TEXAS REGISTER

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Kimberly Reyes

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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(512) 463-5561
FAX (512) 463-5569

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

IN THIS ISSUE

WITHDRAWN RULES

ADOPTED RULES

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 December 1, 2009

Appointed to the Texas County and District Retirement System for a term to expire December 31, 2011, Dorye Kristeen Roe of Bryan (replacing Gerald Winn of Bryan who resigned).

Appointments for December 4, 2009

Appointed to the Brazos River Authority Board of Directors for a term to expire February 1, 2015, Michel Todd Brashears of Wolfforth (replacing Jim Landtroop of Plainview who resigned).

Appointments for December 9, 2009

Appointed to the Juvenile Justice Advisory Board for a term at the pleasure of the Governor, David Scott Matthew of Georgetown.

Appointed to the Rehabilitation Council of Texas for a term to expire October 29, 2012, Wilma Michelle Crain of Lubbock (replacing William Mullican of Pflugerville whose term expired).

Appointed to the Rehabilitation Council of Texas for a term to expire October 29, 2012, Roy Larry Evans of San Angelo (Mr. Evans is being reappointed).

Appointed to the Rehabilitation Council of Texas for a term to expire October 29, 2012, Rames Gonzalez, Jr. of Palmview (pursuant to the U.S. Rehabilitation Act).

Appointments for December 14, 2009

Appointed to the Office of Public Utility Counsel, effective December 21, 2009, for a term to expire February 1, 2011, Sheri Sanders Givens of Round Rock (replacing Don Ballard of Austin who resigned).

Appointed to the Governor's Committee on People with Disabilities for a term to expire February 1, 2010, Patricia A. Watson of Flower Mound (replacing Peggy Cosner of Belton whose term expired).

Appointed to the Housing and Health Services Coordination Council, pursuant to SB 1878, 81st Legislature, Regular Session, for a term to expire September 1, 2013, Felix Briones, Jr. of Austin.

Appointed to the Housing and Health Services Coordination Council, pursuant to SB 1878, 81st Legislature, Regular Session, for a term to expire September 1, 2013, Michael R. Goodwin of Boerne.

Appointed to the Housing and Health Services Coordination Council, pursuant to SB 1878, 81st Legislature, Regular Session, for a term to expire September 1, 2015, Jimmy H. Carmichael of Brownwood.

Appointed to the Housing and Health Services Coordination Council, pursuant to SB 1878, 81st Legislature, Regular Session, for a term to expire September 1, 2015, Kenneth R. Darden of Livingston.

Appointed to the Texas Medical Board District Three Review Committee for a term to expire January 15, 2010, Jayaram B. Naidu of Odessa (replacing Victor Diaz of El Paso whose term expired).

Appointed to the Texas Medical Board District Three Review Committee for a term to expire January 15, 2014, John P. McKinley of Amarillo (replacing Lee Anderson of Fort Worth whose term expired).

Appointments for December 15, 2009

Appointed as Judge of the 203rd Judicial District Court, Dallas County for a term until the next General Election and until her successor shall be duly elected and qualified, Jennifer Balido of Dallas. Ms. Balido is replacing Justice Lana Myers who was appointed to the 5th Court of Appeals.

Appointed as Judge of the 295th Judicial District Court, Harris County for a term until the next General Election and until her successor shall be duly elected and qualified, Caroline E. Baker of Houston. Judge Baker is replacing Justice Tracy Christopher who was appointed to the 14th Court of Appeals.

Appointed to the Texas Forensic Science Commission for a term to expire September 1, 2011, Nizam Peerwani of Fort Worth (replacing Randall Frost of Boerne who resigned).

Appointed to the Trinity River Authority Board of Directors for a term to expire March 15, 2015, William W. Collins, Jr. of Fort Worth (replacing Barbara Nash of Arlington who resigned).

Rick Perry, Governor

TRD-200905863

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Proclamation 41-3232

TO ALL TO WHOM THESE PRESENTS SHALL COME:

WHEREAS, Hurricane Ike inflicted serious damage on the coastal region of Texas on September 13, 2008; and

WHEREAS, on October 3, 2008, the President of the United States signed into law the Heartland Disaster Tax Relief Act of 2008 (the "Act"), which included changes to the federal tax law designed to provide economic relief to the Hurricane Ike disaster area; and

WHEREAS, in accordance with the Act, the Hurricane Ike disaster area includes the following 34 Texas counties: Angelina, Austin, Brazoria, Chambers, Cherokee, Fort Bend, Galveston, Gregg, Grimes, Hardin, Harris, Harrison, Houston, Jasper, Jefferson, Liberty, Madison, Matagorda, Montgomery, Nacogdoches, Newton, Orange, Polk, Rusk, Sabine, San Augustine, San Jacinto, Shelby, Smith, Trinity, Tyler, Walker, Waller and Washington; and

WHEREAS, the Act allows for the issuance of certain tax-exempt, qualified Hurricane Ike disaster area bonds to provide financing in the Hurricane Ike disaster area, through December 31, 2012; and

WHEREAS, the Act provides that the Governor of the State of Texas shall designate qualified Hurricane Ike disaster area bonds on the basis of providing assistance to areas in the order in which such assistance is most needed; and

WHEREAS, the Act provides that the maximum aggregate face amount of such bonds that may be designated shall not exceed the product of $2,000 multiplied by the portion of the population that is in the Texas counties of Brazoria, Chambers, Galveston, Jefferson, and Orange (as determined on the basis of the most recent census estimate of resident population released by the U.S. Census Bureau before September 13, 2008), which is a total of $1,863,270,000; and

WHEREAS, the legislature has authorized the Bond Review Board in Section 1372.101(b) of the Texas Government Code to administer the qualified Hurricane Ike disaster area bond program established by the governor.

NOW, THEREFORE, I, Rick Perry, Governor of the State of Texas do hereby find and determine that, for purposes of the Act, the following priorities for designation of qualified Hurricane Ike disaster area bonds will, unless otherwise determined by the Governor of the State of Texas, provide assistance to the areas specified in the order in which such assistance is most needed:

• Seventy-seven percent of the total such bonds, or $1,434,717,900, shall be reserved for projects located in the following eight counties: Brazoria, Chambers, Galveston, Harris, Jefferson, Liberty, Montgomery and Orange; and

• Thirteen percent of the total such bonds, or $242,225,100, shall be reserved for projects located in the following nine counties: Fort Bend, Grimes, Hardin, Jasper, Newton, Polk, San Jacinto, Tyler and Walker; and

• Ten percent of the total such bonds, or $186,327,000, shall be reserved for projects located in the following 17 counties: Angelina, Austin, Cherokee, Gregg, Harrison, Houston, Madison, Matagorda, Nacogdoches, Rusk, Sabine, San Augustine, Shelby, Smith, Trinity, Waller and Washington; and

BE IT FURTHER RESOLVED, the principal amount of any such bonds designated for a single applicant shall be no less than $10,000,000; and

BE IT FURTHER RESOLVED, the Bond Review Board shall, under the direction of the Office of the Governor, administer the state's qualified Hurricane Ike disaster area bond program; and

BE IT FURTHER RESOLVED, as part of its administration of the program, the Bond Review Board shall maintain the official record of the designations and issuances of all qualified Hurricane Ike disaster area bonds; and

BE IT FURTHER RESOLVED, eligible issuers of such bonds shall complete and submit to the Bond Review Board an official application to the Office of the Governor for designation of the bonds as qualified Hurricane Ike disaster area bonds (and, at the election of the applicant, for designation of a person to use the property to be financed as carrying on a trade or business replacing a trade or business with respect to which another person suffered a loss attributable to Hurricane Ike) in the form approved by the Office of the Governor and available at the Bond Review Board, together with a $1,000 application fee; and

BE IT FURTHER RESOLVED, the application shall include a letter of bond counsel to the effect that interest on the bonds would not be excluded from gross income for federal income tax purposes unless the bonds receive the requested designation(s) and, if the requested designation(s) are made, bond counsel expects to be able to render an opinion that the bonds and the project comply with the requirements of the Act and applicable state law; and

BE IT FURTHER RESOLVED, applicants are subject to requests from the Office of the Governor or the Bond Review Board for additional information related to an application; and

BE IT FURTHER RESOLVED, following application to the Bond Review Board, the Office of the Governor shall make designations on a case-by-case basis to ensure that each project is an appropriate use of funds under the Act; and

BE IT FURTHER RESOLVED, once an applicant receives a designation of bonds as qualified Hurricane Ike disaster area bonds, the period for issuing such bonds is within 120 days after the date of designation or such longer period approved by the Office of the Governor (the "Designation Period"); and

BE IT FURTHER RESOLVED, if such bonds are not issued within the Designation Period, the designation is deemed waived, and the amount of the designation automatically becomes eligible for new designation in accordance with the program requirements; and

BE IT FURTHER RESOLVED, within five days after such bonds are issued, the applicant shall submit to the Bond Review Board a certification, in a form approved by the Office of the Governor and available from the Bond Review Board, of the principal amount of such bonds that have been issued, and the applicant shall promptly notify the Bond Review Board of any abandonment of its intention to issue such bonds and release its designation for such bonds; and

BE IT FURTHER RESOLVED, this proclamation supersedes my proclamation dated March 17, 2009, designating priorities for utilization of qualified Hurricane Ike disaster area bonds, but my proclamation of even date therewith designating bonds as Hurricane Ike disaster area bonds (and the designation made thereby) is hereby saved and shall remain unaffected by this proclamation; and

BE IT FURTHER RESOLVED, I reserve the right, as necessary to benefit the citizens of the Hurricane Ike disaster area, to amend any and all of the resolutions of this proclamation.

IN TESTIMONY WHEREOF, I have hereunto signed my name and have officially caused the Seal of State to be affixed at my Office in the City of Austin, Texas, this the 7th day of December, 2009.

Rick Perry, Governor

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

TRD-200905889

EMERGENCY RULES

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

TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 61. SCHOOL DISTRICTS

SUBCHAPTER JJ. COMMISSIONER'S RULES CONCERNING AUTOMATIC COLLEGE ADMISSION

19 TAC §61.1201

The Texas Education Agency (TEA) adopts on an emergency basis new §61.1201, concerning automatic college admission. The new section implements the requirements of the Texas Education Code (TEC), §28.026, Notice of Automatic College Admission, which requires that the commissioner adopt procedures and appropriate forms to ensure that school districts provide high school students and parents with written notification of the substance of the TEC, §51.803, relating to automatic college admission. The TEC, §28.026(c), authorizes the commissioner to take such action in the manner provided by law for emergency rules.

The new section is adopted on an emergency basis to take effect immediately. The TEA finds that the requirements of state law in the TEC, §28.026, as amended by Senate Bill 175, 81st Texas Legislature, 2009, require the adoption of the new section on fewer than 30 days notice. The TEC, §28.026, requires school districts to provide students and their parents or guardians with written notification not later than the 14th day after the last day of classes for the fall semester or an equivalent date in the case of a school operated on a year-round system, beginning with the 2009-2010 school year. The emergency adoption will make the procedures and form available beginning in December 2009. New 19 TAC §61.1201 establishes in rule procedures for consistent implementation of the statutorily-required written notification. The emergency action also adopts in rule the appropriate form for use by school districts.

