0073-AIR-E on September 11, 2009 assessing $19,875 in administrative penalties with $3,975 deferred.

Information concerning any aspect of this order may be obtained by contacting John Muennink, Enforcement Coordinator at (361) 825-3423, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding RAHISA UNITED, INC. dba A to Z Food & Fuel, Docket No. 2009-0137-PST-E on September 11, 2009 assessing $16,242 in administrative penalties with $3,248 deferred.

Information concerning any aspect of this order may be obtained by contacting Wallace Myers, Enforcement Coordinator at (512) 239-6580, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Reynolds & Kay, Ltd., Docket No. 2009-0161-WQ-E on September 11, 2009 assessing $26,450 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Heather Brister, Enforcement Coordinator at (254) 761-3034, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Leslie G. Perry dba Bilt Rite Portable Buildings, Docket No. 2009-0226-MLM-E on September 11, 2009 assessing $2,649 in administrative penalties with $529 deferred.

Information concerning any aspect of this order may be obtained by contacting Ross Fife, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Valero Refining-Texas L.P., Docket No. 2009-0288-AIR-E on September 11, 2009 assessing $24,484 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting John Muennink, Enforcement Coordinator at (361) 825-3423, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Rohm and Haas Texas Incorporated, Docket No. 2009-0296-AIR-E on September 11, 2009 assessing $59,700 in administrative penalties with $11,940 deferred.

Information concerning any aspect of this order may be obtained by contacting Rebecca Johnson, Enforcement Coordinator at (361) 825-3420, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding ConocoPhillips Company, Docket No. 2009-0301-AIR-E on September 11, 2009 assessing $10,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Roshondra Lowe, Enforcement Coordinator at (713) 767-3553, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Harris County Municipal Utility District No. 109, Docket No. 2009-0305-MWD-E on September 11, 2009 assessing $10,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Jorge Ibarra, Enforcement Coordinator at (817) 588-5890, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Cain Addition Home Owners Association CAHA, Docket No. 2009-0320-PWS-E on September 11, 2009 assessing $3,300 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Becky Combs, Staff Attorney at (512) 239-6939, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Sooners Group, LP, Docket No. 2009-0321-WQ-E on September 11, 2009 assessing $1,050 in administrative penalties with $210 deferred.

Information concerning any aspect of this order may be obtained by contacting Tom Jecha, Enforcement Coordinator at (512) 239-2576, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Taisseer Al-Aqqad dba Best Food Store, Docket No. 2009-0328-PST-E on September 11, 2009 assessing $3,021 in administrative penalties with $604 deferred.

Information concerning any aspect of this order may be obtained by contacting Tom Greimel, Enforcement Coordinator at (512) 239-5690, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding American Airlines, Inc., Docket No. 2009-0352-AIR-E on September 11, 2009 assessing $5,457 in administrative penalties with $1,091 deferred.

Information concerning any aspect of this order may be obtained by contacting Terry Murphy, Enforcement Coordinator at (512) 239-5025, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding WHITE OAK UTILITIES, INC., Docket No. 2009-0367-MWD-E on September 11, 2009 assessing $8,010 in administrative penalties with $1,602 deferred.

Information concerning any aspect of this order may be obtained by contacting Jennifer Graves, Enforcement Coordinator at (956) 430-6023, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Chevron Phillips Chemical Company LP, Docket No. 2009-0389-AIR-E on September 11, 2009 assessing $7,450 in administrative penalties with $1,490 deferred.

Information concerning any aspect of this order may be obtained by contacting Terry Murphy, Enforcement Coordinator at (512) 239-5025, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Tim Kahir Helo, Docket No. 2009-0391-PST-E on September 11, 2009 assessing $4,976 in administrative penalties with $995 deferred.

Information concerning any aspect of this order may be obtained by contacting Brianna Carlson, Enforcement Coordinator at (956) 430-6021, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Houston Harrisburg Convenience Store, Inc. dba Harrisburg CITGO, Docket No. 2009-0392-PST-E on September 11, 2009 assessing $3,596 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Mike Fishburn, Staff Attorney at (512) 239-0635, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Chevron Phillips Chemical Company LP, Docket No. 2009-0396-AIR-E on September 11, 2009 assessing $25,000 in administrative penalties with $5,000 deferred.

Information concerning any aspect of this order may be obtained by contacting James Nolan, Enforcement Coordinator at (512) 239-6634, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding WRL General Contractors, Ltd., Docket No. 2009-0414-WQ-E on September 11, 2009 assessing $11,875 in administrative penalties with $2,375 deferred.

Information concerning any aspect of this order may be obtained by contacting Lanae Foard, Enforcement Coordinator at (512) 239-2554, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Humberto Gonzalez, Docket No. 2009-0419-PST-E on September 11, 2009 assessing $3,500 in administrative penalties with $700 deferred.

Information concerning any aspect of this order may be obtained by contacting Michael Pace, Enforcement Coordinator at (817) 588-5933, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Texas Department of Transportation, Docket No. 2009-0434-MWD-E on September 11, 2009 assessing $8,010 in administrative penalties with $1,602 deferred.

Information concerning any aspect of this order may be obtained by contacting Jennifer Graves, Enforcement Coordinator at (956) 430-6023, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding TMT, INC. dba Whip In 112, Docket No. 2009-0436-PST-E on September 11, 2009 assessing $4,071 in administrative penalties with $814 deferred.

Information concerning any aspect of this order may be obtained by contacting Keith Frank, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding U.S. Department of Agriculture, Docket No. 2009-0438-PWS-E on September 11, 2009 assessing $825 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Stephen Thompson, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Curtis White dba El Pinon Estates Water System, Docket No. 2009-0439-PWS-E on September 11, 2009 assessing $610 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Christopher Keffer, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Valero Refining-Texas L.P., Docket No. 2009-0448-AIR-E on September 11, 2009 assessing $10,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Nadia Hameed, Enforcement Coordinator at (713) 767-3629, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Petrolia, Docket No. 2009-0458-PWS-E on September 11, 2009 assessing $1,008 in administrative penalties with $201 deferred.

Information concerning any aspect of this order may be obtained by contacting Rebecca Clausewitz, Enforcement Coordinator at (210) 403-4012, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Texas Department of Criminal Justice, Docket No. 2009-0462-MWD-E on September 11, 2009 assessing $3,360 in administrative penalties with $672 deferred.

Information concerning any aspect of this order may be obtained by contacting Lauren Smitherman, Enforcement Coordinator at (512) 239-5223, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Sabine River Authority of Texas, Docket No. 2009-0469-MWD-E on September 11, 2009 assessing $1,514 in administrative penalties with $302 deferred.

Information concerning any aspect of this order may be obtained by contacting Harvey Wilson, Enforcement Coordinator at (512) 239-0321, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Shareef I Enterprises, Inc. dba Beach Citgo, Docket No. 2009-0483-PST-E on September 11, 2009 assessing $3,071 in administrative penalties with $614 deferred.

Information concerning any aspect of this order may be obtained by contacting Michael Pace, Enforcement Coordinator at (817) 588-5933, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Raymond C. Honke, Docket No. 2009-0484-PWS-E on September 11, 2009 assessing $1,332 in administrative penalties with $266 deferred.

Information concerning any aspect of this order may be obtained by contacting Stephen Thompson, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Chevron Phillips Chemical Company LP, Docket No. 2009-0489-AIR-E on September 11, 2009 assessing $8,034 in administrative penalties with $1,606 deferred.

Information concerning any aspect of this order may be obtained by contacting Rebecca Johnson, Enforcement Coordinator at (361) 825-3420, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Thomas M. Skelton and Phillis A. Skelton, Docket No. 2009-0508-EAQ-E on September 11, 2009 assessing $3,000 in administrative penalties with $600 deferred.

Information concerning any aspect of this order may be obtained by contacting Samuel Short, Enforcement Coordinator at (512) 239-5363, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding BASF Corporation, Docket No. 2009-0525-AIR-E on September 11, 2009 assessing $13,300 in administrative penalties with $2,660 deferred.

Information concerning any aspect of this order may be obtained by contacting Miriam Hall, Enforcement Coordinator at (512) 239-1044, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Scenic Point Northview, Inc., Docket No. 2009-0527-MWD-E on September 11, 2009 assessing $19,760 in administrative penalties with $3,952 deferred.

Information concerning any aspect of this order may be obtained by contacting Carlie Konkol, Enforcement Coordinator at (361) 825-3422, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Inverness Forest Improvement District, Docket No. 2009-0538-MWD-E on September 11, 2009 assessing $4,050 in administrative penalties with $810 deferred.

Information concerning any aspect of this order may be obtained by contacting Evette Alvarado, Enforcement Coordinator at (512) 239-2573, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Clara, Inc. dba Clara's Store & Bakery, Docket No. 2009-0539-PST-E on September 11, 2009 assessing $4,275 in administrative penalties with $855 deferred.

Information concerning any aspect of this order may be obtained by contacting Elvia Maske, Enforcement Coordinator at (512) 239-0789, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Dal-Tile Corporation, Docket No. 2009-0559-PST-E on September 11, 2009 assessing $2,527 in administrative penalties with $505 deferred.

Information concerning any aspect of this order may be obtained by contacting Rajesh Acharya, Enforcement Coordinator at (512) 239-0577, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Elias Farah and Mansour Ghaith dba Henderson Deli, Docket No. 2009-0565-PST-E on September 11, 2009 assessing $5,976 in administrative penalties with $1,195 deferred.

Information concerning any aspect of this order may be obtained by contacting Keith Frank, Enforcement Coordinator at (512) 239-1203, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding BASF Corporation, Docket No. 2009-0572-AIR-E on September 11, 2009 assessing $6,507 in administrative penalties with $1,301 deferred.

Information concerning any aspect of this order may be obtained by contacting Nadia Hameed, Enforcement Coordinator at (713) 767-3629, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding DEWAN ENTERPRISES, INC. dba Marium Food Mart, Docket No. 2009-0581-PST-E on September 11, 2009 assessing $3,080 in administrative penalties with $616 deferred.

Information concerning any aspect of this order may be obtained by contacting Michael Pace, Enforcement Coordinator at (817) 588-5933, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Teague, Docket No. 2009-0594-MWD-E on September 11, 2009 assessing $7,462 in administrative penalties with $1,492 deferred.

Information concerning any aspect of this order may be obtained by contacting Lauren Smitherman, Enforcement Coordinator at (512) 239-5223, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Aztec Cove Property Owners Association, Inc., Docket No. 2009-0595-MWD-E on September 11, 2009 assessing $2,740 in administrative penalties with $548 deferred.

Information concerning any aspect of this order may be obtained by contacting Lanae Foard, Enforcement Coordinator at (512) 239-2554, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Jeffrey H. Jeong dba A J All Seasons 1, Docket No. 2009-0608-PST-E on September 11, 2009 assessing $3,850 in administrative penalties with $770 deferred.

Information concerning any aspect of this order may be obtained by contacting Elvia Maske, Enforcement Coordinator at (512) 239-0789, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Citgo Refining and Chemicals Company L.P., Docket No. 2009-0622-AIR-E on September 11, 2009 assessing $4,800 in administrative penalties with $960 deferred.

Information concerning any aspect of this order may be obtained by contacting Rebecca Johnson, Enforcement Coordinator at (361) 825-3420, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Blanco, Docket No. 2009-0655-PWS-E on September 11, 2009 assessing $397 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Christopher Keffer, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Afzal Shekhani dba Adams Plaza, Docket No. 2009-0692-PST-E on September 11, 2009 assessing $6,728 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Barham Richard, Staff Attorney at (512) 239-0600, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding LITTLE STAR INC. dba T & T Food Mart, Docket No. 2009-0707-PST-E on September 11, 2009 assessing $3,096 in administrative penalties with $619 deferred.