The new section is simultaneously being proposed for permanent adoption.

The new section is adopted under the TEC, §28.026, as amended by Senate Bill 175, 81st Texas Legislature, 2009, which authorizes the commissioner to adopt procedures and appropriate forms to ensure that school districts provide high school students and parents with written notification of the substance of the TEC, §51.803, relating to automatic college admission. The TEC, §28.026(c), authorizes the commissioner to take such action in the manner provided by law for emergency rules.

The new section implements the TEC, §28.026.

§61.1201. Notification of Automatic College Admission.

(a) In accordance with the Texas Education Code (TEC), §28.026, a school district shall provide each student, at the time the student first registers for one or more classes required for high school graduation, with a written notification of the substance of the TEC, §51.803, concerning automatic college admission.

(b) Not later than the 14th day after the last day of classes for the fall semester or an equivalent date in the case of a school operated on a year-round system, a school district shall provide each eligible senior student under the TEC, §51.803, and each student enrolled in the junior year of high school who has a grade point average in the top ten percent of the student's high school class, and the student's parent or guardian, with a written notification of the student's eligibility for automatic college admission. The written notification shall provide a detailed explanation in plain language of the substance of the TEC, §51.803, using the form developed by the Texas Education Agency.

(1) The notification form to be used by school districts is provided in this paragraph entitled "Notification of Eligibility for Automatic College Admission."
Figure: 19 TAC §61.1201(b)(1)

(2) A school district shall obtain written acknowledgement of receipt of the notification from each eligible student and the student's parent or guardian.

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 December 11, 2009.

TRD-200905785
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Effective Date: December 11, 2009
Expiration Date: April 9, 2010
For further information, please call: (512) 475-1497

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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 4. AGRICULTURE

PART 2. TEXAS ANIMAL HEALTH COMMISSION

CHAPTER 55. SWINE

4 TAC §55.1

The Texas Animal Health Commission (Commission) proposes amendments to Chapter 55, Swine, §55.1, concerning Testing Breeding Swine Prior to Sale or Change of Ownership. The purpose of the amendment is to clarify the definition of "breeding swine". The change is intended to provide greater clarity to the definition and the application of the rule.

The current requirement provides that "(s)wine that are six months of age or older (sexually mature, intact animals) and that are used or intended to be used for breeding" but is being modified to remove the last part of the definition regarding swine that are used or intended to be used for breeding. The reason for the modification is to ensure that any swine that are six months of age or older and who are sexually mature, intact animals are tested because they could end up being used for breeding even though that may not have been the intent at the time of sale. This change in the definition allows the Commission to ensure that test eligible animals are tested.

FISCAL NOTE

Dr. Matt Cochran, Deputy Director for Administration and Finance, Texas Animal Health Commission, has determined for the first five-year period the rules are in effect, there will be no additional fiscal implications for state or local government as a result of enforcing or administering the rules. There will be no effect to individuals required to comply with the rule as proposed. There will be no effect on small or micro businesses.

PUBLIC BENEFIT NOTE

Dr. 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 clear and concise regulations which can be found in one chapter.

LOCAL EMPLOYMENT IMPACT STATEMENT

In accordance with Government Code, §2001.022, this agency has determined that the adopted 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 rule is an activity related to the handling of animals, including requirements for testing, movement, inspection, identification, reporting of disease, and treatment, in accordance with Title 4 TAC, §59.7, and is, therefore, compliant with the Private Real Property Preservation Act in Government Code, Chapter 2007.

REQUEST FOR COMMENT

Comments regarding the proposed amendments 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, exotic livestock, domestic fowl, or exotic fowl from disease. The Commission is authorized, by §161.041(b), to act to eradicate or control any disease or agent of transmission for any disease that affects livestock. If the Commission determines that a disease listed in §161.041 of this code or an agent of transmission of one of those diseases exists in a place in this state among livestock, or that livestock are exposed to one of those diseases or an agent of transmission of one of those diseases, the Commission shall establish a quarantine on the affected animals or on the affected place. That is found in §161.061.

As a control measure, the Commission by rule may regulate the movement of animals. The Commission may restrict the intrastate movement of animals even though the movement of the animals is unrestricted in interstate or international commerce. The Commission may require testing, vaccination, or another epidemiologically sound procedure before or after animals are moved. That is found in §161.054. An agent of the Commission is entitled to stop and inspect a shipment of animals or animal products being transported in this state in order to determine if the shipment originated from a quarantined area or herd; or determine if the shipment presents a danger to the public health or livestock industry through insect infestation or through a communicable or noncommunicable disease. That authority is found in §161.048.

Also, in Chapter 165 entitled "Control of Diseases in Swine" §165.022 provides that the Commission may adopt rules providing for the manner, method, and system of eradicating swine diseases.

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

§55.1. Testing Breeding Swine Prior to Sale or Change of Ownership.

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

(1) Breeding Swine--Swine that are six months of age or older and are [~~(~~]sexually mature, intact animals[~~)~~ ~~and that are used or intended to be used for breeding~~].

(2) Change of Ownership--Taking possession of breeding swine as a result of a gift or by some other form of remuneration.

(3) Test or Testing--Collection and examination of blood samples taken from swine by using recognized tests for Pseudorabies and Swine Brucellosis infection.

(4) Test Eligible--A term used to describe those sexually intact breeding swine, that are six months of age or older, are required to be tested for Pseudorabies and Brucellosis.

(5) Commercial Production Swine--Those swine that are continuously managed and have adequate facilities and practices to prevent exposure to either transitional production swine or feral swine.

(6) Transitional Production Swine--Swine that have a reasonable opportunity to be exposed to feral swine or captive feral swine.

(7) Farm of Origin--A farm where swine were born or on which they have resided for at least 90 consecutive days immediately prior to movement.

(8) Infected Herd--Any herd in which any swine have been determined to be infected with pseudorabies virus by an official pseudorabies epidemiologist.

(b) Testing Prior to Change of Ownership.

(1) All breeding swine shall be tested negative for Pseudorabies and Swine Brucellosis within 30 days prior to change of ownership in Texas. Swine from herds with a current disease-free status are exempt from this test requirement.

(2) Blood will be collected by TAHC or USDA, VS Regulatory personnel or Texas licensed, USDA Accredited Veterinarians or their employees and tested using tests referenced in current national disease program standards.

(3) Breeding Swine from which blood was collected at a livestock market may be moved from the market to a recognized slaughter facility without receiving test results. No permit or Hold Order is required for movement to a recognized slaughter facility.

(4) Breeding Swine from which blood was collected at a livestock market may be moved from the market to the premise of the buyer under Hold Order pending results of the test and should be isolated from other swine until test results are known.

(5) Each animal tested shall be identified by a USDA Veterinary Services approved identification eartag (metal, plastic, or other) that conforms to the nine-character alpha-numeric National Uniform Eartagging System.

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

Filed with the Office of the Secretary of State on December 14, 2009.

TRD-200905815

Gene Snelson
General Counsel
Texas Animal Health Commission
Earliest possible date of adoption: January 24, 2010
For further information, please call: (512) 719-0700

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TITLE 16. ECONOMIC REGULATION

PART 8. TEXAS RACING COMMISSION

CHAPTER 313. OFFICIALS AND RULES OF HORSE RACING

SUBCHAPTER A. OFFICIALS

DIVISION 3. DUTIES OF OTHER OFFICIALS

16 TAC §313.49, §313.59

The Texas Racing Commission proposes amendments to 16 TAC §313.49, Starter, and §313.59, Assistant Starters. Section 313.49 relates to the duties of the starter, and §313.59 relates to the duties of the assistant starters.

Section 313.49 currently requires the starter to assign assistant starters to horses at random in the starting gate. The proposed amendment will modify the requirement by allowing the starter to assign assistant starters to specific horses in the starting gate, with the stewards' approval, if necessary to ensure the safety of racing participants and the integrity of racing.

The proposed changes to §313.59 would prohibit certain types of unethical conduct by the assistant starters at the starting gate. These changes would align the Texas rules with the national model rules for assistant starters.

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

Ms. King has also determined that for each year of the first five years the amendments are in effect the anticipated public benefit will be to increase safety for the race participants and to enhance the integrity of racing.

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

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

All comments or questions regarding the proposed amendments may be submitted in writing within 30 days following publication of this notice in the *Texas Register* to Carolyn Weiss, Assistant to the Executive Director for the Texas Racing Commission, at P.O. Box 12080, Austin, Texas 78711-2080, telephone (512) 833-6699, or fax (512) 833-6907.

The amendments are proposed under Texas Revised Civil Statutes Annotated Article 179e, §3.02, which authorizes the Commission to make rules relating exclusively to horse and greyhound racing, and §3.07, which authorizes the Commission to make rules specifying the authority and duties of each official.

The amendments implement Texas Revised Civil Statutes Annotated Article 179e.

§313.49. Starter.

(a) - (c) (No change.)

(d) The starter shall assign the stall positions to the assistant starters at random. The starter may not notify the assistant starters of their respective stall positions for a race more than 10 minutes before post time for the race. With the approval of the stewards, the starter may make exceptions to this subsection if necessary to ensure the safety of the race participants and the integrity of racing.

(e) (No change.)

§313.59. Assistant Starters.

(a) The assistant starters shall be supervised by the starter. The assistant starters shall load the horses into the starting gate and, when required, head the horses in the starting gate.

(b) With respect to an official race, the assistant starters shall not:

(1) handle or take charge of any horse in the starting gate without the expressed permission of the starter;

(2) impede the start of a race;

(3) apply a whip or other device, with the exception of steward-approved twitches, to assist in loading a horse into the starting gate;

(4) slap, boot, or otherwise dispatch a horse from the starting gate; or

(5) strike or use abusive language to a jockey.

This 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 December 14, 2009.

TRD-200905835
Mark Fenner
General Counsel
Texas Racing Commission
Earliest possible date of adoption: January 24, 2010
For further information, please call: (512) 833-6699

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TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 61. SCHOOL DISTRICTS
SUBCHAPTER JJ. COMMISSIONER'S RULES CONCERNING AUTOMATIC COLLEGE ADMISSION

19 TAC §61.1201

The Texas Education Agency (TEA) proposes new §61.1201, concerning automatic college admission. The proposed new section would implement the requirements of the Texas Education Code (TEC), §28.026, Notice of Automatic College Admission. The TEC, §28.026, as amended by Senate Bill (SB) 175, 81st Texas Legislature, 2009, requires that the commissioner adopt procedures and appropriate forms to ensure that school districts provide high school students and parents with written notification of the substance of the TEC, §51.803, relating to automatic college admission.

The TEC, §28.026, requires each high school in a school district to post appropriate signs in each counselor's office, in each principal's office, and in each administrative building indicating the substance of the TEC, §51.803, regarding automatic college admission. SB 175, 81st Texas Legislature, 2009, amended the TEC, §28.026, requiring the commissioner to adopt procedures to ensure that school districts provide high school students and the students' parents or guardians with written notification of the substance of the TEC, §51.803, relating to automatic college admission. The TEC, §28.026, also requires the commissioner to adopt forms for districts to use in providing notice to students and parents. School districts are required to provide students and their parents or guardians with written notification not later than the 14th day after the last day of classes for the fall semester or an equivalent date in the case of a school operated on a year-round system.