Information concerning any aspect of this order may be obtained by contacting Tom Greimel, Enforcement Coordinator at (512) 239-5690, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Center Convenience, Inc. dba Almeda Food Mart, Docket No. 2009-0736-PST-E on September 11, 2009 assessing $3,596 in administrative penalties with $719 deferred.

Information concerning any aspect of this order may be obtained by contacting Mike Meyer, Enforcement Coordinator at (512) 239-4492, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was entered regarding Brian K. Sumner, Docket No. 2009-0742-OSI-E on September 11, 2009 assessing $175 in administrative penalties.

Information concerning any aspect of this citation may be obtained by contacting Melissa Keller, SEP Coordinator at (512) 239-1768, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was entered regarding Whitestone Custom Homes, Ltd., Docket No. 2009-0743-WQ-E on September 11, 2009 assessing $700 in administrative penalties.

Information concerning any aspect of this citation may be obtained by contacting Melissa Keller, SEP Coordinator at (512) 239-1768, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was entered regarding Becky Burns, Docket No. 2009-0756-WOC-E on September 11, 2009 assessing $210 in administrative penalties.

Information concerning any aspect of this citation may be obtained by contacting Melissa Keller, SEP Coordinator at (512) 239-1768, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was entered regarding Delicias Restaurant-Store, LLC, Docket No. 2009-0769-PST-E on September 11, 2009 assessing $7,700 in administrative penalties.

Information concerning any aspect of this citation may be obtained by contacting Melissa Keller, SEP Coordinator at (512) 239-1768, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was entered regarding Flournoy Construction Company, L.L.C., Docket No. 2009-0873-WQ-E on September 11, 2009 assessing $700 in administrative penalties.

Information concerning any aspect of this citation may be obtained by contacting Melissa Keller, SEP Coordinator at (512) 239-1768, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was entered regarding Juan Michel, Docket No. 2009-0950-WOC-E on September 11, 2009 assessing $210 in administrative penalties.

Information concerning any aspect of this citation may be obtained by contacting Melissa Keller, SEP Coordinator at (512) 239-1768, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was entered regarding Rickey G. Bockmon, Docket No. 2009-0957-WOC-E on September 11, 2009 assessing $210 in administrative penalties.

Information concerning any aspect of this citation may be obtained by contacting Melissa Keller, SEP Coordinator at (512) 239-1768, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An order was entered regarding Alan Black and Yolanda Black dba Black's Construction and Caliche Pit, Docket No. 2008-1234-MSW-E on September 16, 2009 assessing $8,400 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Clinton Sims, Enforcement Coordinator at (512) 239-6933, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

TRD-200904252
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: September 23, 2009

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

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on

the listed Agreed Orders (AOs) in accordance with Texas Water Code (TWC), §7.075. Section 7.075 requires that before the commission may approve the AOs, the commission shall allow the public an opportunity to submit written comments on the proposed AOs. Section 7.075 requires that notice of the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **November 9, 2009.** Section 7.075 also requires that the commission promptly consider any written comments received and that the commission may withdraw or withhold approval of an AO if a comment discloses facts or considerations that indicate that consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed AO is not required to be published if those changes are made in response to written comments.

A copy of each proposed AO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Written comments about an AO should be sent to the attorney designated for the AO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on November 9, 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: Joe E. Panagopoulos dba Metro Materials; DOCKET NUMBER: 2008-1188-MSW-E; TCEQ ID NUMBER: RN105225106; LOCATION: 8319 Potranco Road, San Antonio, Bexar County; TYPE OF FACILITY: brush, mulch, rock, and dirt recycling facility; RULES VIOLATED: 30 TAC §328.4(a) and §328.5(a) and TCEQ AO Docket Number 2007-1182-MSW-E, by failing to comply with Ordering Provision Number 2.b. of TCEQ AO Docket Number 2007-1182-MSW-E by failing to obtain authorization to operate as a recycling facility or properly remove all brush, mulch, sand, and gravel from the facility; 30 TAC §328.5(c)(1), by failing to provide a written cost estimate, in current dollars, showing the cost of hiring a third party to close the facility by disposition of all processed and unprocessed materials in accordance with all applicable regulations; 30 TAC §328.5(d), by failing to establish and maintain financial assurance for closure of the facility; 30 TAC §328.5(h), by failing to have a fire prevention and suppression plan that shall be made available to the local fire prevention authority having jurisdiction over the facility for review and coordination; PENALTY: $8,625; STAFF ATTORNEY: Stephanie J. Frazee, Litigation Division, MC 175, (512) 239-3693; REGIONAL OFFICE: San Antonio Regional Office, 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(2) COMPANY: Larry O'Neill dba Lazy Acres Trailer Park; DOCKET NUMBER: 2008-1829-PWS-E; TCEQ ID NUMBER: RN101653723; LOCATION: 8611 New Laredo Highway, San Antonio, Bexar County; TYPE OF FACILITY: public water supply; RULES VIOLATED: 30 TAC §290.109(c)(2)(A)(ii) and §290.122(c)(2)(A) and Texas Health and Safety Code, §341.033(d), by failing to collect routine distribution water samples for coliform analysis for the months of May 2006, September 2006, July 2007, October - December 2007, and February and March of 2008 and by failing to provide public notification of the failure to collect routine distribution water samples for coliform analysis for the months of May 2006, July 2007, October - December 2007, and February and March 2008; 30 TAC §290.109(c)(3)(A)(ii) and §290.122(c)(2)(A), by failing to collect and submit a minimum of four repeat distribution coliform samples within 24 hours after being notified of a total coliform-positive result on a routine sample found during the months of October 2006 and March 2007, and by failing to provide public notice of the failure to collect all required repeat samples during the month of March 2007, and 30 TAC §290.109(c)(2)(F) and §290.122(c)(2)(A) by failing to collect a minimum of five months routine distribution coliform samples during the months of November 2006 and March 2007 following a total coliform-positive and by failing to provide public notice of the failure to conduct proper distribution coliform sampling during the month of March 2007; PENALTY: $6,286; STAFF ATTORNEY: Jacquelyn Boutwell, Litigation Division, MC 175, (512) 239-5846; REGIONAL OFFICE: San Antonio Regional Office, 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(3) COMPANY: Rolando Rodriguez and Josefina Rodriguez; DOCKET NUMBER: 2008-0932-MLM-E; TCEQ ID NUMBER: RN105501969; LOCATION: 110 Little America Lane, Los Fresnos, Cameron County; TYPE OF FACILITY: unauthorized disposal site; RULES VIOLATED: 30 TAC §330.15(c) and TWC, §26.121(a)(1), by failing to prevent the unauthorized disposal of municipal solid waste; PENALTY: $1,000; STAFF ATTORNEY: Stephanie J. Frazee, Litigation Division, MC 175, (512) 239-3693; REGIONAL OFFICE: Harlingen Regional Office, 1804 West Jefferson Avenue, Harlingen, Texas 78550-5247, (956) 425-6010.

(4) COMPANY: Terry Fuessel; DOCKET NUMBER: 2009-0479-OSS-E; TCEQ ID NUMBER: RN105004303; LOCATION: 1530 County Road 211, Mertzon, Irion County; TYPE OF FACILITY: on-site sewage facility; RULES VIOLATED: 30 TAC §285.3(b)(1), by failing to obtain an authorization to construct an on-site sewage facility; PENALTY: $262; STAFF ATTORNEY: Mike Fishburn, Litigation Division, MC 175, (512) 239-0635; REGIONAL OFFICE: San Angelo Regional Office, 622 South Oakes, Suite K, San Angelo, Texas 76903-7013, (325) 655-9479.

(5) COMPANY: Three Lakes Land Company, L.L.C.; DOCKET NUMBER: 2007-1075-MLM-E; TCEQ ID NUMBER: RN104801121; LOCATION: north side of Business 83, at the northwest corner or the intersection of Business 83 and Baker Potts Road, Harlingen, Cameron County; TYPE OF FACILITY: unauthorized municipal solid waste disposal site; RULES VIOLATED: 30 TAC §330.15(c), by failing to prevent the unauthorized disposal of municipal solid waste; and Texas Health and Safety Code, §382.085(b) and 30 TAC §111.201, by failing to comply with the general prohibition on outdoor burning; PENALTY: $40,250; STAFF ATTORNEY: Barham A. Richard, Litigation Division, MC 175, (512) 239-0107; REGIONAL OFFICE: Harlingen Regional Office, 1804 West Jefferson Avenue, Harlingen, Texas 78550-5247, (956) 425-6010.

TRD-200904407
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: September 29, 2009

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

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Default Orders (DOs). The commission staff proposes a DO when the staff has sent an executive director's preliminary report and petition (EDPRP) to an entity outlining the alleged violations; the proposed penalty; and the proposed technical requirements necessary to

bring the entity back into compliance; and the entity fails to request a hearing on the matter within 20 days of its receipt of the EDPRP or requests a hearing and fails to participate at the hearing. Similar to the procedure followed with respect to Agreed Orders entered into by the executive director of the commission, in accordance with Texas Water Code (TWC), §7.075 this notice of the proposed order and the opportunity to comment is published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **November 9, 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.

A copy of each proposed DO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Written comments about the DO should be sent to the attorney designated for the DO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on November 9, 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: Bill Bearden dba Ovilla Road Citgo; DOCKET NUMBER: 2008-1444-PST-E; TCEQ ID NUMBER: RN102058997; LOCATION: 907 Lark Lane, Oak Leaf, Ellis County; TYPE OF FACILITY: out-of-service convenience store; RULES VIOLATED: 30 TAC §334.72, by failing to report a suspected release within 24 hours of discovery; 30 TAC §334.74(2)(A), by failing to investigate a suspected release within 30 days of discovery; and 30 TAC §334.49(a)(2), (c)(4)(C), and §334.54(c)(1), and TWC, §26.3475(d), by failing to ensure that the corrosion protection system is operating and maintained in a manner that will ensure that corrosion protection will continuously be provided to all underground components of an underground storage tank (UST) system, and by failing to have the corrosion protection system inspected and tested for operability and adequacy of protection at least once every three years; PENALTY: $10,221; STAFF ATTORNEY: Phillip Goodwin, Litigation Division, MC 175, (512) 239-0675; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(2) COMPANY: Chris James Becker; DOCKET NUMBER: 2009-0451-LII-E; TCEQ ID NUMBER: RN103229274; LOCATION: 5104 Jacobs Creek Court, Austin, Travis County; TYPE OF FACILITY: irrigation system; RULES VIOLATED: 30 TAC §344.24(a), by failing to comply with local requirements, ordinances and regulations designed to protect the public water supply; PENALTY: $620; STAFF ATTORNEY: Sharesa Y. Alexander, Litigation Division, MC 175, (512) 239-3503; REGIONAL OFFICE: Austin Regional Office, 2800 South Interstate Highway 35, Suite 100, Austin, Texas 78704-5712, (512) 339-2929.

(3) COMPANY: George Sprague dba George's Tire Shop; DOCKET NUMBER: 2009-0685-WQ-E; TCEQ ID NUMBER: RN105473672; LOCATION: intersection of Corpus Christi Street and Dallas Street, Rockport, Aransas County; TYPE OF FACILITY: scrap waste and recycling facility; RULES VIOLATED: 40 Code of Federal Regulations §122.26(c) and 30 TAC §281.25(a)(4), by failing to obtain authorization to discharge storm water associated with industrial activities; PENALTY: $3,150; STAFF ATTORNEY: Tommy Tucker Henson II, Litigation Division, MC 175, (512) 239-0946; REGIONAL OFFICE: Corpus Christi Regional Office, 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5839, (361) 825-3100.

(4) COMPANY: Humberto Saldana; DOCKET NUMBER: 2009-0345-LII-E; TCEQ ID NUMBER: RN105640874; LOCATION: 4413 Diaz Avenue, Fort Worth, Tarrant County; TYPE OF FACILITY: landscaping business; RULES VIOLATED: 30 TAC §30.5(b) and §334.30, TWC, §37.003, and Texas Occupations Code §1903.251, by failing to refrain from advertising or representing himself to the public as a person who can perform services for which a license or registration is required when not possessing a current license or registration; PENALTY: $262; STAFF ATTORNEY: Mike Fishburn, Litigation Division, MC 175, (512) 239-0635; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(5) COMPANY: Jose Antonio Camacho; DOCKET NUMBER: 2009-0251-LII-E; TCEQ ID NUMBER: RN105624696; LOCATION: 20715 Greymoss, Houston, Harris County; TYPE OF FACILITY: irrigation system; RULES VIOLATED: 30 TAC §30.5(a) and §344.4(a), TWC, §37.003, and Texas Occupations Code §1903.251, by failing to obtain a TCEQ irrigator license prior to selling and installing a landscape irrigation system at the site during April and May 2007; PENALTY: $744; STAFF ATTORNEY: Kari Gilbreth, Litigation Division, MC 175, (512) 239-1320; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023, (713) 767-3500.

(6) COMPANY: Joseph Piazza dba Exxon Northgate; DOCKET NUMBER: 2005-1711-MLM-E; TCEQ ID NUMBER: RN100612456; LOCATION: 5221 Wren Avenue, El Paso, El Paso County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.49(c)(4)(C) and TWC, §26.3475(d), by failing to test the cathodic protection system for operability and adequacy of protection at a frequency of at least once every three years; 30 TAC §37.815(a) and (b), by failing to demonstrate acceptable financial assurance for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of petroleum USTs; 30 TAC §334.50(b)(1)(A) and (d)(1)(B)(ii) and TWC, §26.3475(c)(1), by failing to reconcile inventory control records on a monthly basis which equals or exceeds the sum of 1% of the flow through plus 130 gallons; 30 TAC §114.100(a) and Texas Health and Safety Code, §382.085(b), dispensed fuel without the required minimum oxygen content of 2.7% by weight; PENALTY: $10,800; STAFF ATTORNEY: Gary Shiu, Litigation Division, MC R-12, (713) 422-8916; REGIONAL OFFICE: El Paso Regional Office, 401 East Franklin Avenue, Suite 560, El Paso, Texas 79901-1212, (915) 834-4949.

TRD-200904408
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: September 29, 2009

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Notice of Opportunity to Request a Public Meeting for a New Municipal Solid Waste Transfer Station Registration Application

Ms. Karen Rodewald, P.O. Box 142028, Austin, Texas 78714-2028, has applied to the Texas Commission on Environmental Quality

(TCEQ) for proposed Registration No. 40243, to construct and operate a Type V municipal solid waste transfer station. The proposed facility, River City Recycles, will be located 8000 Daffan Lane, Austin, Texas 78724, in Travis County. This facility is requesting authorization to recycle and transfer municipal solid waste which includes construction and demolition waste. The registration application is available for viewing and copying at the TCEQ Region 11 Office, 2800 S. IH 35, Suite 100, Austin, Travis County, TX 78704-5712.

PUBLIC COMMENT/PUBLIC MEETING. Written public comments or written requests for a public meeting must be submitted to the Office of Chief Clerk at the address included in the information section below. Comments may also be received if a public meeting is held on the facility. A public meeting will be held by the executive director if requested by a member of the legislature who represents the general area where the development is to be located, or if there is a substantial public interest in the proposed development. The purpose of the public meeting is for the public to provide input for consideration by the commission, and for the applicant and the commission staff to provide information to the public. A public meeting is not a contested case hearing. The executive director will review and consider public comments and written requests for a public meeting submitted prior to the notice of final determination. The executive director is not required to file a response to comments.

EXECUTIVE DIRECTOR ACTION. The executive director shall, after review of an application for registration, determine if the application will be approved or denied in whole or in part. If the executive director acts on an application, the chief clerk shall mail or otherwise transmit notice of the action and an explanation of the opportunity to file a motion to reconsider the executive director's decision. The chief clerk shall mail this notice to the owner and operator, the public interest counsel, to adjacent landowners as shown on the required land ownership map and landowners list, and to other persons who timely filed public comment in response to public notice. Not all persons on the mailing list for this notice will receive the notice letter from the Office of the Chief Clerk.

INFORMATION. Written public comments or requests to be placed on the permanent mailing list for this application should be submitted to the Office of the Chief Clerk, MC 105, TCEQ, P.O. Box 13087, Austin, TX 78711-30887 or electronically submitted to http://www5.tceq.state.tx.us/ecmnts/index.cfm. Individual members of the general public may contact the Office of Public Assistance at 1-800-687-4040. General information regarding the TCEQ can be found at our web site at www.tceq.state.tx.us. Further information may also be obtained from Ms. Karen Rodewald at the address stated above or by calling (512) 832-8300.

TRD-200904422
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: September 30, 2009

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Notice of Public Hearings on Proposed Revisions to 30 TAC Chapter 101 and to the State Implementation Plan

The Texas Commission on Environmental Quality (commission) will conduct concurrent public hearings to receive testimony regarding proposed revisions to 30 TAC Chapter 101, General Air Quality Rules, Subchapter A, Definitions, and Subchapter H, Emissions Banking and Trading, Division 6, Highly-Reactive Volatile Organic Compound Emissions Cap and Trade Program, and corresponding revisions to the state implementation plan (SIP) under the requirements of Texas Health and Safety Code, §382.017; Texas Government Code, Chapter 2001, Subchapter B; and 40 Code of Federal Regulations §51.102, of the United States Environmental Protection Agency (EPA) concerning SIPs.

The proposed amendments to Chapter 101, Subchapter A, §101.1, Definitions, would update the definition of volatile organic compound to link the 30 TAC definition with the current definition in 40 Code of Federal Regulations and correct the reportable quantity for 1,1,1,2,3,3,3-heptafluoropropane. The proposed amendment to Chapter 101, Subchapter H, Division 6, Highly-Reactive Volatile Organic Compound Emissions Cap and Trade Program, would also reduce the total cap amount of allowances and revise the allocation methodology of allowances for participants in the Highly-Reactive Volatile Organic Compound Emissions Cap and Trade Program. **(Rule Project No. 2009-006-101-EN)**

Public hearings for this proposed rulemaking and corresponding SIP revision are scheduled in conjunction with the proposed amendments to Chapter 101, Subchapter H, Division 3, Mass Emissions Cap and Trade (MECT) program; and Chapter 115, Subchapter E, Division 4, Offset Lithographic Printing at the following times and locations: October 28, 2009, 2:00 p.m. and 6:00 p.m., in Conference Room A at the Houston-Galveston Area Council, 3555 Timmons Lane, Houston; and in Austin on October 29, 2009, 1:00 p.m. and 3:00 p.m., at the Texas Commission on Environmental Quality complex, Building E, Room 201S, 12100 Park 35 Circle. The hearings will be structured for the receipt of oral or written comments by interested persons. Registration will begin 30 minutes prior to each 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 discuss the proposals 30 minutes before each hearing and will answer questions before and after the hearing.

Persons planning to attend the hearing, who have special communication or other accommodation needs, should contact Charlotte Horn, Texas Register Team (512) 239-0779. Requests should be made as far in advance as possible.

Comments may be submitted to Jessica Rawlings, Texas Register Team, Office of Legal Services, Texas Commission on Environmental Quality, MC 205, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at *www5.tceq.state.tx.us/rules/ecomments/.* File size restrictions may apply to comments being submitted via the eComments system. Copies of the proposed rules can be obtained from the commission's Web site at *http://www.tceq.state.tx.us/nav/rules/propose_adopt.html.* Copies of the proposed SIP revisions and all appendices can be obtained from the commission's Web site at *http://www.tceq.state.tx.us/implementation/air/sip/Hottop.html.* For further information regarding the proposed rules and SIP revisions, please contact Ray Schubert, Air Quality Planning Section, at (512) 239-6615.

TRD-200904274
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: September 25, 2009

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Notice of Public Hearings on Proposed Revisions to 30 TAC Chapters 101 and 115 and to the State Implementation Plan

The Texas Commission on Environmental Quality (commission) will conduct public hearings to receive testimony regarding proposed revisions to 30 TAC Chapter 101, General Air Quality Rules, and 30 TAC Chapter 115, Control of Air Pollution from Volatile Organic

Compounds and corresponding revisions to the state implementation plan (SIP) under the requirements of Texas Health and Safety Code, §382.017; Texas Government Code, Chapter 2001, Subchapter B; and 40 Code of Federal Regulations §51.102, and the United States Environmental Protection Agency (EPA) concerning SIPs. Additionally, the commission will also receive testimony regarding the proposed eight-hour ozone attainment demonstration and reasonable further progress (RFP) demonstration for the Houston-Galveston-Brazoria (HGB) area.

The proposed amendment to Chapter 101, Subchapter H, Division 3, Mass Emissions Cap and Trade (MECT) Program, would revise the definition of "Uncontrolled design capacity" to provide additional flexibility for certain stationary diesel engines and clarify both site and facility applicability. In addition, the proposed amendment would maintain the integrity of the nitrogen oxides (NO_x) cap in the HGB ozone nonattainment area and minimize increases in the NO_x cap by discontinuing the acceptance of late ECT-3 forms, Level of Activity Certification, from major sources of NO_x submitted after March 30, 2010. **(Rule Project No. 2009-019-101-EN)**

The proposed amendment to Chapter 101, Subchapter H, Division 6, Highly-Reactive Volatile Organic Compound Emissions Cap and Trade Program, would reduce the total cap amount of allowances and revise the allocation methodology of allowances for participants in the Highly-Reactive Volatile Organic Compound (HRVOC) Emissions Cap and Trade Program. A proposed amendment to §101.1 would also update the definition of volatile organic compound (VOC) to link the 30 TAC definition with the current definition in 40 Code of Federal Regulations and correct the reportable quantity for 1,1,1,2,3,3,3-heptafluoropropane. **(Rule Project No. 2009-006-101-EN)**

The proposed amendments to Chapter 115, Subchapter E, Division 4, Offset Lithographic Printing, would reduce the VOC content limits on fountain solutions used by sources that are subject to the existing Chapter 115 rules. The proposed rulemaking would also limit the VOC content of fountain and cleaning solutions used by certain sources that are exempt from the existing Chapter 115 rules. **(Rule Project No. 2008-019-115-EN)**

The proposed HGB Attainment Demonstration SIP revision contains Federal Clean Air Act-required SIP elements, including a photochemical modeling analysis, a weight of evidence analysis, a reasonable available control technology (RACT) analysis, a reasonably available control measures (RACM) analysis, a motor vehicle emissions budget (MVEB) for 2018, and a contingency plan. In addition, the Houston-Galveston Area Council has committed to emissions reductions through the Voluntary Mobile Emission Reduction Program and implementation of transportation control measures. The proposed revision also describes the concurrently proposed rule revisions in Chapters 101 and 115. The commission is also soliciting comments on whether it is appropriate to perform a 1997 eight-hour ozone standard mid-course review analysis, and, if so, what elements should be contained in the analysis. The commission is also seeking input on the appropriate date to submit the mid-course review. **(Rule Project No. 2009-017-SIP-NR)**

The proposed HGB Eight-Hour Ozone Nonattainment Area RFP SIP revision demonstrates that the 18 percent ozone precursor emissions reduction requirement will be met for the analysis period of 2002 to 2008, 9 percent between 2009 and 2011, 9 percent between 2012 and 2014, 9 percent between 2015 and 2017, 3 percent in 2018, and 3 percent for contingency purposes. This revision also includes a revised MVEB for the milestone years 2008, 2011, 2014, 2017, and 2018. No new on-road mobile source controls have been adopted as part of the plan. However, on-road mobile source emissions inventories have been updated using the latest available data and the EPA's MOBILE6 inventory development tool. As a result of the required mobile source emission inventory updates, the MVEBs are updated as part of this SIP revision. **(Rule Project No. 2009-018-SIP-NR)**

Public hearings on these proposals will be held at the following times and locations: October 28, 2009, 2:00 p.m. and 6:00 p.m., in Conference Room A at the Houston-Galveston Area Council, 3555 Timmons Lane, Houston; and in Austin on October 29, 2009, 3:00 p.m., at the Texas Commission on Environmental Quality complex, Building E, Room 201S, 12100 Park 35 Circle. The hearings will be structured for the receipt of oral or written comments by interested persons. Registration will begin 30 minutes prior to each 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 discuss the proposals 30 minutes before each hearing and will answer questions before and after the hearing.