The proposed new 19 TAC §61.1201 would establish in rule procedures for consistent implementation of the statutorily-required written notification. The proposal would also adopt in rule the appropriate form for use by school districts. This new section was submitted for adoption on an emergency basis simultaneous to the submission as proposed.

The proposed new section would have no procedural and reporting requirements. At the local level, school districts will be required to obtain written acknowledgement of receipt of notification forms.

Anita Givens, associate commissioner for standards and programs, has determined that for the first five-year period the new section is in effect there will be no additional costs for state government as a result of enforcing or administering the rule action. Fiscal implications are anticipated for school districts to duplicate and distribute the notice of automatic admission to students and parents. Duplication costs for a one-page notice are anticipated to range from $12,000 to $20,000 per year on a statewide basis, assuming the notice is provided mainly to students registering for Grade 9.

Ms. Givens 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 rule action will be to ensure school districts consistently notify students of the substance of the automatic college admission policy. There is no anticipated economic cost to persons who are required to comply with the proposed new section.

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 December 25, 2009, and ends January 25, 2010. 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 14 calendar days after notice of the proposal has been published in the *Texas Register* on December 25, 2009.

The new section is proposed under the TEC, §28.026, as amended by SB 175, 81st Texas Legislature, 2009, which authorizes the commissioner to adopt procedures and appropriate forms to ensure that school districts provide high school students and parents with written notification of the substance of the TEC, §51.803, relating to automatic college admission.

The new section implements the TEC, §28.026.

§61.1201. Notification of Automatic College Admission.

(a) In accordance with the Texas Education Code (TEC), §28.026, a school district shall provide each student, at the time the student first registers for one or more classes required for high school graduation, with a written notification of the substance of the TEC, §51.803, concerning automatic college admission.

(b) Not later than the 14th day after the last day of classes for the fall semester or an equivalent date in the case of a school operated on a year-round system, a school district shall provide each eligible senior student under the TEC, §51.803, and each student enrolled in the junior year of high school who has a grade point average in the top ten percent of the student's high school class, and the student's parent or guardian, with a written notification of the student's eligibility for automatic college admission. The written notification shall provide a detailed explanation in plain language of the substance of the TEC, §51.803, using the form developed by the Texas Education Agency.

(1) The notification form to be used by school districts is provided in this paragraph entitled "Notification of Eligibility for Automatic College Admission."
Figure: 19 TAC §61.1201(b)(1)

(2) A school district shall obtain written acknowledgement of receipt of the notification from each eligible student and the student's parent or guardian.

This 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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CHAPTER 75. CURRICULUM
SUBCHAPTER BB. COMMISSIONER'S RULES CONCERNING PROVISIONS FOR CAREER AND TECHNICAL EDUCATION

19 TAC §§75.1021 - 75.1025, 75.1031

The Texas Education Agency (TEA) proposes amendments to §§75.1021 - 75.1025 and §75.1031, concerning career and technical (CTE) education. Sections 75.1021 - 75.1025 establish requirements for CTE, including general provisions, provisions for members of special populations, opportunities for students to participate in student leadership organizations, and annual evaluation of CTE programs. Section 75.1031 addresses voluntary workforce training standards and agreements. The proposed amendments would implement the requirements of the Texas Education Code (TEC), §29.182(b), relating to CTE and would update references to federal laws and codes.

The TEC, §29.185, authorizes the TEA to prescribe requirements for CTE in public schools as necessary to comply with federal law. The TEC, §29.001, directs the TEA to develop and implement a statewide plan with programmatic content that includes procedures designed to ensure that, when appropriate, each student with a disability is provided an opportunity to participate in career and technical education classes, in addition to participating in regular or special classes. Additionally, the Texas Labor Code, §311.004, authorizes the TEA to adopt rules necessary to administer its responsibilities related to the program for voluntary workforce training for certain students. Rules adopted by the commissioner of education in 19 TAC Chapter 75, Subchapter BB, implement these statutory requirements.

The TEC, §29.182, requires the TEA to prepare and biennially update a state plan for CTE that sets forth objectives for CTE for the next biennium and long-term goals for the following five years. HB 3, 81st Texas Legislature, 2009, requires that the state plan for CTE ensure that CTE constitutes an option for student learning that provides a rigorous course of study consistent with the required curriculum. The TEC, §29.182, also requires the state plan for CTE to outline outcomes and opportunities for students in CTE programs.

The proposed amendments would update 19 TAC Chapter 75, Subchapter BB, to incorporate new statutory language relating to establishing CTE as an integral part of the total education system and as an option for student learning that provides a rigorous course of study. The proposed amendments would also designate recognized CTE student organizations.

In addition, the federal Carl D. Perkins Career and Technical Education Improvement Act of 2006 changed the name of the program from career and technology education to career and technical education.

The proposed amendments would update references to federal laws and codes throughout the subchapter as applicable and change all references from "career and technology" in the subchapter, including the titles of the subchapter and affected rules, to "career and technical" to align with the federal law.

The proposed amendments would have no new procedural and reporting requirements. The proposed amendments 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 amendments are in effect there will be no additional costs for state or local government as a result of enforcing or administering the rule action.

Ms. Givens has determined that for each year of the first five years the amendments are in effect the public benefit anticipated as a result of enforcing the rule action will be further clarification of options and outcomes for students in CTE programs. There is no anticipated economic cost to persons who are required to comply with the proposed amendments.

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 December 25, 2009, and ends January 25, 2010. 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 14 calendar days after notice of the proposal has been published in the *Texas Register* on December 25, 2009.

The amendments are proposed under the TEC, §29.001, which directs the TEA to develop and implement a statewide plan with programmatic content that includes procedures designed to ensure that, when appropriate, each student with a disability is provided an opportunity to participate in CTE classes, in addition to participating in regular or special classes; TEC, §29.182, which requires the TEA to prepare and biennially update a state plan for CTE that includes procedures to ensure that CTE constitutes an option for student learning that provides a rigorous course of study consistent with the required curriculum and which also requires the state plan for CTE to outline outcomes and opportunities for students in CTE programs; TEC, §29.185, which authorizes the TEA to prescribe requirements for CTE in public schools as necessary to comply with federal law; and Texas Labor Code, §311.004, which authorizes the TEA to adopt rules necessary to administer its responsibilities related to the Voluntary Workforce Training for Certain Students program.

The amendments implement the TEC, §§29.001, 29.182, and 29.185, and Texas Labor Code, §311.004.

§75.1021. Applicability.

The provisions of this subchapter apply only to school districts receiving federal career and technical [~~technology~~] education funds.

§75.1022. [~~Career and Technology Education Program~~] General Provisions.

(a) As specified in the Texas Education Code, §29.182, career and technical education is established as an integral part of the total education system and constitutes an option for student learning that provides a rigorous course of study that:

(1) incorporates competencies leading to academic and technical skill attainment;

(2) leads to an industry-recognized license, credential, or certificate or, at the postsecondary level, an associate or baccalaureate degree;

(3) includes opportunities for students to earn college credit for coursework; and

(4) includes, as an integral part of the program, participation by students and teachers in activities of career and technical student organizations supported by the Texas Education Agency (TEA) and State Board of Education.

(b) [~~(a)~~] The state shall distribute federal funds available under the Carl D. Perkins Career [~~Vocational~~] and Technical Education Improvement Act of 2006 [~~1998~~], Public Law 109-270 [~~105-332~~] (Carl D. Perkins Act of 2006 [~~1998~~]), to eligible institutions.

(c) [~~(b)~~] An eligible secondary entity seeking financial assistance under the Carl D. Perkins Act of 2006 [~~1998~~] shall submit a local plan to the TEA [~~Texas Education Agency (TEA)~~] as described in 20 United States Code (USC), §2354, in accordance with requirements established by the TEA.

(d) [~~(c)~~] Each eligible recipient that receives funding under the Carl D. Perkins Act of 2006 [~~1998~~] shall use the funds to improve career and technical [~~technology~~] education programs in compliance with 20 USC, §2355.

§75.1023. Provisions for Individuals Who Are Members of Special Populations.

(a) An individual who is a member of a special population as defined in 20 [~~23~~] United States Code (USC), §2302(29) [~~§2302(23)~~], shall be provided career and technical education [~~technology services~~] in accordance with all applicable federal law and regulations, state statutes, and rules of the State Board of Education (SBOE) and commissioner of education.

(b) A student with a disability shall be provided career and technical education [~~technology services~~] in accordance with the provisions of the Individuals with Disabilities Education Improvement Act (IDEA) of 2004, 20 USC §§1400-1491o, [~~Public Law 105-17, as amended through the 1997 Amendments,~~] and implementing regulations, state statutes, and rules of the SBOE and commissioner of education relating to services to students with disabilities.

(c) A student with a disability shall be instructed in accordance with the student's individualized education program (IEP) in the least restrictive environment, as determined by the admission, review, and dismissal (ARD) committee. If a student is unable to receive a free appropriate public education (educational benefit) in a regular career and technical [~~technology~~] education program, using supplementary aids and services, the student may be served in separate programs designed to address the student's occupational/training needs, such as career and technical [~~technology~~] education for students with disabilities (CTED) programs.

(d) A student with a disability identified in accordance with provisions of Public Law 105-302 and the IDEA of 2004, 20 USC §§1400-1491o [~~Amendments of 1997, Public Law 105-17~~], is an eligible participant in career and technical [~~technology~~] education when the requirements of this subsection are met.

(1) The ARD committee shall include a representative from career and technical [~~technology~~] education, preferably the teacher, when considering initial or continued placement of a student in a career and technical [~~technology~~] education program.

(2) Planning for students with disabilities shall be coordinated among career and technical [~~technology~~] education, special education, and state rehabilitation agencies and should include a coherent sequence of courses.

(3) A school district shall monitor to determine if the instruction being provided students with disabilities in career and technical [~~technology~~] education classes is consistent with the IEP [~~IEPs~~] developed for a student [~~the students~~].

(4) A school district shall provide supplementary services that each student with a disability needs to successfully complete a career and technical [~~technology~~] education program, such as curriculum modification, equipment modification, classroom modification, supportive personnel, and instructional aids and devices.

(5) A school district shall help fulfill the transitional service requirements of the IDEA of 2004, 20 USC §§1400-1491o [~~Amendments of 1997, Public Law 105-17~~], and implementing regulations,

state statutes, and rules of the commissioner of education for each student with a disability who is completing a coherent sequence of career and technical [~~technology~~] education courses.

(6) When determining placement in a career and technical education [~~technology~~] classroom, the ARD committee shall consider a student's graduation plan, the content of the individual transition plan and the IEP, and classroom supports. Enrollment numbers should not create a harmful effect on student learning for a student with or without disabilities in accordance with the provisions in the IDEA of 2004, 20 USC §§1400-1491o [~~Amendments of 1997, Public Law 105-17~~], and its implementing regulations.

§75.1024. Career and Technical [~~Technology Education~~] Student Organizations.

(a) A school district may use federal career and technical [~~technology~~] education funds to provide opportunities for student participation in approved student leadership organizations and assist career and technical [~~vocational~~] student organizations in accordance with all applicable federal and state laws, rules, and regulations. The following provisions apply to career and technical [~~technology education~~] student organizations.