Persons planning to attend the hearing, who have special communication or other accommodation needs, should contact Charlotte Horn, Texas Register Team (512) 239-0779. Requests should be made as far in advance as possible.

Comments may be submitted to Jessica Rawlings, Texas Register Team, Office of Legal Services, Texas Commission on Environmental Quality, MC 205, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at *www5.tceq.state.tx.us/rules/ecomments/*. File size restrictions may apply to comments being submitted via the eComments system. **All comments should reference the rule or SIP project number that the comment pertains to: Rule Project No. 2009-019-101-EN for the proposed MECT rule amendments, Rule Project No. 2009-006-101-EN for the proposed HRVOC rule amendments, Rule Project No. 2008-019-115-EN for the proposed VOC rule amendments, SIP Project No. 2009-017-SIP-NR for the proposed HGB Attainment Demonstration SIP revision and SIP Project No. 2009-018-SIP-NR for the proposed HGB RFP SIP revision. Comments must be received by November 9, 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*. Copies of the proposed SIP revisions and all appendices can be obtained from the commission's Web site at *http://www.tceq.state.tx.us/implementation/air/sip/Hottop.html*. For further information regarding the proposed rules and SIP revisions, please contact Ray Schubert, Air Quality Planning Section, at (512) 239-6615.

TRD-200904267
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: September 25, 2009

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Notice of Public Hearings on Proposed Revisions to 30 TAC Chapter 115 and to the State Implementation Plan

The Texas Commission on Environmental Quality (commission) will conduct public hearings to receive testimony regarding proposed revisions to 30 TAC Chapter 101, General Air Quality Rules, and 30 TAC Chapter 115, Control of Air Pollution from Volatile Organic Compounds and corresponding revisions to the state implementation plan (SIP) under the requirements of Texas Health and Safety Code, §382.017; Texas Government Code, Chapter 2001, Subchapter B; and 40 Code of Federal Regulations §51.102, and the United States Environmental Protection Agency (EPA) concerning SIPs. Additionally, the commission will also receive testimony regarding the

proposed eight-hour ozone volatile organic compound (VOC) reasonably available control technology (RACT) update, demonstration of noninterference, and modified failure-to-attain contingency plan for the Dallas-Fort-Worth (DFW) area.

The proposed amendments to Chapter 115, Subchapter E, Division 4, Offset Lithographic Printing, would reduce the VOC content limits on fountain solutions used by sources that are subject to the existing Chapter 115 rules. The proposed rulemaking would also limit the VOC content of fountain and cleaning solutions used by certain sources that are exempt from the existing Chapter 115 rules. **(Rule Project No. 2008-019-115-EN)**

The proposed DFW SIP revision contains Federal Clean Air Act-required SIP elements including an update to the VOC RACT element of the DFW 1997 Eight-Hour Ozone Attainment Demonstration SIP Revision. The proposed DFW SIP revision also includes a demonstration of noninterference to attainment of the 1997 eight-hour ozone standard from a Chapter 117 rule revision proposed by the commission on August 12, 2009, and a modified failure-to-attain contingency plan. The proposed revision also incorporates the concurrently proposed rule revision in Chapter 115 regarding the offset lithographic printing contingency measure. **(Rule Project No. 2009-021-SIP-NR)**

Public hearings on these proposals will be held at the following times and locations: in Austin on October 29, 2009, 1:00 p.m., at the Texas Commission on Environmental Quality complex, Building E, Room 201S, 12100 Park 35 Circle; and in Fort Worth on November 2, 2009, 2:00 p.m., at the Texas Commission on Environmental Quality, Region 4 Office, DFW Public Meeting Room, 2309 Gravel Road, Fort Worth. The hearings will be structured for the receipt of oral or written comments by interested persons. Registration will begin 30 minutes prior to each 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 discuss the proposals 30 minutes before each hearing and will answer questions before and after the hearing. Persons planning to attend the hearing, who have special communication or other accommodation needs, should contact Charlotte Horn, Texas Register Team (512) 239-0779. Requests should be made as far in advance as possible.

Comments may be submitted to Jessica Rawlings, Texas Register Team, Office of Legal Services, Texas Commission on Environmental Quality, MC 205, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at *www5.tceq.state.tx.us/rules/ecomments/*. File size restrictions may apply to comments being submitted via the eComments system. **All comments should reference the rule or SIP project number that the comment pertains to: Rule Project No. 2008-019-115-EN for the proposed VOC rule amendments and SIP Project No. 2009-021-SIP-NR for the proposed DFW SIP revision. Comments must be received by November 9, 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*. Copies of the proposed SIP revision and the appendix can be obtained from the commission's Web site at *http://www.tceq.state.tx.us/implementation/air/sip/Hottop.html*. For further information regarding the proposed rule and SIP revision, please contact Ray Schubert, Air Quality Planning Section, at (512) 239-6615.

TRD-200904265
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: September 25, 2009

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Notice of Water Quality Applications

The following notices were issued on September 10, 2009 through September 17, 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

LAS VENTANAS LAND PARTNERS LTD has applied for a renewal of TCEQ Permit No. WQ0014534001, which authorizes the disposal of treated domestic wastewater at a daily average flow not to exceed 630,000 gallons per day via surface irrigation of 262 acres of non-public access land. 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 3.6 miles west-southwest of the intersection of Ranch-to-Market Road 620 and Lakeway Boulevard in Travis County, Texas 78734.

KINDER MORGAN PETCOKE LP which operates Kinder Morgan Deepwater Bulk Terminal, a petroleum coke storage and handling facility, has applied for a major amendment to TPDES Permit No. WQ0004301000 to authorize an additional impoundment for retaining storm water associated with the petroleum coke operation and an increase in the storage area for petroleum coke. The current permit authorizes the discharge of process wastewater and storm water on an intermittent and flow variable basis via Outfall 001. The facility is located just south of the Houston Ship Channel, and approximately 1.0 mile northeast of the intersection of East Beltway and State Highway 225, in the City of Pasadena, Harris County, Texas. The TCEQ Executive Director has reviewed this action for consistency with the Texas Coastal Management Program goals and policies in accordance with the regulations of the Coastal Coordination Council, and has determined that the action is consistent with the applicable CMP goals and policies.

FORT HANCOCK WATER CONTROL AND IMPROVEMENT DISTRICT which proposes to operate Fort Hancock WCID Plant, has applied for a new permit, proposed Permit No. WQ0004869000, to authorize the discharge of microfilter backwash water and reverse osmosis reject water at an average flow not to exceed 36,000 gallons per day via evaporation. This permit will not authorize a discharge of pollutants into water in the State. The facility and the disposal site will be located approximately 2.5 miles northwest of the intersection of State Highway 180 (Knox Avenue) and Interstate 10, Hudspeth County, Texas.

CITY OF COLEMAN has applied for a renewal of TPDES Permit No. WQ0010150001 which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 800,000 gallons per day. The current permit also authorizes the disposal of treated domestic wastewater via irrigation of 57 acres of City owned pastureland. The facility is located east of the City of Coleman on the south side of Hords Creeks and approximately 3/4 mile northwest of the intersection of Farm-to-Market Road 568 and U.S. Highway 84 in Coleman County, Texas 76834.

CITY OF RUNAWAY BAY has applied for a renewal of TPDES Permit No. WQ0010862001 which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 400,000 gallons per day. The facility is located approximately 2,000 feet north of U.S. Highway 380 and approximately 7,000 feet southwest of the point where U.S. Highway 380 crosses Lake Bridgeport in Wise County, Texas 76426.

LA JOYA INDEPENDENT SCHOOL DISTRICT has applied for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0013523014, to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 13,500 gallons per day. The facility will be located at 6401 North Abram, approximately 300 feet north of the intersection of Mile 5 North and Abram Road in Hidalgo County, Texas 78560.

CITY OF ROBERT LEE has applied for a renewal of TPDES Permit No. WQ0013901001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 121,000 gallons per day. The facility is located at 101 West 1st Street on the east bank of the Colorado River, approximately 2,500 feet southwest of the Coke County Courthouse in the City of Robert Lee in Coke County, Texas 76945.

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-200904258
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: September 24, 2009

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Notice of Water Quality Applications

The following notices were issued on September 21, 2009 through September 24, 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 WHITESBORO has applied for a renewal of TCEQ Permit No. WQ0004660000, which authorizes the land application of sewage sludge for beneficial use. The current permit authorizes land application of sewage sludge for beneficial use on 40 acres. This permit will not authorize a discharge of pollutants into waters in the State. The sewage sludge land application site is located five miles east of Whitesboro, approximately 6,500 feet east of the easterly intersection of Farm-to-Market Road 901 and Highway 56, approximately 2,000 feet south of Highway 56, in Grayson County, Texas 76273.

CITY OF UVALDE has applied for a renewal of TPDES Permit No. WQ0010306001, which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 970,000 gallons per day from Outfall 001 and Outfall 003 and a volume not to exceed an annual average flow of 500,000 gallons per day from Outfall 002. The facility is located approximately 1.3 miles southwest of the intersection of Farm-to-Market Road 117 and U.S. Highway 83 in Uvalde County, Texas 78801.

CITY OF CORPUS CHRISTI has applied to the Texas Commission on Environmental Quality (TCEQ) for a minor amendment to the Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0010401005 to authorize a reduction in annual average flow from 10.0 million gallons per day to 8.0 million gallons per day and to replace existing treatment units with new units. The existing permit authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 10,000,000 gallons per day. The facility is located at 1402 West Broadway approximately 3000 feet east of the intersection of Broadway and North Port Avenue in the City of Corpus Christi in Nueces County, Texas 78401.

THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY (TCEQ) has initiated a minor amendment of the Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0011941001 issued to Harris County Municipal Utility District No. 58 so that the sampling type for Flow, Carbonaceous Biochemical Oxygen Demand (CBOD5), Total Suspended Solids (TSS), and Ammonia Nitrogen (NH3-N) is corrected to Instantaneous for Flow, and Grab for CBOD5, TSS, and NH3-N with a chlorine residual monitoring frequency of five times per week in the interim phase, and corrected to Totalizing Meter for Flow, and Composite for CBOD5, TSS, and NH3-N with a chlorine residual monitoring frequency of daily in the final phase. The facility is located approximately 1,100 feet west of Kuykendahl Road and 2,250 feet south of Farm-to-Market Road 1960 on the north and south sides of Bammel Village Drive in Harris County, Texas.

WHITESTONE HOUSTON LAND LTD has applied for a renewal of TPDES Permit No. WQ0014560001 which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 900,000 gallons per day. The facility will be located approximately 4,300 feet south of Roman Forest Boulevard and 8,500 feet east of the intersection of U.S. Highway 59 and Caney Creek in Montgomery County, Texas 77357.

LAZY NINE MUNICIPAL UTILITY DISTRICT 1A AND SWEETWATER AUSTIN PROPERTIES LLC have applied for a minor amendment to TCEQ Permit No. WQ0014629001 to authorize the disposal of treated domestic wastewater at a daily average flow not to exceed 180,000 gallons per day via surface irrigation of 73.3 acres of non-public access rangeland land in the Interim Phase and a daily average flow not to exceed 490,000 gallons per day via surface irrigation of 199.5 acres of non-public access rangeland land in the Final Phase. The existing permit authorizes the disposal of treated domestic wastewater at a daily average flow not to exceed 180,000 gallons per day via surface irrigation of 73.3 acres of non-public access rangeland land in the Interim I Phase, a daily average flow not to exceed 440,000 gallons per day via surface irrigation of 179 acres of non-public access rangeland land in the Interim II Phase and a daily average flow not to exceed 700,000 gallons per day via surface irrigation of 285 acres of non-public access rangeland land in the Final Phase. This permit will not authorize a discharge of pollutants into waters in the State. The wastewater treatment facility and disposal site are located approximately 6.2 miles west of the Village of Bee Cave near State Highway 71 in Travis County, Texas 78669.