(1) A student shall not be required to join such an organization.

(2) Student participation in career and technical [~~vocational~~] student organizations shall be governed in accordance with Chapter 76 of this title (relating to Extracurricular Activities).

(b) The following career and technical student organizations are recognized by the United States Department of Education and the Texas Education Agency:

(1) Business Professionals of America (BPA);

(2) DECA;

(3) Future Business Leaders of America (FBLA);

(4) FFA;

(5) Family, Career and Community Leaders of America (FCCLA);

(6) Health Occupations Students of America (HOSA);

(7) Technology Student Association (TSA); and

(8) SkillsUSA.

§75.1025. Program Evaluations.

Each district and consortium shall annually evaluate its career and technical [~~technology~~] education programs.

§75.1031. Voluntary Workforce Training Standards and Agreements.

(a) A voluntary workforce training program means a career and technical [~~technology~~] secondary and postsecondary education program conducted under an agreement as described in §75.1033 of this title (relating to Certified Program Agreements) or a voluntary program certified by the Texas Education Agency (TEA) [~~(Agency)~~] in conjunction with the Texas Workforce Commission that [~~which~~] meets the standards prescribed under §75.1032 of this title (relating to Certification Standards). The voluntary workforce training program must:

(1) integrate a secondary school academic curriculum with private sector workplace training and a postsecondary curriculum;

(2) place the participant in job internships;

(3) be designed to continue into postsecondary education and lead to the participant earning an associate's degree or a bachelor's degree;

(4) result in teaching new skills and adding value to the wage-earning potential of the participant and increasing the participant's long-term employability in Texas; and

(5) meet recognized or accepted industry standards.

(b) The participants must be at least 16 years of age and enrolled in a public or private secondary or postsecondary school, or an equivalent program, and who began to voluntarily participate in a certified voluntary workforce training program as part of secondary school education.

(c) Each certified voluntary workforce training program must have a designated sponsor responsible for operating the program and in whose name the program is registered when certified by the TEA [~~Agency~~]. The term "sponsor" shall be defined as the entity or organization in whose name the program is registered. Examples of sponsors may include, but are not be limited to, a business, a school district, a local workforce development board, or other appropriate entity who has agreed to operate the program according to the established guidelines.

(d) No student will be required to participate in a certified voluntary workforce training 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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Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
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CHAPTER 102. EDUCATIONAL PROGRAMS
SUBCHAPTER EE. COMMISSIONER'S RULES CONCERNING PILOT PROGRAMS

19 TAC §102.1051

The Texas Education Agency (TEA) proposes an amendment to §102.1051, concerning the financial literacy pilot program. The section establishes the purpose of the financial literacy pilot program and provisions relating to school district participation in the program. The proposed amendment would implement the requirements of the Texas Education Code (TEC), §29.915, Financial Literacy Pilot Program, as amended by House Bill (HB) 3646, 81st Texas Legislature, 2009, which requires the TEA by rule to expand the financial literacy pilot program.

The TEC, §29.915, requires the TEA by rule to establish and implement a financial literacy pilot program. HB 3646, 81st Texas Legislature, 2009, requires the TEA by rule to expand the financial literacy pilot program from not more than 25 school districts to not more than 100 school districts.

Under the TEC, §29.915, the TEA is permitted to solicit and accept a gift, grant, or donation from any source for the implemen-

tation of the program. The program may be implemented only if sufficient funds are available for that purpose.

The proposed amendment to 19 TAC §102.1051 would update the rule to specify that not more than 100 school districts will be selected to participate in the financial literacy pilot program.

The TEA is required to provide each member of the legislature with a report relating to the implementation and effectiveness of the program no later than January 1, 2011. Accordingly, each participating district will be required to report information on implementation of the program to the TEA in accordance with requirements specified by the commissioner. 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 state or local government as a result of enforcing or administering the rule action.

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 rule action will be to provide students in participating school districts with the knowledge and skills necessary to make critical decisions relating to personal finance. 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 December 25, 2009, and ends January 25, 2010. 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 14 calendar days after notice of the proposal has been published in the *Texas Register* on December 25, 2009.

The amendment is proposed under the TEC, §29.915, which authorizes the TEA to establish and implement a financial literacy pilot program by rule to provide students in participating districts with the knowledge and skills necessary as self-supporting adults to make critical decisions relating to personal financial matters.

The amendment implements the TEC, §29.915.

§102.1051. Financial Literacy Pilot Program.

(a) Program purpose. In accordance with the Texas Education Code (TEC), §29.915, the Texas Education Agency (TEA) shall establish and implement a financial literacy pilot program to provide students in participating school districts with the knowledge and skills necessary as self-supporting adults to make critical decisions relating to personal financial matters.

(b) Application. School districts must submit a letter of interest to the TEA division responsible for curriculum, including a commitment to use the curriculum designated by the pilot and to participate in any training required by the pilot. No more than 100 [~~25~~] school districts will be selected to participate in the program. If more than 100 [~~25~~] letters of interest are received, districts will be selected to reflect the following criteria:

(1) balance between large and small districts;

(2) representation of the various geographic regions of the state; and

(3) representation of the overall demographics of the state.

(c) Notification. The TEA will notify each applicant in writing of the selection or non-selection for participation.

(d) Implementation. Districts shall participate in training and use materials identified in accordance with the TEC, §29.915(c).

(e) Evaluation. Each participating district shall report information on implementation of the program to the TEA in accordance with requirements specified by the commissioner of education.

(f) Funding. Implementation of the pilot is contingent upon sufficient funding in accordance with the TEC, §29.915(e).

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

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Cristina De La Fuente-Valadez
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Texas Education Agency
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TITLE 22. EXAMINING BOARDS

PART 15. TEXAS STATE BOARD OF PHARMACY

CHAPTER 291. PHARMACIES

SUBCHAPTER B. COMMUNITY PHARMACY (CLASS A)

22 TAC §291.34

The Texas State Board of Pharmacy proposes amendments to §291.34, concerning Records. The amendments, if adopted, clarify the requirements for faxed prescriptions.

Gay Dodson, R.Ph., Executive Director/Secretary, has determined that, for the first five-year period the rule is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Ms. Dodson has determined that, for each year of the first five-year period the rule will be in effect, the public benefit anticipated as a result of enforcing the rule will ensure that prescriptions that are faxed to pharmacies have the appropriate information on the documents transmitted to the pharmacy. There is no fiscal impact for individuals, small or large businesses, or to other entities which are required to comply with this section.

Comments on the proposed amendments may be submitted to Allison Benz, R.Ph., M.S., Director of Professional Services, Texas State Board of Pharmacy, 333 Guadalupe Street, Suite 3-600, Austin, Texas 78701, FAX (512) 305-8082. Comments must be received by 5:00 p.m., January 29, 2010.

The amendments are proposed under §551.002 and §554.051 of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by this rule: Texas Pharmacy Act, Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

§291.34. Records.

(a) (No change.)

(b) Prescriptions

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

(6) Prescription drug order information.

(A) (No change.)

(B) All original electronic prescription drug orders shall bear:

(i) name of the patient, if such drug is for an animal, the species of such animal, and the name of the owner;

(ii) address of the patient, provided, however, a prescription for a dangerous drug is not required to bear the address of the patient if such address is readily retrievable on another appropriate, uniformly maintained pharmacy record, such as medication records;

(iii) name, and if for a controlled substance, the address and DEA registration number of the practitioner;

(iv) name and strength of the drug prescribed;

(v) quantity prescribed;

(vi) directions for use;

(vii) indications for use, unless the practitioner determines the furnishing of this information is not in the best interest of the patient;

(viii) date of issuance;

(ix) if a faxed prescription, a statement which indicates that the prescription has been faxed [~~electronically transmitted~~] (e.g., Faxed to [~~or electronically transmitted to~~]);

[~~(x) name, address, and electronic access number of the pharmacy to which the prescription was transmitted;~~]

(x) [~~(xi)~~] telephone number of the prescribing practitioner;

(xi) [~~(xii)~~] date the prescription drug order was electronically transmitted to the pharmacy, if different from the date of issuance of the prescription; and

(xii) [~~(xiii)~~] if transmitted by a designated agent, the full name of the designated agent.

(C) - (D) (No change.)

(7) (No change.)

(c) - (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.

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

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Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
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For further information, please call: (512) 305-8037

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SUBCHAPTER D. INSTITUTIONAL PHARMACY (CLASS C)

22 TAC §§291.72 - 291.75

The Texas State Board of Pharmacy proposes amendments to §291.72, concerning Definitions, §291.73, concerning Personnel, §291.74, concerning Operational Standards, and §291.75, concerning Records. The amendments, if adopted, will implement provisions of H.B. 1924 as passed by the 81st Texas Legislature which allows hospitals that have ongoing "clinical pharmacy programs" to allow pharmacy technicians to verify the accuracy of work performed by another pharmacy technician relating to the filling of floor stock and unit dose distribution systems if the patient's orders have previously been reviewed and approved by a pharmacist (Tech-Check-Tech).

Gay Dodson, R.Ph., Executive Director/Secretary, has determined that, for the first five-year period the rule is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Ms. Dodson has determined that, for each year of the first five-year period the rule will be in effect, the public benefit anticipated as a result of enforcing the rule will ensure that pharmacy technicians checking certain work of other pharmacy technicians are appropriately trained and performing the allowed duties. There is no fiscal impact for individuals, small or large businesses, or to other entities which are required to comply with this section.

Comments on the proposed amendments may be submitted to Allison Benz, R.Ph., M.S., Director of Professional Services, Texas State Board of Pharmacy, 333 Guadalupe Street, Suite 3-600, Austin, Texas 78701, FAX (512) 305-8082. Comments must be received by 5:00 p.m., January 29, 2010.

The amendments are proposed under §§51.002, 554.051, and 560.053 of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act. The Board interprets §560.053 as authorizing the agency to adopt rules establishing additional pharmacy classifications.

The statutes affected by this rule: Texas Pharmacy Act, Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

§291.72. Definitions.

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

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

(7) Clinical Pharmacy Program--An ongoing program in which pharmacists provide direct focused, medication-related care for the purpose of optimizing patients' medication therapy and achieving definite outcomes, which includes one or more of the following activities:

(A) prospective medication therapy consultation, selection, and adjustment;

(B) monitoring laboratory values and therapeutic drug monitoring;

(C) identifying and resolving medication-related problems; and

(D) disease state management.

(8) [~~(7)~~] Confidential record--Any health-related record that contains information that identifies an individual and that is maintained by a pharmacy or pharmacist, such as a patient medication record, prescription drug order, or medication drug order.

(9) [~~(8)~~] Consultant pharmacist--A pharmacist retained by a facility on a routine basis to consult with the facility in areas that pertain to the practice of pharmacy.

(10) [~~(9)~~] Controlled substance--A drug, immediate precursor, or other substance listed in Schedules I - V or Penalty Groups 1 - 4 of the Texas Controlled Substances Act, as amended, or a drug, immediate precursor, or other substance included in Schedules I - V of the Federal Comprehensive Drug Abuse Prevention and Control Act of 1970, as amended (Public Law 91-513).