SHELL OIL COMPANY AND DEER PARK REFINING LIMITED PARTNERSHIP which operates the Shell Deer Park Refinery, has applied for a major amendment to TPDES Permit No. WQ0000403000 to increase the daily average and daily maximum effluent limits for total suspended solids (TSS) at Outfall 007, to authorize the discharge of groundwater via Outfall 007, and to authorize the discharge of additional non-process wastewaters at Outfalls 002 and 003. The current permit authorizes the discharge of utility wastewater and storm water at a daily average flow not to exceed 2,300,000 gallons per day via Outfall 001; fire water and storm water on an intermittent and flow variable basis via Outfall 002, 003, 004, 006, and 009; fire water, previously monitored effluents (contaminated runoff) and storm water on an intermittent and flow variable basis via Outfall 008; and treated process wastewater, sanitary wastewater, ballast wastewater, utility wastewater, landfill leachate, and storm water at a daily average flow not to exceed 9,250,000 gallons per day via Outfall 007. The facility is lo-

cated at 5900 State Highway 225, south of the Houston Ship Channel, west of Patrick Bayou, and north of State Highway 225 at Center Street in the City of Deer Park, Harris County, Texas.

NORTH ALAMO WATER SUPPLY CORPORATION which operates the Lasara Reverse Osmosis Water Treatment Plant, has applied to the Texas Commission on Environmental Quality (TCEQ) for a major amendment to TPDES Permit No. WQ0004480000 authorizing a reduction in effluent monitoring frequency from once per day to once every two weeks (Bi-weekly), an authorization of less stringent effluent limitations for Total Dissolved Solids, and the inclusion of membrane cleaning water and pipeline washwater in the waste stream. The current permit authorizes the discharge of reverse osmosis reject water at a daily average flow not to exceed 1,000,000 gallons per day. The facility is located on the north side of State Highway 186, approximately 0.6 mile east of the intersection of State Highway 186 and Farm-to-Market Road 1015, and approximately 8.2 miles west of US Highway 77, northeast of the community of Lasara, Willacy County, Texas 78539.

DALLAS FORT WORTH INTERNATIONAL AIRPORT which operates an international airport that provides ground support activities and airport infrastructure and support activities to companies and individuals who operate commercial and private aircraft, has applied for a renewal of TPDES Permit No. WQ0001441000, which authorizes the discharge of stormwater on an intermittent and variable basis. The facility is located within the northeast corner of Tarrant County and the northwest corner of Dallas County, just southeast of Lake Grapevine in Dallas and Tarrant Counties, Texas 75261 and 75063.

CARGILL MEAT SOLUTIONS CORPORATION which operates Cargill Meat Solutions Plainview Beef Plant, has applied for a renewal of TCEQ Permit No. WQ00001463000, which authorizes packing plant process wastewater from slaughtering and rendering operations and miscellaneous wastewaters (utility wastewater, wash waters, domestic wastewater, and process area storm water runoff) to be disposed of via irrigation; and hide processing wastewater and other high salt concentrated wastewater to be disposed of via evaporation. This permit will not authorize a discharge of pollutants into water in the State. The facility and land application site are located immediately northeast of the intersection of Interstate Highway 27 and Farm-to-Market Road 3183, approximately 1.5 miles north of the City of Plainview, Hale County, Texas. The facility and land application site are located in the drainage area of White River Lake, in Segment No. 1240 of the Brazos River Basin.

GULF CHEMICAL AND METALLURGICAL CORPORATION which operates Gulf Chemical and Metallurgical Plant, has applied for a major amendment with renewal to TPDES Permit No. WQ0001861000 to authorize an increase in the daily average and daily maximum flow limits at Outfall 001. The current permit authorizes the discharge of process wastewater, cooling water, domestic sewage and storm water runoff at a daily average flow not to exceed 350,000 gallons per day via Outfall 001; and the discharge of storm water runoff on an intermittent and flow variable basis via Outfall 002. The facility is located at 302 Midway Road, approximately 0.5 mile north of the intersection of Midway Road and Dow Canal Road, in the City of Freeport, Brazoria County, Texas 77542. The TCEQ Executive Director has reviewed this action for consistency with the Texas Coastal Management Program goals and policies in accordance with the regulations of the Coastal Coordination Council, and has determined that the action is consistent with the applicable CMP goals and policies.

LOWER COLORADO RIVER AUTHORITY which operates LCRA General Office Complex, has applied for a renewal of TPDES Permit No. WQ0003516000, which authorizes the discharge of once-through cooling water at a daily average flow not to exceed 1,250,000 gallons per day, via Outfall 001 The facility is located on the east side of Lake Austin at Tom Miller Dam in the City of Austin, Travis County, Texas. The TCEQ Executive Director has reviewed this action for consistency with the Texas Coastal Management Program (CMP) goals and policies in accordance with the regulations of the Coastal Coordination Council, and has determined that the action is consistent with the applicable CMP goals and policies.

CITY OF COLUMBUS has applied for a renewal of TPDES Permit No. WQ0010025001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 650,000 gallons per day. The facility is located approximately 0.2 mile north of Interstate Highway 10, on the west bank of the Colorado River, near the easterly end of McCormick Street, in the southeast corner of the City of Columbus in Colorado County, Texas 78934.

CITY OF COLUMBUS has applied for a renewal of TPDES Permit No. WQ0010025002, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 150,000 gallons per day. The facility is located approximately 1,000 feet south and 2,000 feet west of the intersection of State Highway 71 and the Colorado River in Colorado County, Texas 78934.

CITY OF POTH has applied for a major amendment to TCEQ Permit No. WQ0010052001, to revise the effluent limitations in accordance with the requirements of 30 TAC §309.4, for irrigation without public exposure, and to increase the acreage irrigated to 105.60 acres. The current permit authorizes the disposal of treated domestic wastewater at a daily average flow not to exceed 220,000 gallons per day via surface irrigation of 92 acres of non-public access pastureland. This permit will not authorize a discharge of pollutants into waters in the State. The wastewater treatment facility and disposal site are located approximately 1 mile due south of the intersection of U.S. Highway 181 and Farm-to-Market Road 541 in Wilson County, Texas 78147.

THE CITY OF CARRIZO SPRINGS has applied for a renewal of TPDES Permit No. WQ0010145001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 950,000 gallons per day. The facility is located approximately 0.5 mile northeast of the intersection of U.S. Highway 83 and State Highway 85 in the City of Carrizo Springs in Dimmit County, Texas 78834.

CITY OF WEIMAR has applied to the Texas Commission on Environmental Quality (TCEQ) for a renewal of TPDES Permit No. WQ0010311001 which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 500,000 gallons per day. The facility is located approximately 2,500 feet east of Farm-to-Market Road 155 between U.S. Highway 90 and Interstate Highway 10 in Colorado County, Texas 78962.

VICTORIA COUNTY WATER CONTROL AND IMPROVEMENT DISTRICT NO 1 has applied for a renewal of TPDES Permit No. WQ0010513002 which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 300,000 gallons per day. The facility is located at 279 Halk Road northwest of and adjacent to the Missouri Pacific Railroad right-of-way, approximately 3,000 feet northeast along the Missouri Pacific Railroad from its intersection with State Highway 185 in the City of Bloomington in Victoria County, Texas 77951.

ORANGE COUNTY WATER CONTROL AND IMPROVEMENT DISTRICT NO 1 has applied for a major amendment to TPDES Permit No. WQ0010875001 to authorize an increase in the discharge of treated domestic wastewater from a daily average flow not to exceed 750,000 gallons per day to an annual average flow not to exceed 3,000,000 gallons per day. The facility is located approximately 300 feet northwest of the intersection of Oak Lane and Ferndale Street in the City of Vidor in Orange County, Texas.

THE CITY OF ROPESVILLE has applied for a major amendment to TCEQ Permit No. WQ0011150001, to authorize an increase in the daily average flow from 38,500 gallons per day to 70,000 gallons per day and to increase the irrigated acreage from 13 acres to 19 acres of non-public access pastureland. The applicant is also requesting authorization to construct a facultative lagoon wastewater treatment system to replace the existing Imhoff tank wastewater treatment system. The wastewater treatment facility and disposal site are located immediately east of U.S. Highway 62 and approximately one mile southwest of the intersection of State Highway 62 and Farm-to-Market Road 41 in the City of Ropesville in Hockley County, Texas. This permit will not authorize a discharge of pollutants into waters in the State.

BEVIL OAKS MUNICIPAL UTILITY DISTRICT has applied for a renewal of TPDES Permit No. WQ0011551001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 200,000 gallons per day. The facility is located approximately 6.5 miles northwest of the intersection of State Highway 105 and U.S. Highway 287, at a point 2.3 miles north of State Highway 105, in the northeast corner of the town of Bevil Oaks, approximately 700 feet south of Pine Island Bayou in Jefferson County, Texas 77713.

TEXAS DEPARTMENT OF TRANSPORTATION has applied for a renewal of TPDES Permit No. WQ0012024001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 20,000 gallons per day. The facility is located on the right-of-way of U.S. Highway 59, approximately 0.6 mile west of the City of Inez (on the southbound traffic side) in Victoria County, Texas 77968.

529 #35, LTD. has applied for a renewal of TPDES Permit No. WQ0013484001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 200,000 gallons per day. The facility is located 6,800 feet west of U.S. Highway 290, 2,900 feet south of Farm-to-Market Road 529 (Spencer Road), north of Fisher Road and east of Addicks Fairbanks Road on U.S. 65 in Harris County, Texas 77041.

TEXAS PARKS AND WILDLIFE DEPARTMENT has applied for a renewal of TPDES Permit No. WQ0014267001 which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 40,000 gallons per day. The facility is located approximately 2,000 feet north of the intersection of State Highway 134 and 2198 in Harrison County, Texas 75661.

WYLIE NORTHEAST SPECIAL UTILITY DISTRICT has applied for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0014935001, to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 900,000 gallons per day. The facility will be located approximately 3,680 feet northeast of the intersection of Parker Road and Aztec Lane in Collin County, Texas 75098.

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-200904421
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: September 30, 2009

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Notice of Water Rights Applications

Notices issued September 14, 2009.

APPLICATION NO. 14-1333A; The City of San Angelo, applicant, 72 West College, San Angelo, Texas 76903, has applied for an amendment to Certificate of Adjudication No. 14-1333 to add municipal purpose of use, add a downstream diversion point on the Concho River, Colorado River Basin, and to add an additional place of use within San Angelo's service area. More information on the application and how to participate in the permitting process is given below. The application and a portion of the required fees were received on August 13, 2007. Additional information and fees were received on September 28, March 26, 2008, and August 5 and August 10, 2009. The application was declared administratively complete and accepted for filing with the Office of the Chief Clerk on August 10, 2009. Written public comments and requests for a public meeting should be received in the Office of Chief Clerk, at the address provided in the information section below, by October 5, 2009.

APPLICATION NO. 14-1337A; The City of San Angelo, applicant, 72 West College, San Angelo, Texas 76903, has applied for an amendment to Certificate of Adjudication No. 14-1337 to add municipal purpose of use, add a downstream diversion point on the Concho River, Colorado River Basin, and to add an additional place of use within San Angelo's service area. More information on the application and how to participate in the permitting process is given below. The application and a portion of the required fees were received on August 13, 2007. Additional information and fees were received on September 28, 2007, March 27, 2008, and August 5, 2009. The application was declared administratively complete and accepted for filing with the Office of the Chief Clerk on August 5, 2009. Written public comments and requests for a public meeting should be received in the Office of Chief Clerk, at the address provided in the information section below, by October 5, 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-200904251
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: September 23, 2009

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Texas Facilities Commission

Request for Proposals #303-0-10242

The Texas Facilities Commission (TFC), on behalf of the Department of State Health Services (DSHS), announces the issuance of Request for Proposals (RFP) #303-0-10242. TFC seeks a five or ten year lease of approximately 3,876 square feet of office space in Palestine, Anderson County, Texas.

The deadline for questions is October 16, 2009, and the deadline for proposals is October 26, 2009, at 3:00 p.m. The award date is November 18, 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 an RFP. Neither this notice nor the RFP commits TFC to pay for any costs incurred prior to the award of a grant.

Parties interested in submitting a proposal may obtain information by contacting 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=85232.*

TRD-200904402
Kay Molina
General Counsel
Texas Facilities Commission
Filed: September 29, 2009

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Request for Proposals #303-0-10283

The Texas Facilities Commission (TFC), on behalf of the Texas Department of Criminal Justice (TDCJ), announces the issuance of Request for Proposals (RFP) #303-0-10283. TFC seeks a five (5) year lease of approximately 19,821 square feet of office space in Huntsville, Texas.

The deadline for questions is November 16, 2009, and the deadline for proposals is November 30, 2009, at 3:00 p.m. The award date is January 22, 2010. TFC reserves the right to accept or reject any or all proposals submitted. TFC is under no legal or other obligation to execute a lease on the basis of this notice or the distribution of an RFP. Neither this notice nor the RFP commits TFC to pay for any costs incurred prior to the award of a grant.

Parties interested in submitting a proposal may obtain information by contacting 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=85243.*

TRD-200904399
Kay Molina
General Counsel
Texas Facilities Commission
Filed: September 29, 2009

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Texas Health and Human Services Commission

Public Notice

The Texas Health and Human Services Commission announces its intent to submit an amendment to the Texas State Plan for Medical Assistance, under Title XIX of the Social Security Act. The proposed amendment is effective December 1, 2009.

Currently, the state provides Medicaid coverage for one year to a newborn whose mother was receiving Medicaid on the date of the newborn's birth, as long as the newborn goes home with and continues to live with the mother for one year and the mother remains eligible for Medicaid or would remain eligible if still pregnant. The CHIP Reauthorization Act of 2009 (CHIPRA) amends §1902(e)(4) of the Social Security Act (42 U.S.C. §1396a(e)(4)) (Act) by deleting both requirements. The proposed amendment will allow babies born to women covered by Medicaid to be enrolled automatically in Medicaid for one year, regardless of whether the newborn lives with the mother or whether the mother remains eligible for Medicaid.

The proposed amendment will have no fiscal impact to the state or federal budgets.

For additional information or a copy of the amendment, please contact Stephanie Stephens in the Acute Care Policy Development unit of the Medicaid and CHIP Division by telephone at (512) 491-1482 or be e-mail at Stephanie.Stephens@hhsc.state.tx.us.

TRD-200904397
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Filed: September 29, 2009

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Texas Department of Insurance

Company Licensing

Application for admission to the State of Texas by ACCIDENT INSURANCE COMPANY, INC., a foreign fire and casualty company. The home office is in Irmo, South Carolina.

Application to change the name of AMERICAN INTERNATIONAL SOUTH INSURANCE COMPANY to CHARTIS CASUALTY COMPANY, a foreign fire and casualty company. The home office is in Harrisburg, Pennsylvania.

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-200904417
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: September 30, 2009

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Texas Lottery Commission

Texas Lottery Retailer Sales Performance Incentive Program

Authority

Pursuant to §466.358 of the State Lottery Act and Title 16, Part 9, §401.314 of the Texas Administrative Code, the Texas Lottery Commission is authorized to offer special incentive and bonus programs for lottery retailers based on attainment of sales volume, redemption of winning tickets or other objective criteria established by the director of

the lottery. Pursuant to that authority, the following incentive program is hereby initiated.

Eligibility Criteria and Design

The purpose of the Texas Lottery's retailer incentive plan is to generate additional revenue for the Foundation School Fund. The plan will focus on those retailers who have demonstrated over time the ability to consistently produce strong sales. Therefore, not all retailers will be eligible to participate in the program.

The initial quarterly retailer incentive program for Fiscal Year 2010 is designed to reward retailers with exemplary sales performance using a two-phase approach:

Phase I: Eligible retailers will be required to meet a specific sales increase in order to earn a set incentive amount for instant ticket sales and a separate required sales increase to earn a set incentive amount for on-line ticket sales*.

Phase II: Retailers who meet the required sales increase in the instant ticket sales category, on-line ticket sales category, or both categories in Phase I are automatically qualified to receive entries into a random drawing for additional cash prizes.

Incentives will be paid to eligible retailers as a lump sum at the end of the incentive period so long as the retailer's 13-week sales average meets the required sales increase. The first 13-week incentive period will run from September 6 through December 5, 2009.

* Due to the potential dramatic impact of jackpot levels on retailers' sales, *Lotto Texas*®, *Mega Millions*® and *Megaplier*® sales are not included in the initial incentive program.

Sales Levels and Associated Incentive Payments

Instant Ticket Sales

Retailer Weekly Sales Categories	Average Weekly Sales	Weekly Average Sales Increase	Total 13-Week Incentive Amount
	<3000	not eligible	
	≥3000, <4000	$350	$260
	≥4000, <6000	$500	$390
	≥6000, <8000	$600	$520
	≥8000, <10000	$700	$650
	≥10000, <12000	$750	$975
	≥12000, <15000	$850	$1,300
	≥15000	$1,000	$1,950

On-Line Ticket Sales

Retailer Weekly Sales Categories	Average Weekly Sales	Weekly Average Sales Increase	Total 13-Week Incentive Amount
	<500	not eligible	
	≥500, <700	$60	$40
	≥700, <900	$70	$55
	≥900, <1200	$80	$70
	≥1200, <1500	$95	$90
	≥1500, <2500	$115	$150
	≥2500, <5000	$165	$260
	≥5000	$275	$540

Drawings

Retailers can also qualify for entries into a random drawing for cash prizes by meeting their required Phase 1 sales increases in the instant ticket sales category, on-line ticket sales category, or both categories, and will receive entries into the drawing based on the criteria below:

Instant Ticket Sales - Qualifying retailers receive one entry into the drawing for every $5,000 in instant sales during the incentive period.

On-Line Ticket Sales - Qualifying retailers receive one entry into the drawing for every $1,500 in on-line sales during the incentive period.

Retailers may win only once per drawing. Cash prizes will be awarded per the prize structure outlined below:

Number of Prizes	Dollar Prize	Total
2	$50,000	$100,000
5	$10,000	$50,000
20	$5,000	$100,000
30	$2,500	$75,000
100	$1,000	$100,000
150	$500	$75,000
307		$500,000

The Texas Lottery intends to utilize this sales performance incentive plan based on thirteen-week sales cycles throughout Fiscal Years 2010 and 2011. Modifications and adjustments may be made to the plan over

time based on retailer sales performance response and participation in the plan.

Complete program details and additional information can be obtained from the Texas Lottery at 1-800-37-LOTTO (1-800-375-6886) or licensed retailers can obtain additional information from their Lottery Sales Representative.

TRD-200904413
Pete Wassdorf
Assistant General Counsel
Texas Lottery Commission
Filed: September 30, 2009

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Lower Rio Grande Valley Development Council

Hidalgo County Regional Mobility Authority Solicitation for Letters of Interest

The Hidalgo County Regional Mobility Authority (the Authority) seeks to engage a consultant to provide certain Professional Services as defined more specifically in the solicitation below.

Background

The Authority was created through the joint efforts of Hidalgo County (the County) and the Texas Transportation Commission with the intended purpose of providing mobility solutions to the region.

The Authority has identified the Hidalgo County Loop Project System as its initial project and on August 9, 2007, engaged Hidalgo County Road Builders as the Authority's Pass-Through Agent (the Agent) for the design, development, construction, and/or financing of that project. Recently, the Authority elected to begin development of the Loop Project System with a starter system referred to as the Hidalgo Trade Corridor System, including two independent sections, Section A and Section B and has agreed to accept a Guaranteed Maximum Price Proposal from the Agent with regard to this starter system.

Scope of Services

The Authority seeks Letters of Interest (LOI) for Professional Services relating to review of the Guaranteed Maximum Price Proposal to be submitted on or before October 16, 2009 by the Agent.

The Authority contemplates any engagement issued under this LOI to be short-term, lasting approximately 80-140 days. Any engagement under this procurement will be limited to a work order amount not to exceed $75,000, with an option for an additional work order at the Authority's discretion.

Qualifications

The successful respondent, which may be either an individual or a firm, will have demonstrable knowledge of and experience with regard to pricing and developing roadway projects under alternative delivery mechanisms. Specifically, the successful respondent will understand and be able to calculate, assess, review, comment, and make recommendations on proposed project construction costs, as well additional costs in the areas of Environmental mitigation, Permitting, Right-of-way, Relocation of impacted property owners, Utility relocation, Construction management, Materials testing, Preparation of design documents, Program management.

The letter of interest should indicate if respondent is certified under TxDOT's DBE/HUB/SBE program. Further, the Letter of interest should indicate if the respondent is part of Hidalgo County's certified engineer pool.

Response

Responses shall be in the form of a brief letter of interest, and contain as an attachment, not to exceed three pages, a resume of the respondent/key personnel. This resume should include a description of similar project/quality assurance review and/or management, if any, which may be ongoing. Specific project references must be included.

Responses should not include fee estimates. Any response which includes such information will be returned to the sender and not considered for the proposed engagement.

Responses are due no later than noon on October 15, 2009. Responses should be submitted to: Hidalgo County Regional Mobility Authority, 311 N. 15th Street, McAllen, Texas 78501, Office: (956) 682-3481, Attention: Victor Morales.

It is anticipated that the Board will consider the responses and possible select a Project Development Consultant at a board meeting prior to October 31, 2009.

Disclaimer

Publishing this solicitation in no way obligates the Authority to engage any of the respondents. The Authority reserves the right to waive any requirement under this solicitation.

TRD-200904409
Victor Morales
Procurement Officer
Lower Rio Grande Valley Development Council
Filed: September 29, 2009

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North East Texas Regional Mobility Authority

Notice of Availability of Request for Qualifications for Bond Counsel Services

The North East Texas Regional Mobility Authority ("NET RMA"), a political subdivision of the State of Texas, is soliciting statements of interest and qualifications from law firms interested in representing the NET RMA in connection with bond issuances and other financing transactions, including advising the NET RMA in its use of the proceeds generated from successful financings.

The request for qualifications will be available on or about September 25, 2009. Copies may be obtained electronically from the website of the NET RMA at www.netrma.org. Copies will also be available by contacting Mike Battles at (903) 509-1552. Periodic updates, addenda, and clarifications may be posted on the NET RMA website, and interested parties are responsible for monitoring the website accordingly. Final proposals must be received by the North East Texas Regional Mobility Authority, 909 ESE Loop 323, Suite 360, Tyler, Texas 75701 by 4:00 p.m., CST, October 26, 2009, to be eligible for consideration.

Each firm will be evaluated based on the criteria and process set forth in the RFQ. The final selection of a firm or firms to serve as bond counsel, if any, will be made by the NET RMA Board of Directors.

TRD-200904401
Jeff Austin, III
Chairman
North East Texas Regional Mobility Authority
Filed: September 29, 2009

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Texas Parks and Wildlife Department

Notice of Proposed Real Estate Transaction

Authorization of Pipeline Easement

San Jacinto Battleground State Historic Site - Harris County

On November 5, 2009, the Texas Parks and Wildlife Commission (the Commission) will consider authorizing the Executive Director to negotiate terms and conditions and to issue an easement for the installation of an 8-inch buried pipeline at the San Jacinto Battleground State Historic Site in Harris County. The meeting will start at 9:00 a.m. at 4200 Smith School Road, Austin, Texas. Before taking action, the Commission will take public comment regarding the proposed transaction. Public comment may also be submitted to Ted Hollingsworth, Land Conservation, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744 or by email at ted.hollingsworth@tpwd.state.tx.us or made in person at time of meeting.