(11) [~~(10)~~] Dangerous drug--A drug or device that:

(A) is not included in Penalty Group 1, 2, 3, or 4, Chapter 481, Health and Safety Code, and is unsafe for self-medication; or

(B) bears or is required to bear the legend:

(i) "Caution: federal law prohibits dispensing without prescription" or "Rx only" or another legend that complies with federal law; or

(ii) "Caution: federal law restricts this drug to use by or on the order of a licensed veterinarian."

(12) [~~(11)~~] Device--An instrument, apparatus, implement, machine, contrivance, implant, in vitro reagent, or other similar or related article, including any component part or accessory, that is required under federal or state law to be ordered or prescribed by a practitioner.

(13) [~~(12)~~] Direct copy--Electronic copy or carbonized copy of a medication order, including a facsimile (FAX) or digital image.

(14) [~~(13)~~] Dispense--Preparing, packaging, compounding, or labeling for delivery a prescription drug or device in the course of professional practice to an ultimate user or his agent by or pursuant to the lawful order of a practitioner.

(15) [~~(14)~~] Distribute--The delivery of a prescription drug or device other than by administering or dispensing.

(16) [~~(15)~~] Distributing pharmacist--The pharmacist who checks the medication order prior to distribution.

(17) [~~(16)~~] Downtime--Period of time during which a data processing system is not operable.

(18) [~~(17)~~] Drug regimen review--

(A) An evaluation of medication orders and patient medication records for:

(i) known allergies;

(ii) rational therapy--contraindications;

(iii) reasonable dose and route of administration;

(iv) reasonable directions for use;

(v) duplication of therapy;

(vi) drug-drug interactions;

(vii) drug-food interactions;

(viii) drug-disease interactions;

(ix) adverse drug reactions; and

(x) proper utilization, including overutilization or underutilization.

(B) The drug regimen review may be conducted prior to administration of the first dose (prospective) or after administration of the first dose (retrospective).

(19) [~~(18)~~] Electronic signature--A unique security code or other identifier which specifically identifies the person entering information into a data processing system. A facility which utilizes electronic signatures must:

(A) maintain a permanent list of the unique security codes assigned to persons authorized to use the data processing system; and

(B) have an ongoing security program which is capable of identifying misuse and/or unauthorized use of electronic signatures.

(20) [~~(19)~~] Expiration date--The date (and time, when applicable) beyond which a product should not be used.

(21) [~~(20)~~] Facility--

(A) a hospital or other patient facility that is licensed under Chapter 241 or 577, Health and Safety Code;

(B) a hospice patient facility that is licensed under Chapter 142, Health and Safety Code;

(C) an ambulatory surgical center licensed under Chapter 243, Health and Safety Code; or

(D) a hospital maintained or operated by the state.

(22) [~~(21)~~] Floor stock--Prescription drugs or devices not labeled for a specific patient and maintained at a nursing station or other hospital department (excluding the pharmacy) for the purpose of administration to a patient of the facility.

(23) [~~(22)~~] Formulary--List of drugs approved for use in the facility by the committee which performs the pharmacy and therapeutics function for the facility.

(24) [~~(23)~~] Full-time pharmacist--A pharmacist who works in a pharmacy from 30 to 40 hours per week or if the pharmacy is open less than 60 hours per week, one-half of the time the pharmacy is open.

(25) [~~(24)~~] Hard copy--A physical document that is readable without the use of a special device (i.e., data processing system, computer, etc).

(26) [~~(25)~~] Hot water--The temperature of water from the pharmacy's sink maintained at a minimum of 105 degrees F (41 degrees C).

(27) [~~(26)~~] Institutional pharmacy--Area or areas in a facility where drugs are stored, bulk compounded, delivered, compounded, dispensed, and distributed to other areas or departments of the facility, or dispensed to an ultimate user or his or her agent.

(28) [~~(27)~~] Investigational new drug--New drug intended for investigational use by experts qualified to evaluate the safety and effectiveness of the drug as authorized by the Food and Drug Administration.

(29) [~~(28)~~] Medical Practice Act--The Texas Medical Practice Act, Subtitle B, Occupations Code, as amended.

(30) [~~(29)~~] Medication order--A written order from a practitioner or a verbal order from a practitioner or his authorized agent for administration of a drug or device.

(31) [~~(30)~~] Part-time pharmacist--A pharmacist either employed or under contract, who routinely works less than full-time.

(32) [~~(31)~~] Patient--A person who is receiving services at the facility (including patients receiving ambulatory procedures and patients conditionally admitted as observation patients), or who is receiving long term care services or Medicare extended care services in a swing bed on the hospital premise or an adjacent, readily accessible facility that is under the authority of the hospital's governing body. For the purposes of this definition, the term "long term care services" means those services received in a skilled nursing facility which is a distinct part of the hospital and the distinct part is not licensed separately or formally approved as a nursing home by the state, even though it is designated or certified as a skilled nursing facility. A patient includes a person confined in any correctional institution operated by the state of Texas.

(33) [~~(32)~~] Perpetual inventory--An inventory which documents all receipts and distributions of a drug product, such that an accurate, current balance of the amount of the drug product present in the pharmacy is indicated.

(34) [~~(33)~~] Pharmaceutical care--The provision of drug therapy and other pharmaceutical services intended to assist in the cure or prevention of a disease, elimination or reduction of a patient's symptoms, or arresting or slowing of a disease process.

(35) [~~(34)~~] Pharmacist-in-charge--Pharmacist designated on a pharmacy license as the pharmacist who has the authority or responsibility for a pharmacy's compliance with laws and rules pertaining to the practice of pharmacy.

(36) [~~(35)~~] Pharmacy and therapeutics function--Committee of the medical staff in the facility which assists in the formulation of broad professional policies regarding the evaluation, selection, distribution, handling, use, and administration, and all other matters relating to the use of drugs and devices in the facility.

(37) [~~(36)~~] Pharmacy technician--An individual who is registered with the board as a pharmacy technician and whose responsibility in a pharmacy is to provide technical services that do not require professional judgment regarding preparing and distributing drugs and who works under the direct supervision of and is responsible to a pharmacist.

(38) [~~(37)~~] Pharmacy technician trainee--An individual who is registered with the board as a pharmacy technician trainee and is authorized to participate in a pharmacy's technician training program.

(39) [~~(38)~~] Pre-packaging--The act of re-packaging and re-labeling quantities of drug products from a manufacturer's original container into unit-dose packaging or a multiple dose container for distribution within the facility except as specified in §291.74(f)(3)(B) of this title (relating to Operational Standards).

(40) [~~(39)~~] Prescription drug--

(A) A substance for which federal or state law requires a prescription before it may be legally dispensed to the public;

(B) A drug or device that under federal law is required, prior to being dispensed or delivered, to be labeled with either of the following statements:

(i) Caution: federal law prohibits dispensing without prescription or "Rx only" or another legend that complies with federal law; or

(ii) Caution: federal law restricts this drug to use by or on order of a licensed veterinarian; or

(C) A drug or device that is required by any applicable federal or state law or regulation to be dispensed on prescription only or is restricted to use by a practitioner only.

(41) [~~(40)~~] Prescription drug order--

(A) a written order from a practitioner or a verbal order from a practitioner or his authorized agent to a pharmacist for a drug or device to be dispensed; or

(B) a written order or a verbal order pursuant to Subtitle B, Chapter 157, Occupations Code.

[~~(41) Quality assurance--The set of activities used to assure that the process used in the preparation of sterile drug preparations lead to preparations that meet predetermined standards of quality.~~]

[~~(42) Quality control--The set of testing activities used to determine that the ingredients, components (e.g., containers), and final sterile preparations prepared meet predetermined requirements with respect to identity, purity, non-pyrogenicity, and sterility.~~]

(42) [~~(43)~~] Sample--A prescription drug which is not intended to be sold and is intended to promote the sale of the drug.

(43) [~~(44)~~] Supervision--

(A) Physically present supervision--In a Class C pharmacy, a pharmacist shall be physically present to directly supervise pharmacy technicians or pharmacy technician trainees.

(B) Electronic supervision--In a Class C pharmacy in a facility with [~~licensed for~~] 100 beds or less, a pharmacist licensed in Texas may electronically supervise pharmacy technicians or pharmacy technician trainees to perform the duties specified in §291.73(e)(2) of this title (relating to Personnel) provided:

(i) the pharmacy uses a system that monitors the data entry of medication orders and the filling of such orders by an electronic method that shall include the use of one or more the following types of technology:

(I) digital interactive video, audio, or data transmission;

(II) data transmission using computer imaging by way of still-image capture and store and forward; and

(III) other technology that facilitates access to pharmacy services;

(ii) the pharmacy establishes controls to protect the privacy and security of confidential records;

(iii) the pharmacist responsible for the duties performed by a pharmacy technician or pharmacy technician trainee verifies:

(I) the data entry; and

(II) the accuracy of the filled orders prior to release of the order; and

(iv) the pharmacy keeps permanent digital records of duties electronically supervised and data transmissions associated with electronically supervised duties for a period of two years.

(C) If the conditions of subparagraph (B) of this paragraph are met, electronic supervision shall be considered the equivalent of direct supervision for the purposes of the Act.

(44) Tech-Check-Tech--Allowing a pharmacy technician to verify the accuracy of work performed by another pharmacy technician relating to the filling of floor stock and unit dose distribution systems for a patient admitted to the hospital if the patient's orders have previously been reviewed and approved by a pharmacist.

(45) - (48) (No change.)

§291.73. Personnel.

(a) Requirements for pharmacist services.

(1) A Class C pharmacy in a facility with [~~licensed for~~] 101 beds or more shall be under the continuous on-site supervision of a pharmacist during the time it is open for pharmacy services; provided, however, that pharmacy technicians and pharmacy technician trainees may distribute prepackaged and prelabeled drugs from a drug storage area of the facility e.g., a surgery suite, in the absence of physical supervision of a pharmacist, under the following conditions:

(A) the distribution is under the control of a pharmacist; and

(B) a pharmacist is on duty in the facility.

(2) A Class C pharmacy in a facility with [~~licensed for~~] 100 beds or less shall have the services of a pharmacist at least on a part-time or consulting basis according to the needs of the facility except that a pharmacist shall be on-site at least once every seven days.

(3) A pharmacist shall be accessible at all times to respond to other health professional's questions and needs. Such access may be through a telephone which is answered 24 hours a day, e.g., answering or paging service, a list of phone numbers where the pharmacist may be reached, or any other system which accomplishes this purpose.

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

(e) Pharmacy technicians and pharmacy technician trainees.

(1) General.

(A) All pharmacy technicians and pharmacy technician trainees shall meet the training requirements specified in §297.6 of this title (relating to Pharmacy Technician and Pharmacy Technician Trainee Training).

(B) A pharmacy technician performing the duties specified in paragraph (2)(C) of this subsection shall complete training regarding:

(i) procedures for one pharmacy technician to verify the accuracy of actions performed by another pharmacy technician including required documentation; and

(ii) the duties that may be performed by one pharmacy technician and checked by another pharmacy technician.

(2) Duties. Duties may include, but need not be limited to, the following functions under the supervision of and responsible to a pharmacist:

(A) Facilities with [~~licensed for~~] 101 beds or more. The following functions must be performed under the physically present supervision of a pharmacist:

(i) - (ix) (No change.)