TRD-200904419
Ann Bright
General Counsel
Texas Parks and Wildlife Department
Filed: September 30, 2009

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Notice of Proposed Real Estate Transaction

Land Acquisition

Village Creek State Park - Hardin County

In a meeting on November 5, 2009, the Texas Parks and Wildlife Commission (the Commission) will consider the acquisition of approximately 1,500 acres as an addition to Village Creek State Park in Hardin County. At this meeting, the public will have an opportunity to comment on the proposed transaction before the Commission takes action. The meeting will start at 9:00 a.m. at the Texas Parks and Wildlife Department Headquarters, 4200 Smith School Road, Austin, Texas 78744. Prior to the meeting, public comment may be submitted to Ted Hollingsworth, Land Conservation, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744 or by email at ted.hollingsworth@tpwd.state.tx.us or through the TPWD web site at tpwd.state.tx.us.

TRD-200904403
Ann Bright
General Counsel
Texas Parks and Wildlife Department
Filed: September 29, 2009

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Public Utility Commission of Texas

Announcement of Application for Amendment to a State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas (commission) received an application on September 24, 2009, to amend a state-issued certificate of franchise authority (CFA), pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act (PURA).

Project Title and Number: Application of Grande Communications Networks LLC for an Amendment to a State-Issued Certificate of Franchise Authority for a Transfer in Ownership/Control, Project Number 37493 before the Public Utility Commission of Texas.

Information on the application may be obtained by contacting the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at (888) 782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at (800) 735-2989. All inquiries should reference Project Number 37493.

TRD-200904405
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: September 29, 2009

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Notice of Application for Service Provider Certificate of Operating Authority

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) of an application on September 25, 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 Telix, LLC for a Service Provider Certificate of Operating Authority, Docket Number 37495 before the Public Utility Commission of Texas.

Applicant intends to provide facilities-based/UNE and resale telecommunications services.

Applicant's requested SPCOA geographic area includes the geographic areas currently served by Southwestern Bell Telephone Company d/b/a AT&T Texas, Verizon Southwest, and Embarq.

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 October 19, 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 37495.

TRD-200904406
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: September 29, 2009

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Notice of Application for Waiver of Denial of Request for Numbering Resources

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on September 22, 2009, for waiver of denial by the Pooling Administrator (PA) of Southwestern Bell Telephone Company d/b/a AT&T Texas' (AT&T Texas) request for ten (10) thousand-blocks of numbers on behalf of its customer, the Methodist Hospital System in the 281 NPA, in the Barker rate center.

Docket Title and Number: Petition of Southwestern Bell Telephone Company d/b/a AT&T Texas for Waiver of Denial of Numbering Resources - Barker Rate Center, Docket Number 37487.

The Application: AT&T Texas submitted an application to the PA for the requested numbering resources in accordance with the current guidelines. The PA denied the request because AT&T Texas did not meet the months-to-exhaust and utilization criteria established by the Federal Communications Commission.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free

at (888) 782-8477 no later than October 16, 2009. Hearing and speech impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll free at (800) 735-2989. All comments should reference Docket Number 37487.

TRD-200904284
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: September 25, 2009

♦ ♦ ♦

Notice of Application for Waiver of Denial of Request for Numbering Resources

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on September 28, 2009, for waiver of denial by the Pooling Administrator (PA) of Time Warner Telecom of Texas, LLC (TWTC) request for a thousands-block of numbers in the Richmond-Rosenberg, Texas rate center.

Docket Title and Number: Petition of Time Warner Telecom of Texas, LLC for Waiver of Denial of Numbering Resources, Docket Number 37499.

The Application: TWTC submitted an application to the PA for the requested numbering resources in accordance with the current guidelines. The PA denied the request because TWTC did not meet the months-to-exhaust and utilization criteria established by the Federal Communications Commission. TWTC has exhausted its extended metro service (EMS) numbers in the Richmond-Rosenberg rate center.

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 (888) 782-8477 no later than October 16, 2009. Hearing and speech impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll free at (800) 735-2989. All comments should reference Docket Number 37499.

TRD-200904410
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: September 29, 2009

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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 September 17, 2009, for an amendment to certificated service area boundaries within Webb County, Texas.

Docket Style and Number: Joint Application of Medina Electric Cooperative, Inc. and AEP Texas Central Company to amend a Certificate of Convenience and Necessity for Service Area Boundaries within Webb County. Docket Number 37474.

The Application: The developer of the new Las Lomas Industrial Park requested electric service. The parcel of land lies partially within Medina Electric Cooperative, Inc.'s (MEC) service area and the remainder lies in AEP Texas Central Company's (TCC) service area. MEC and TCC have agreed to the proposed boundary change. The granting of this application will remove the potential for duplication of facilities by both utilities on certain tracts within the industrial park that are bisected by the current service area boundary between the two utilities. There are currently no consumers in the affected areas of the proposed boundary change.

Persons wishing to comment on the action sought or intervene should contact the Public Utility Commission of Texas no later than October 9, 2009 by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) 1-800-735-2989. All comments should reference Docket Number 37474.

TRD-200904283
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: September 25, 2009

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Public Notice of Request for Comment on Strawman Rule

The staff of the Public Utility Commission of Texas (commission) request comments regarding a strawman rule which will result in a rulemaking for utility infrastructure storm hardening. Project Number 37475, *Rulemaking for Utility Infrastructure Storm Hardening* has been assigned to this proceeding.

The commission staff strawman rule will be filed in Central Records under Project No. 37475 by Friday, October 9, 2009. The commission requests interested persons file written comments on this strawman rule.

Responses 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 by Friday, October 30, 2009, and reply comments may be filed by Friday, November 6, 2009. All responses should reference Project No. 37475.

Questions concerning the comments or this notice should be referred to Regina Chapline, Infrastructure and Reliability Division, (512) 936-7292. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136.

TRD-200904423
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: September 30, 2009

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Request for Comments on Proceeding to Develop the Standard Forms Required by P.U.C. Substantive Rule §25.107(f)(4)(F) and (G)(i)

The Public Utility Commission of Texas (P.U.C. or commission) requests comments regarding a new standard form letter of credit and a new standard form guaranty agreement required by P.U.C. Substantive Rule §25.107, regarding Certification of Retail Electric Providers (REPs). Project Number 37035, *PUC Proceeding to Develop the Standard Forms Required by P.U.C. Subst. R. §25.107(f)(4)(F) and (f)(4)(G)(i),* has been established for this proceeding. The development of a standard form letter of credit and a standard form guaranty agreement is required by P.U.C. Substantive Rule §25.107(f)(4)(F) and (f)(4)(G)(i). The commission intends for the letter of credit to provide a source of cash that is payable to the commission and permits the commission to draw funds pursuant to P.U.C. Substantive Rule §25.107(f)(4)(F). The commission intends for the guaranty agreement

to provide a guarantee to the commission that obligations of a REP are supported by its affiliate guarantor. The commission requests that each REP providing comments review the draft standard form irrevocable stand-by letter of credit with their banker to determine if the banker could (hypothetically) execute the letter of credit in its current draft form. If the banker could not execute the letter of credit in its current form, or if the banker has any other issues or concerns, the commission requests that the REP identify those issues in its comments. The letter of credit and guaranty agreement can be found on the commission's Interchange (http://www.puc.state.tx.us/interchange/index.cfm) under Project Number 37035.

Comments may be filed by submitting 16 copies to the Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, Austin, Texas 78711-3326. Initial comments will be received until 3:00 p.m. on Friday, October 23, 2009. Reply comments will be received until 3:00 p.m. on Friday, October 30, 2009. All comments should reference Project Number 37035.

Questions concerning Project Number 37035 should be referred to Mr. Neal Frederick, Rate Regulation Division, at (512) 936-7459 or Mr. Patrick Peters, Legal Division, at (512) 936-7232. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136.

TRD-200904271
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: September 25, 2009

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Texas Department of Transportation

Aviation Division - Request for Proposal for Aviation Architectural/Engineering Services

The Texas State Technical College at Waco, through its agent the Texas Department of Transportation (TxDOT), intends to engage an aviation professional architectural/engineering for services pursuant to Government Code, Chapter 2254, Subchapter A. TxDOT Aviation Division will solicit and receive proposals for aviation architectural/engineering design services described below:

Airport Sponsor: Texas State Technical College at Waco; Texas State Technical College - Waco Airport. TxDOT CSJ No. 10CTTSTCW. Scope: Site analysis and design new air traffic control tower, including cab equipment, and construction management.

There is no DBE requirement for this project. The TxDOT Project Manager is Stephanie Kleiber.

To assist in your proposal preparation the most recent Airport Layout Plan, 5010 drawing, and the criteria are available online at

www.txdot.gov/avn/avninfo/notice/consult/index.htm

by selecting Texas State Technical College - Waco Airport. The proposal should address a technical approach for the current scope. Firms shall use page 4; Recent Airport Experience, to list relevant past projects.

Interested firms shall utilize the latest version of Form AVN-550, titled "Aviation Professional Architectural/Engineering Services Proposal". The form may be requested from TxDOT Aviation Division, 125 East 11th Street, Austin, Texas 78701-2483, phone number, 1-800-68-PILOT (74568). The form may be emailed by request or downloaded from the TxDOT web site at

www.txdot.gov/business/projects/aviation.htm.

The form may not be altered in any way. All printing must be in black on white paper, except for the optional illustration page. Firms must carefully follow the instructions provided on each page of the form. Proposals may not exceed the number of pages in the proposal format. The proposal format consists of seven pages of data plus two optional pages consisting of an illustration page and a proposal summary page. Proposals shall be stapled but not bound in any other fashion. PROPOSALS WILL NOT BE ACCEPTED IN ANY OTHER FORMAT.

ATTENTION: To ensure utilization of the latest version of Form AVN-550, firms are encouraged to download Form AVN-550 from the TxDOT website as addressed above. Utilization of Form AVN-550 from a previous download may not be the exact same format. Form AVN-550 is a PDF Template.

Please note:

Five completed, unfolded copies of Form AVN-550 **must be received** by TxDOT Aviation Division at 150 East Riverside Drive, 5th Floor, South Tower, Austin, Texas 78704 no later than November 3, 2009, 4:00 p.m. Electronic facsimiles or forms sent by email will not be accepted. Please mark the envelope of the forms to the attention of Edie Stimach.

The consultant selection committee will be composed of Aviation Division staff members with one local government member. The final selection by the committee will generally be made following the completion of review of proposals. The committee will review all proposals and rate and rank each. The criteria for evaluation of architectural/engineering proposals can be found at

www.txdot.gov/business/projects/aviation.htm.

All firms will be notified and the top rated firm will be contacted to begin fee negotiations. The selection committee does, however, reserve the right to conduct interviews for the top rated firms if the committee deems it necessary. If interviews are conducted, selection will be made following interviews.

If there are any procedural questions, please contact Edie Stimach, Grant Manager, or Stephanie Kleiber, Project Manager for technical questions at 1-800-68-PILOT (74568).

TRD-200904388
Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Filed: September 28, 2009

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Aviation Division - Request for Proposal for Aviation Engineering Services

The City of Plainview and Hale County, through their agent the Texas Department of Transportation (TxDOT), intend to engage an aviation professional engineering firm for services pursuant to Government Code, Chapter 2254, Subchapter A. TxDOT Aviation Division will solicit and receive proposals for professional aviation engineering design services described below.

The following is a listing of proposed projects at the Plainview/Hale County Airport during the course of the next five years through multiple grants.

Current Project: Plainview/Hale County Airport. TxDOT CSJ No. 0905PLNVW. Airport improvement project to: reconstruct fueling pad area and northwest apron; reconstruct hangar access taxiway northwest side.