(B) Facilities with [~~licensed for~~] 100 beds or less.

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

(C) Facilities with an ongoing clinical pharmacy program. A Class C pharmacy with an ongoing clinical pharmacy program may allow a pharmacy technician to verify the accuracy of the duties specified in clause (ii) of this subparagraph when performed by another pharmacy technician, under the following conditions:

(i) The pharmacy technician:

(I) is a registered pharmacy technician and not a pharmacy technician trainee; and

(II) meets the training requirements specified in §297.6 of this title and the training requirements specified in paragraph (1) of this subsection.

(ii) If the requirements of clause (i) of this subparagraph are met, a pharmacy technician may verify the accuracy of the following duties performed by another pharmacy technician:

(I) filling medication carts;

(II) distributing routine orders for stock supplies to patient care areas; and

(III) accessing and restocking automated medication supply systems after proper training on the use of the automated medication supply system and demonstration of comprehensive knowledge of the written policies and procedures for its operation; and

(iii) The patient's orders have previously been reviewed and approved by a pharmacist.

(3) (No change.)

(f) - (g) (No change.)

§291.74. Operational Standards.

(a) Licensing requirements.

(1) - (13) (No change.)

(14) A Class C (Institutional) pharmacy with an ongoing clinical pharmacy program that proposes to allow a pharmacy technician to verify the accuracy of work performed by another pharmacy technician relating to the filling of floor stock and unit dose distribution systems for a patient admitted to the hospital if the patient's orders have previously been reviewed and approved by a pharmacist shall make application to the board as follows.

(A) The pharmacist-in-charge must submit an application on a form provided by the board, containing the following information:

(i) name, address, and pharmacy license number;

(ii) name and license number of the pharmacist-in-charge;

(iii) name and registration numbers of the pharmacy technicians;

(iv) anticipated date the pharmacy plans to begin allowing a pharmacy technician to verify the accuracy of work performed by another pharmacy technician;

(v) documentation that the pharmacy has an ongoing clinical pharmacy program; and

(vi) any other information specified on the application.

(B) The pharmacy may not allow a pharmacy technician to check the work of another pharmacy technician until the board has reviewed and approved the application and issued an amended license to the pharmacy.

(C) Every two years, in connection with the application for renewal of the pharmacy license, the pharmacy shall provide updated documentation that the pharmacy continues to have an ongoing clinical pharmacy program as specified in subparagraph (A)(v) of this paragraph.

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

(f) Drugs.

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

(5) Distribution.

(A) Medication orders.

(i) Drugs may be given to patients in facilities only on the order of a practitioner. No change in the order for drugs may be made without the approval of a practitioner except as authorized by the practitioner in compliance with paragraph (2)(C) of this subsection.

(ii) Drugs may be distributed only from the original or a direct copy of the practitioner's medication order.

(iii) Pharmacy technicians and pharmacy technician trainees may not receive verbal medication orders.

(iv) Institutional pharmacies shall be exempt from the labeling provisions and patient notification requirements of §562.006 and §562.009 of the Act, as respects drugs distributed pursuant to medication orders.

(B) Procedures.

(i) Written policies and procedures for a drug distribution system (best suited for the particular institutional pharmacy) shall be developed and implemented by the pharmacist-in-charge, with the advice of the committee performing the pharmacy and therapeutics function for the facility.

(ii) The written policies and procedures for the drug distribution system shall include, but not be limited to, procedures regarding the following:

(I) pharmaceutical care services;

(II) handling, storage and disposal of cytotoxic drugs and waste;

(III) disposal of unusable drugs and supplies;

(IV) security;

(V) equipment;

(VI) sanitation;

(VII) reference materials;

(VIII) drug selection and procurement;

(IX) drug storage;

(X) controlled substances;

(XI) investigational drugs, including the obtaining of protocols from the principal investigator;

(XII) prepackaging and manufacturing;

(XIII) stop orders;

(XIV) reporting of medication errors, adverse drug reactions/events, and drug product defects;

(XV) physician orders;

(XVI) floor stocks;

(XVII) drugs brought into the facility;

(XVIII) furlough medications;

(XIX) self-administration;

(XX) emergency drug supply;

(XXI) formulary;

(XXII) monthly inspections of nursing stations and other areas where drugs are stored, distributed, administered or dispensed;

(XXIII) control of drug samples;

(XXIV) outdated and other unusable drugs;

(XXV) routine distribution of patient medication;

(XXVI) preparation and distribution of sterile preparations;

(XXVII) handling of medication orders when a pharmacist is not on duty;

(XXVIII) use of automated compounding or counting devices;

(XXIX) use of data processing and direct imaging systems;

(XXX) drug administration to include infusion devices and drug delivery systems;

(XXXI) drug labeling;

(XXXII) recordkeeping;

(XXXIII) quality assurance/quality control;

(XXXIV) duties and education and training of professional and nonprofessional staff; [~~and~~]

(XXXV) emergency preparedness plan, to include continuity of patient therapy and public safety; and[.]

(XXXVI) procedures for a pharmacy technician to verify the accuracy of work performed by another pharmacy technician, if applicable.

(6) (No change.)

(g) - (j) (No change.)

§291.75. Records.

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

(c) Patient records.

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

(10) Ongoing clinical pharmacy program records. If a pharmacy has an ongoing clinical pharmacy program and allows pharmacy technicians to verify the accuracy of work performed by other pharmacy technicians, the pharmacy must have a record of the pharmacy technicians and the duties performed.

(d) - (f) (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 December 11, 2009.

TRD-200905783
Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
Earliest possible date of adoption: January 24, 2010
For further information, please call: (512) 305-8037

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SUBCHAPTER H. OTHER CLASSES OF PHARMACIES

22 TAC §291.151

The Texas State Board of Pharmacy proposes new §291.151, concerning Class F Pharmacies Located in Freestanding Emergency Medical Care Centers, Subchapter H. The new rules establish a new class of pharmacy, Class F Pharmacies, located in freestanding emergency medical care facilities. HB 1357, passed by the 81st Texas Legislature, authorizes the Texas Department of State Health Services to regulate Freestanding Emergency Medical Care Centers and these new entities need a pharmacy license in order to possess drugs to treat patients.

Gay Dodson, R.Ph., Executive Director/Secretary, has determined that, for the first five-year period the new rule is in effect, there will be fiscal implications for state government as a result of enforcing or administering the proposal as follows:

Revenue Increase

FY2010 = $26,345

FY2011 = $23,950

FY2012 = $23,950

FY2013 = $23,950

FY2014 = $23,950

Ms. Dodson has determined that, for each year of the first five-year period the rule will be in effect, the public benefit anticipated as a result of enforcing the rule will ensure that pharmacies located in Freestanding Emergency Medical Care Centers are properly licensed and regulated in order to protect the public. The effect on large, small or micro-businesses required to comply with the new rule will be an initial licensing fee of $482 and a biennial renewal fee of $479. The economic cost to an individual will be the same as the economic cost to a business, if the individual chooses to pay the business registration fee. In addition, the entities will be required to have at least one pharmacist in order to operate the pharmacy. TSBP is unable to predict the cost to the pharmacies due to multiple variables effecting the cost.

Comments on the proposed rule may be submitted to Allison Benz, R.Ph., M.S., Director of Professional Services, Texas State Board of Pharmacy, 333 Guadalupe Street, Suite 3-600, Austin, Texas 78701, FAX (512) 305-8082. Comments must be received by 5:00 p.m., January 29, 2010.

The new rule is proposed under §§551.002, 554.051, and 560.053 of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act. The Board interprets §560.053 as authorizing the agency to adopt rules establishing additional pharmacy classifications.

The statutes affected by this rule: Texas Pharmacy Act, Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

§291.151. Class F Pharmacies Located in a Freestanding Emergency Medical Care Center.

(a) Purpose. The purpose of this section is to provide standards in the conduct, practice activities, and operation of a pharmacy located in a freestanding emergency medical care center that is licensed by the Texas Department of State Health Services. Class F pharmacies located in a freestanding emergency medical care center shall comply with this section.

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

(1) Act--The Texas Pharmacy Act, Chapters 551 - 566 and 568 - 569, Occupations Code, as amended.

(2) Automated drug dispensing system--An automated device that measures, counts, and/or packages a specified quantity of dosage units for a designated drug product.

(3) Board--The Texas State Board of Pharmacy.

(4) Consultant pharmacist--A pharmacist retained by a facility on a routine basis to consult with the FEMCC in areas that pertain to the practice of pharmacy.

(5) Controlled substance--A drug, immediate precursor, or other substance listed in Schedules I - V or Penalty Groups 1 - 4 of the Texas Controlled Substances Act, as amended, or a drug immediate precursor, or other substance included in Schedule I - V of the Federal Comprehensive Drug Abuse Prevention and Control Act of 1970, as amended (Public Law 91-513).

(6) Direct copy--Electronic copy or carbonized copy of a medication order including a facsimile (FAX) or digital image.

(7) Dispense--Preparing, packaging, compounding, or labeling for delivery a prescription drug or device in the course of professional practice to an ultimate user or his agent by or pursuant to the lawful order of a practitioner.

(8) Distribute--The delivery of a prescription drug or device other than by administering or dispensing.

(9) Downtime--Period of time during which a data processing system is not operable.

(10) Electronic signature--A unique security code or other identifier which specifically identifies the person entering information

into a data processing system. A facility which utilizes electronic signatures must:

(A) maintain a permanent list of the unique security codes assigned to persons authorized to use the data processing system; and

(B) have an ongoing security program which is capable of identifying misuse and/or unauthorized use of electronic signatures.

(11) Floor stock--Prescription drugs or devices not labeled for a specific patient and maintained at a nursing station or other FEMCC department (excluding the pharmacy) for the purpose of administration to a patient of the FEMCC.

(12) Formulary--List of drugs approved for use in the FEMCC by an appropriate committee of the freestanding emergency medical care center.

(13) Freestanding emergency medical care center (FEMCC)--A freestanding facility that is licensed by the Texas Department of State Health Services to provide emergency care to patients.

(14) Hard copy--A physical document that is readable without the use of a special device (i.e., data processing system, computer, etc.).

(15) Investigational new drug--New drug intended for investigational use by experts qualified to evaluate the safety and effectiveness of the drug as authorized by the federal Food and Drug Administration.

(16) Medication order--A written order from a practitioner or a verbal order from a practitioner or his authorized agent for administration of a drug or device.

(17) Pharmacist-in-charge--Pharmacist designated on a pharmacy license as the pharmacist who has the authority or responsibility for a pharmacy's compliance with laws and rules pertaining to the practice of pharmacy.

(18) Pharmacy--Area or areas in a facility, separate from patient care areas, where drugs are stored, bulk compounded, delivered, compounded, dispensed, and/or distributed to other areas or departments of the FEMCC, or dispensed to an ultimate user or his or her agent.

(19) Prescription drug--

(A) A substance for which federal or state law requires a prescription before it may be legally dispensed to the public;

(B) A drug or device that under federal law is required, prior to being dispensed or delivered, to be labeled with either of the following statements:

(i) Caution: federal law prohibits dispensing without prescription or "Rx only" or another legend that complies with federal law; or

(ii) Caution: federal law restricts this drug to use by or on order of a licensed veterinarian; or

(C) A drug or device that is required by any applicable federal or state law or regulation to be dispensed on prescription only or is restricted to use by a practitioner only.

(20) Prescription drug order--

(A) A written order from a practitioner or verbal order from a practitioner or his authorized agent to a pharmacist for a drug or device to be dispensed; or

(B) A written order or a verbal order pursuant to Subtitle B, Chapter 157, Occupations Code.

(21) Full-time pharmacist--A pharmacist who works in a pharmacy from 30 to 40 hours per week or if the pharmacy is open less than 60 hours per week, one-half of the time the pharmacy is open.

(22) Part-time pharmacist--A pharmacist who works less than full-time.

(23) Pharmacy technician--An individual who is registered with the board as a pharmacy technician and whose responsibility in a pharmacy is to provide technical services that do not require professional judgment regarding preparing and distributing drugs and who works under the direct supervision of and is responsible to a pharmacist.

(24) Pharmacy technician trainee--An individual who is registered with the board as a pharmacy technician trainee and is authorized to participate in a pharmacy's technician training program.

(25) Texas Controlled Substances Act--The Texas Controlled Substances Act, the Health and Safety Code, Chapter 481, as amended.

(c) Personnel.

(1) Pharmacist-in-charge.

(A) General. Each freestanding emergency medical care center shall have one pharmacist-in-charge who is employed or under contract, at least on a consulting or part-time basis, but may be employed on a full-time basis.

(B) Responsibilities. The pharmacist-in-charge shall have the responsibility for, at a minimum, the following:

(i) establishment of specifications for procurement and storage of all materials, including drugs, chemicals, and biologicals;

(ii) participation in the development of a formulary for the FEMCC, subject to approval of the appropriate committee of the FEMCC;

(iii) distribution of drugs to be administered to patients pursuant to an original or direct copy of the practitioner's medication order;

(iv) filling and labeling all containers from which drugs are to be distributed or dispensed;

(v) maintaining and making available a sufficient inventory of antidotes and other emergency drugs, both in the pharmacy and patient care areas, as well as current antidote information, telephone numbers of regional poison control center and other emergency assistance organizations, and such other materials and information as may be deemed necessary by the appropriate committee of the FEMCC;

(vi) records of all transactions of the FEMCC pharmacy as may be required by applicable state and federal law, and as may be necessary to maintain accurate control over and accountability for all pharmaceutical materials;

(vii) participation in those aspects of the FEMCC's patient care evaluation program which relate to pharmaceutical material utilization and effectiveness;

(viii) participation in teaching and/or research programs in the FEMCC;

(ix) implementation of the policies and decisions of the appropriate committee(s) relating to pharmaceutical services of the FEMCC;

(x) effective and efficient messenger and delivery service to connect the FEMCC pharmacy with appropriate areas of the FEMCC on a regular basis throughout the normal workday of the FEMCC;

(xi) labeling, storage, and distribution of investigational new drugs, including maintenance of information in the pharmacy and nursing station where such drugs are being administered, concerning the dosage form, route of administration, strength, actions, uses, side effects, adverse effects, interactions, and symptoms of toxicity of investigational new drugs;

(xii) meeting all inspection and other requirements of the Texas Pharmacy Act and this section; and

(xiii) maintenance of records in a data processing system such that the data processing system is in compliance with the requirements for a FEMCC.

(2) Consultant pharmacist.

(A) The consultant pharmacist may be the pharmacist-in-charge.

(B) A written contract shall exist between the FEMCC and any consultant pharmacist, and a copy of the written contract shall be made available to the board upon request.

(3) Pharmacists.

(A) General.

(i) The pharmacist-in-charge shall be assisted by a sufficient number of additional licensed pharmacists as may be required to operate the FEMCC pharmacy competently, safely, and adequately to meet the needs of the patients of the facility.

(ii) All pharmacists shall assist the pharmacist-in-charge in meeting the responsibilities as outlined in paragraph (1)(B) of this subsection and in ordering, administering, and accounting for pharmaceutical materials.

(iii) All pharmacists shall be responsible for any delegated act performed by pharmacy technicians or pharmacy technician trainees under his or her supervision.

(iv) All pharmacists while on duty shall be responsible for complying with all state and federal laws or rules governing the practice of pharmacy.

(B) Duties. Duties of the pharmacist-in-charge and all other pharmacists shall include, but need not be limited to, the following:

(i) receiving and interpreting prescription drug orders and oral medication orders and reducing these orders to writing either manually or electronically;

(ii) selection of prescription drugs and/or devices and/or suppliers; and

(iii) interpreting patient profiles.

(C) Special requirements for compounding.

(i) Non-Sterile Preparations. All pharmacists engaged in compounding non-sterile preparations shall meet the training requirements specified in §291.131 of this title (relating to Pharmacies Compounding Non-Sterile Preparations).

(ii) Sterile Preparations. All pharmacists engaged in compounding sterile preparations shall meet the training requirements specified in §291.133 of this title (relating to Pharmacies Compounding Sterile Preparations).

(4) Pharmacy technicians and pharmacy technician trainees.

(A) General. All pharmacy technicians and pharmacy technician trainees shall meet the training requirements specified in §297.6 of this title (relating to Pharmacy Technician and Pharmacy Technician Trainee Training).

(B) Duties. Duties may include, but need not be limited to, the following functions, under the direct supervision of a pharmacist:

(i) prepacking and labeling unit and multiple dose packages, provided a pharmacist supervises and conducts a final check and affixes his or her name, initials, electronic signature to the appropriate quality control records prior to distribution;

(ii) preparing, packaging, compounding, or labeling prescription drugs pursuant to medication orders, provided a pharmacist supervises and checks the preparation;

(iii) compounding non-sterile preparations pursuant to medication orders provided the pharmacy technicians or pharmacy technician trainees have completed the training specified in §291.131 of this title;

(iv) compounding sterile preparations pursuant to medication orders provided the pharmacy technicians or pharmacy technician trainees:

(I) have completed the training specified in §291.133 of this title; and

(II) are supervised by a pharmacist who has completed the sterile preparations training specified in §291.133 of this title, conducts in-process and final checks, and affixes his or her name, initials, or electronic signature to the label or if batch prepared to the appropriate quality control records. (The name, initials, or electronic signature are not required on the label if it is maintained in a permanent record of the pharmacy.)

(v) bulk compounding, provided a pharmacist supervises and conducts in-process and final checks and affixes his or her name, initials, or electronic signature to the appropriate quality control records prior to distribution;

(vi) distributing routine orders for stock supplies to patient care areas;

(vii) entering medication order and drug distribution information into a data processing system, provided judgmental decisions are not required and a pharmacist checks the accuracy of the information entered into the system prior to releasing the order or in compliance with the absence of pharmacist requirements contained in subsection (d)(6)(E) and (F) of this section;

(viii) maintaining inventories of drug supplies;

(ix) maintaining pharmacy records; and

(x) loading bulk unlabeled drugs into an automated drug dispensing system provided a pharmacist supervises, verifies that the system was properly loaded prior to use, and affixes his or her name, initials or electronic signature to the appropriate quality control records.

(C) Procedures.

(i) Pharmacy technicians and pharmacy technician trainees shall handle medication orders in accordance with standard written procedures and guidelines.

(ii) Pharmacy technicians and pharmacy technician trainees shall handle prescription drug orders in the same manner as pharmacy technicians or pharmacy technician trainees working in a Class A pharmacy.

(D) Special requirements for compounding.

(i) Non-Sterile Preparations. All pharmacy technicians and pharmacy technician trainees engaged in compounding non-sterile preparations shall meet the training requirements specified in §291.131 of this title.

(ii) Sterile Preparations. All pharmacy technicians and pharmacy technician trainees engaged in compounding sterile preparations shall meet the training requirements specified in §291.133 of this title.

(5) Owner. The owner of a FEMCC pharmacy shall have responsibility for all administrative and operational functions of the pharmacy. The pharmacist-in-charge may advise the owner on administrative and operational concerns. The owner shall have responsibility for, at a minimum, the following, and if the owner is not a Texas licensed pharmacist, the owner shall consult with the pharmacist-in-charge or another Texas licensed pharmacist:

(A) establishment of policies for procurement of prescription drugs and devices and other products dispensed from the FEMCC pharmacy;

(B) establishment and maintenance of effective controls against the theft or diversion of prescription drugs;

(C) if the pharmacy uses an automated pharmacy dispensing system, reviewing and approving all policies and procedures for system operation, safety, security, accuracy and access, patient confidentiality, prevention of unauthorized access, and malfunction;

(D) providing the pharmacy with the necessary equipment and resources commensurate with its level and type of practice; and

(E) establishment of policies and procedures regarding maintenance, storage, and retrieval of records in a data processing system such that the system is in compliance with state and federal requirements.

(6) Identification of pharmacy personnel. All pharmacy personnel shall be identified as follows:

(A) Pharmacy technicians. All pharmacy technicians shall wear an identification tag or badge that bears the person's name and identifies him or her as a pharmacy technician trainee a registered pharmacy technician, or a certified pharmacy technician, if the technician maintains current certification with the Pharmacy Technician Certification Board or any other entity providing an examination approved by the board.

(B) Pharmacy technician trainees. All pharmacy technician trainees shall wear an identification tag or badge that bears the person's name and identifies him or her as a pharmacy technician trainee.

(C) Pharmacist interns. All pharmacist interns shall wear an identification tag or badge that bears the person's name and identifies him or her as a pharmacist intern.

(D) Pharmacists. All pharmacists shall wear an identification tag or badge that bears the person's name and identifies him or her as a pharmacist.

(d) Operational standards.

(1) Licensing requirements.

(A) A FEMCC pharmacy shall register annually or biennially with the board on a pharmacy license application provided by the board, following the procedures specified in §291.1 of this title (relating to Pharmacy License Application).

(B) If the FEMCC pharmacy is owned or operated by a pharmacy management or consulting firm, the following conditions apply.

(i) The pharmacy license application shall list the pharmacy management or consulting firm as the owner or operator.

(ii) The pharmacy management or consulting firm shall obtain DEA and DPS controlled substances registrations that are issued in the name of the firm, unless the following occur:

(I) the pharmacy management or consulting firm and the facility cosign a contractual pharmacy service agreement which assigns overall responsibility for controlled substances to the facility; and

(II) such pharmacy management or consulting firm maintains dual responsibility for the controlled substances.

(C) A FEMCC pharmacy which changes ownership shall notify the board within 10 days of the change of ownership and apply for a new and separate license as specified in §291.3 of this title (relating to Required Notifications).

(D) A FEMCC pharmacy which changes location and/or name shall notify the board of the change within 10 days and file for an amended license as specified in §291.3 of this title.

(E) A FEMCC pharmacy owned by a partnership or corporation which changes managing officers shall notify the board in writing of the names of the new managing officers within 10 days of the change, following the procedures in §291.3 of this title.

(F) A FEMCC pharmacy shall notify the board in writing within 10 days of closing, following the procedures in §291.5 of this title (relating to Closing a Pharmacy).