The DBE/HUB goal for the current project is 12%. TxDOT Project Manager is Bijan Jamalabad.

Future scope work items for engineering/design services within the next five years may include but are not necessarily limited to the following:

1. Rehabilitate east and west side aprons
2. Rehabilitate RW 4-22 and RW 13-31
3. Mark RW 4-22 and RW 13-31
4. Replace VASI w/PAPI-4 RW 4-22
5. Replace RW 13-31 constant current regulator
6. Install PAPI-2 RW 13-31 and TW lighting for RW 4-22
7. Rehabilitate and mark TWs

The City of Plainview and Hale County reserve their right to determine which of the above scope of services may or may not be awarded to the successful firm and to initiate additional procurement action for any of the services above.

To assist in your proposal preparation the criteria, 5010 drawing, project narrative, and most recent Airport Layout Plan are available online at

www.txdot.gov/avn/avninfo/notice/consult/index.htm

by selecting Hale County Airport. The proposal should address a technical approach for the current scope only. Firms shall use page 4, Recent Airport Experience, to list relevant past projects for both current and future scope.

Interested firms shall utilize the latest version of Form AVN-550, titled "Aviation Engineering Services Proposal." The form may be requested from TxDOT Aviation Division, 125 East 11th Street, Austin, Texas 78701-2483, phone number, 1-800-68-PILOT (74568). The form may be emailed by request or downloaded from the TxDOT web site at

http://www.txdot.gov/business/projects/aviation.htm.

The form may not be altered in any way. All printing must be in black on white paper, except for the optional illustration page. Firms must carefully follow the instructions provided on each page of the form. Proposals may not exceed the number of pages in the proposal format. The proposal format consists of seven pages of data plus two optional pages consisting of an illustration page and a proposal summary page. A prime provider may only submit one proposal. If a prime provider submits more than one proposal, that provider will be disqualified. Proposals shall be stapled but not bound in any other fashion. PROPOSALS WILL NOT BE ACCEPTED IN ANY OTHER FORMAT.

ATTENTION: To ensure utilization of the latest version of Form AVN-550, firms are encouraged to download Form AVN-550 from the TxDOT website as addressed above. Utilization of Form AVN-550 from a previous download may not be the exact same format. Form AVN-550 is a PDF Template.

Please note:

Five completed, unfolded copies of Form AVN-550 **must be received** by TxDOT Aviation Division at 150 East Riverside Drive, 5th Floor, South Tower, Austin, Texas 78704 no later than November 3, 2009, 4:00 p.m. Electronic facsimiles or forms sent by email will not be accepted. Please mark the envelope of the forms to the attention of Kari Campbell.

The consultant selection committee will be composed of local government members. The final selection by the committee will generally be made following the completion of review of proposals. The committee will review all proposals and rate and rank each. The criteria for evaluation of engineering proposals can be found at

http://www.txdot.gov/business/projects/aviation.htm.

All firms will be notified and the top rated firm will be contacted to begin fee negotiations. The selection committee does, however, reserve the right to conduct interviews for the top rated firms if the committee deems it necessary. If interviews are conducted, selection will be made following interviews.

Please contact TxDOT Aviation for any technical or procedural questions at 1-800-68-PILOT (74568). For procedural questions, please contact Kari Campbell, Grant Manager. For technical questions, please contact Bijan Jamalabad, Project Manager.

TRD-200904389
Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Filed: September 28, 2009

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Public Transportation Advisory Committee

The following notice was posted to the Open Meetings site on September 28, 2009:

PUBLIC TRANSPORTATION ADVISORY COMMITTEE

October 23, 2009 - 9:00 a.m. (local time)

Teleconference

200 East Riverside, Room 1A.1, Austin, Texas

Agenda

1. Call to Order
2. Approval of Minutes from March 4, 2009 and May 29, 2009 meetings (Action)
3. Recognition of service for the members whose terms expired September 30, 2009 and welcome to newly appointed members
4. In accordance with 43 TAC §1.82(b)(1), elect chair (Action)
5. In accordance with 43 TAC §1.82(b)(1), elect vice chair (Action)
6. Review and comment on the final draft of proposed revisions to 43 TAC Chapter 31 concerning compliance procedure and in accordance with 43 TAC §1.83(c) act on proposed revisions and review and comment on 43 TAC §1.8 concerning internal ethics and compliance program, as it relates to those amendments to Chapter 31 (Action)
7. Presentation and discussion of the department's Draft 2011-2015 Strategic Plan Vision, Mission, Values, Goals, and Focus Area Statements
8. Discussion and possible action on the Planning & Policy Technical Subcommittee's work program topics
9. Discussion and possible action on the Program Management Technical Subcommittee's work program topics
10. Division Director's Report to the Committee regarding general public transportation matters
11. Public comment
12. Confirm date of next meeting (Action)
13. Adjourn (Action)

TRD-200904390

Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Filed: September 28, 2009

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Transportation Enhancement Program - 2009 Program Call

In accordance with 43 TAC §§11.200 - 11.205, the Texas Department of Transportation issues this 2009 Program Call for the proposed projects of the department's Statewide Transportation Enhancement Program.

Title 23, United States Code, §133(d)(2) and §160(e)(2), requires that 10% of certain funds apportioned a state pursuant to Title 23, United States Code, §104((b)(3), be used for transportation enhancement activities, as defined. The Texas Transportation Commission may allocate funds to the department for use on the state highway system for transportation enhancement activities that provide a safe, effective, and efficient movement of people and goods. The commission will also make funds available in a statewide competitive program that enhances the surface transportation systems and facilities within the state for the benefit of the users of those systems.

Transportation enhancement activities are defined in Title 23, United States Code, §101(a) as:

(1) provision of facilities for pedestrians and bicycles;

(2) provision of safety and education activities for pedestrians and bicycles;

(3) acquisition of scenic easements and scenic or historic sites;

(4) scenic or historic highway program (including the provision of tourist and welcome center facilities);

(5) landscaping and other scenic beautification;

(6) historic preservation;

(7) rehabilitation and operation of historic transportation buildings, structures or facilities (including historic railroad facilities and canals);

(8) preservation of abandoned railway corridors (including the conversion and use thereof for pedestrian or bicycle trails);

(9) control and removal of outdoor advertising;

(10) archaeological planning and research;

(11) environmental mitigation to address water pollution due to highway runoff or reduce vehicle-caused wildlife mortality while maintaining habitat connectivity; and

(12) establishment of transportation museums.

To nominate a project, the eligible nominating entity must file its nomination, in the form prescribed by the department, with the district engineer of the district office responsible for the area in which the proposed enhancement project will be implemented. The address and telephone number of the district offices are available on the department's internet web site at

www.txdot.gov/business/governments/te.htm.

Completed nominations must be received by the department no later than 5:00 p.m., Friday, December 11, 2009.

Information regarding the program, program guide, nomination forms and workshops are available from the department's internet web site at

www.txdot.gov/business/governments/te.htm

or by writing or calling the Design Division, 125 East 11th Street, Austin, Texas 78701-2483, (512) 416-3082.

TRD-200904391
Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Filed: September 28, 2009

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The Texas A&M University System

Notification of Award

In accordance with the provisions of Texas Government Code, Chapter 2254, The Texas A&M University System has entered into a consulting contract for asbestos consulting services. The consultants will provide asbestos program design and air monitoring services in conjunction with various assigned projects throughout The Texas A&M University System.

The Name and Address of the consultants are as follows: Austin Environmental Inc., P.O. Box 3725, Bryan, Texas 77805; Sigma Environmental Services, 5801 Marvin D. Love Freeway, Ste 310, Dallas, Texas 75237; Envirotest, 3902 Braxton, Houston, Texas 77063; Argus Environmental Consultants, 10004 Wurzbach Rd., #247, San Antonio, Texas 78230; Southern Global Safety Services, 2986 County Rd 180, Alvin, Texas 77511; CAM Environmental Services, 817 Southmore Ave, Ste 400, Pasadena, Texas 77502.

The A&M System will pay an unspecific amount greater than $25,000.00 to each consultant over the course of the contracts. The contracts will begin in September 2009 and shall terminate in August 2012 unless renewed for an additional two years.

If any, the consultants will submit documents, films, recordings, or reports compiled by the consultant under the contract to TAMUS, no later than one year after completion of services.

Any questions regarding this posting should be directed to: Don Barwick, HUB and Procurement Manager, Office of HUB and Procurement Programs, The Texas A&M University System, 200 Technology Way, Ste 1273, College Station Texas 77845, Voice: (979) 458-6410, E-mail: dbarwick@tamu.edu.

TRD-200904255
Don Barwick
HUB and Procurement Manager
The Texas A&M University System
Filed: September 24, 2009

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Texas A&M University System Board of Regents

Announcement of Finalist for the Position of Director of Texas Agrilife Research

Pursuant to §552.123, Texas Government Code, the following candidate is the finalist for the position of Director of Texas AgriLife Research. Upon the expiration of twenty-one (21) days, final action is to be taken by the Board of Regents of The Texas A&M University System:

Dr. Craig L. Nessler

TRD-200904280

Vickie Burt Spillers
Executive Secretary to the Board of Regents
Texas A&M University System Board of Regents
Filed: September 25, 2009

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Texas Water Development Board

Request for Applications for Geomorphic Unit Mapping on the Sabine River

The Texas Water Development Board (TWDB) requests the submission of Request for Qualifications (RFQs) for state Fiscal Year 2010 to conduct a research study to document specific procedures and techniques for conducting geomorphic (river styles) mapping across at micro-landform scale of interest to the Texas Instream Flow Program and to provide geomorphic mapping of a selected study sites on the lower Sabine River. The TWDB has a total of $52,000.00 available from the Research and Planning Fund for this study. Rules governing the Research and Planning Fund (31 Texas Administrative Code Chapter 355), guidelines/instruction sheet are available on the TWDB website or by request.

Description of the Objectives and Purpose.

The study will document specific procedures and techniques for conducting and create a hydraulic unit map and morphological unit of interest to the Texas Instream Flow Program who will provide the geomorphic mapping study sites on the lower Sabine River at a scale where geomorphic and biological concerns intersect. Mapping units at this scale, referred to as hydraulic units by river style terminology, can be combined to form what biologists call mesohabitats. Sites selected for mapping will correspond to sites selected for fish habitat modeling by an ongoing Texas Instream Flow Program study of the lower Sabine River.

Deliverables will include a report covering the objectives above, and maps (hardcopy and digital) of the process and key transition zones. A report that will discuss the procedures and techniques used to apply the river style scheme to the Sabine River.

Description of Applicant Criteria.

The applicable scope of work, schedule, and contract amount will be negotiated after the TWDB selects the most qualified applicants. Failure to arrive at mutually agreeable terms of a contract with the most qualified applicant shall constitute a rejection of the TWDB's offer and may result in subsequent negotiations with the next most qualified applicant. The TWDB reserves the right to reject any or all applications if staff determines that the application(s) does not adequately meet the required criteria or if the funding available is less than the requested funding.

Deadline for Submittal, Review Criteria and Contact Person for Additional Information.

Five double-sided, double-spaced copies of a completed application must be filed with the TWDB no later than 12:00 p.m., Noon, Central Standard Time, Thursday, October 19, 2009. Applications can be directed either in person to Mr. David Carter, Texas Water Development Board, Stephen F. Austin Building, Room 531, 1700 North Congress Avenue, Austin, Texas 78701; or by mail to Mr. David Carter, Texas Water Development Board, P.O. Box 13231 - Capitol Station, Austin, Texas 78711-3231. All applicants should obtain the TWDB's guidelines/instruction sheet for responding to the RFQ. Requests for information may be directed to Mr. Carter at the preceding mailing address, or by e-mail at david.carter@twdb.state.tx.us or by calling (512) 936-6079.

TRD-200904420
Kenneth L. Petersen
General Counsel
Texas Water Development Board
Filed: September 30, 2009

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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).