(G) A fee as specified in §291.6 of this title (relating to Pharmacy License Fees) will be charged for issuance and renewal of a license and the issuance of an amended license.

(H) A separate license is required for each principal place of business and only one pharmacy license may be issued to a specific location.

(I) A FEMCC pharmacy engaged in the compounding of non-sterile preparations shall comply with the provisions of §291.131 of this title.

(J) A FEMCC pharmacy engaged in the compounding of sterile preparations shall comply with the provisions of §291.133 of this title.

(2) Environment.

(A) General requirements.

(i) Each freestanding emergency medical care center shall have a designated work area separate from patient areas, and which shall have space adequate for the size and scope of pharmaceuti-

cal services and shall have adequate space and security for the storage of drugs.

(ii) The FEMCC pharmacy shall be arranged in an orderly fashion and shall be kept clean. All required equipment shall be clean and in good operating condition.

(B) Special requirements.

(i) The FEMCC pharmacy shall have locked storage for Schedule II controlled substances and other controlled drugs requiring additional security.

(ii) The FEMCC pharmacy shall have a designated area for the storage of poisons and externals separate from drug storage areas.

(C) Security.

(i) Only authorized personnel may have access to storage areas for prescription drugs and/or devices.

(ii) All storage areas for prescription drugs and/or devices shall be locked by key, combination or other mechanical or electronic means, so as to prohibit unauthorized access.

(iii) The pharmacist-in-charge shall consult with FEMCC personnel with respect to security of the drug storage areas, including provisions for adequate safeguards against theft or diversion of prescription drugs and/or devices.

(3) Equipment and supplies. Freestanding emergency medical care centers supplying drugs for outpatient use shall have the following equipment and supplies:

(A) data processing system including a printer or comparable equipment; and

(B) adequate supply of child-resistant, moisture-proof, and light-proof containers;

(C) adequate supply of prescription labels and other applicable identification labels;

(4) Library. A reference library shall be maintained that includes the following in hard-copy or electronic format and that pharmacy personnel shall be capable of accessing at all times:

(A) current copies of the following:

(i) Texas Pharmacy Act and rules;

(ii) Texas Dangerous Drug Act and rules;

(iii) Texas Controlled Substances Act and rules;

(iv) Federal Controlled Substances Act and rules or official publication describing the requirements of the Federal Controlled Substances Act and rules;

(B) at least one current or updated reference from each of the following categories:

(i) Drug interactions. A reference text on drug interactions, such as Drug Interaction Facts. A separate reference is not required if other references maintained by the pharmacy contain drug interaction information including information needed to determine severity or significance of the interaction and appropriate recommendations or actions to be taken;

(ii) General information. A general information reference text, such as:

(I) Facts and Comparisons with current supplements;

(II) United States Pharmacopeia Dispensing Information Volume I (Drug Information for the Healthcare Provider);

(III) AHFS Drug Information with current supplements;

(IV) Remington's Pharmaceutical Sciences; or

(V) Clinical Pharmacology;

(C) a current or updated reference on injectable drug products, such as Handbook of Injectable Drugs;

(D) basic antidote information and the telephone number of the nearest regional poison control center.

(E) if the pharmacy compounds sterile preparations, specialty references appropriate for the scope of services provided by the pharmacy, e.g., if the pharmacy prepares cytotoxic drugs, a reference text on the preparation of cytotoxic drugs, such as Procedures for Handling Cytotoxic Drugs.

(F) metric-apothecary weight and measure conversion charts.

(5) Drugs.

(A) Procurement, preparation, and storage.

(i) The pharmacist-in-charge shall have the responsibility for the procurement and storage of drugs, but may receive input from other appropriate staff of the facility, relative to such responsibility.

(ii) The pharmacist-in-charge shall have the responsibility for determining specifications of all drugs procured by the facility.

(iii) FEMCC pharmacies may not sell, purchase, trade, or possess prescription drug samples, unless the pharmacy meets all of the following conditions:

(I) the pharmacy is owned by a charitable organization described in the Internal Revenue Code of 1986, or by a city, state or county government;

(II) the pharmacy is a part of a health care entity which provides health care primarily to indigent or low income patients at no or reduced cost;

(III) the samples are for dispensing or provision at no charge to patients of such health care entity; and

(IV) the samples are possessed in compliance with the federal Prescription Drug Marketing Act of 1986.

(iv) All drugs shall be stored at the proper temperatures, as defined in the USP/NF and in §291.15 of this title (relating to Storage of Drugs).

(v) Any drug bearing an expiration date may not be dispensed or distributed beyond the expiration date of the drug.

(vi) Outdated drugs shall be removed from dispensing stock and shall be quarantined together until such drugs are disposed of.

(B) Formulary.

(i) A formulary may be developed by an appropriate committee of the freestanding emergency medical center.

(ii) The pharmacist-in-charge or consultant pharmacist shall be a full voting member of any committee which involves pharmaceutical services.

(C) Prepackaging of drugs and loading of bulk unlabeled drugs into automated drug dispensing system.

(i) Prepackaging of drugs.

(I) Drugs may be prepackaged in quantities suitable for internal distribution only by a pharmacist or by pharmacy technicians or pharmacy technician trainees under the direction and direct supervision of a pharmacist.

(II) The label of a prepackaged unit shall indicate:

(-a-) brand name and strength of the drug; or if no brand name, then the generic name, strength, and name of the manufacturer or distributor;

(-b-) facility's lot number;

(-c-) expiration date; and

(-d-) quantity of the drug, if quantity is greater than one.

(III) Records of prepackaging shall be maintained to show:

(-a-) the name of the drug, strength, and dosage form;

(-b-) facility's lot number;

(-c-) manufacturer or distributor;

(-d-) manufacturer's lot number;

(-e-) expiration date;

(-f-) quantity per prepackaged unit;

(-g-) number of prepackaged units;

(-h-) date packaged;

(-i-) name, initials, or electronic signature of the prepacker; and

(-j-) signature or electronic signature of the responsible pharmacist.

(IV) Stock packages, repackaged units, and control records shall be quarantined together until checked/released by the pharmacist.

(ii) Loading bulk unlabeled drugs into automated drug dispensing systems.

(I) Automated drug dispensing systems may be loaded with bulk unlabeled drugs only by a pharmacist or by pharmacy technicians or pharmacy technician trainees under the direction and direct supervision of a pharmacist.

(II) The label of an automated drug dispensing system container shall indicate the brand name and strength of the drug; or if no brand name, then the generic name, strength, and name of the manufacturer or distributor.

(III) Records of loading bulk unlabeled drugs into an automated drug dispensing system shall be maintained to show:

(-a-) name of the drug, strength, and dosage form;

(-b-) manufacturer or distributor;

(-c-) manufacturer's lot number;

(-d-) expiration date;

(-e-) date of loading;

(-f-) name, initials, or electronic signature of the person loading the automated drug dispensing system; and

(-g-) signature or electronic signature of the responsible pharmacist.

(IV) The automated drug dispensing system shall not be used until a pharmacist verifies that the system is properly loaded and affixes his or her signature or electronic signature to the record specified in subclause (III) of this clause.

(6) Medication orders.

(A) Drugs may be administered to patients in FEMCCs only on the order of a practitioner. No change in the order for drugs may be made without the approval of a practitioner.

(B) Drugs may be distributed only pursuant to the original or a direct copy of the practitioner's medication order.

(C) Pharmacy technicians and pharmacy technician trainees may not receive oral medication orders.

(D) FEMCC pharmacies shall be exempt from the labeling provisions and patient notification requirements of §562.006 and §562.009 of the Act, as respects drugs distributed pursuant to medication orders.

(E) In FEMCCs with a full-time pharmacist, if a practitioner orders a drug for administration to a bona fide patient of the facility when the pharmacy is closed, the following is applicable.

(i) Prescription drugs and devices only in sufficient quantities for immediate therapeutic needs of a patient may be removed from the FEMCC pharmacy.

(ii) Only a designated licensed nurse or practitioner may remove such drugs and devices.

(iii) A record shall be made at the time of withdrawal by the authorized person removing the drugs and devices. The record shall contain the following information:

(I) name of the patient;

(II) name of device or drug, strength, and dosage form;

(III) dose prescribed;

(IV) quantity taken;

(V) time and date; and

(VI) signature or electronic signature of person making withdrawal.

(iv) The original or direct copy of the medication order may substitute for such record, provided the medication order meets all the requirements of clause (iii) of this subparagraph.

(v) The pharmacist shall verify the withdrawal as soon as practical, but in no event more than 72 hours from the time of such withdrawal.

(F) In FEMCCs with a part-time or consultant pharmacist, if a practitioner orders a drug for administration to a bona fide patient of the FEMCC when the pharmacist is not on duty, or when the pharmacy is closed, the following is applicable.

(i) Prescription drugs and devices only in sufficient quantities for therapeutic needs may be removed from the FEMCC pharmacy.

(ii) Only a designated licensed nurse or practitioner may remove such drugs and devices.

(iii) A record shall be made at the time of withdrawal by the authorized person removing the drugs and devices; the record shall meet the same requirements as specified in subparagraph (E)(iii) of this paragraph.

(iv) The pharmacist shall verify each distribution after a reasonable interval, but in no event may such interval exceed seven days.

(7) Floor stock. In facilities using a floor stock method of drug distribution, the following is applicable for removing drugs or devices in the absence of a pharmacist.

(A) Prescription drugs and devices may be removed from the pharmacy only in the original manufacturer's container or prepackaged container.

(B) Only a designated licensed nurse or practitioner may remove such drugs and devices.

(C) A record shall be made at the time of withdrawal by the authorized person removing the drug or device; the record shall contain the following information:

(i) name of the drug, strength, and dosage form;

(ii) quantity removed;

(iii) location of floor stock;

(iv) date and time; and

(v) signature or electronic signature of person making the withdrawal.

(D) A pharmacist shall verify the withdrawal according to the following schedule.

(i) In facilities with a full-time pharmacist, the withdrawal shall be verified as soon as practical, but in no event more than 72 hours from the time of such withdrawal.

(ii) In facilities with a part-time or consultant pharmacist, the withdrawal shall be verified after a reasonable interval, but in no event may such interval exceed seven days.

(8) Policies and procedures. Written policies and procedures for a drug distribution system, appropriate for the freestanding emergency medical center, shall be developed and implemented by the pharmacist-in-charge with the advice of the appropriate committee. The written policies and procedures for the drug distribution system shall include, but not be limited to, procedures regarding the following:

(A) controlled substances;

(B) investigational drugs;

(C) prepackaging and manufacturing;

(D) medication errors;

(E) orders of physician or other practitioner;

(F) floor stocks;

(G) adverse drug reactions;

(H) drugs brought into the facility by the patient;

(I) self-administration;

(J) emergency drug tray;

(K) formulary, if applicable;

(L) drug storage areas;

(M) drug samples;

(N) drug product defect reports;

(O) drug recalls;

(P) outdated drugs;

(Q) preparation and distribution of IV admixtures;

(R) procedures for supplying drugs for postoperative use, if applicable;

(S) use of automated drug dispensing systems; and

(T) use of data processing systems.

(9) Drugs supplied for outpatient use. Drugs supplied to patients for outpatient use shall be supplied according to the following procedures.

(A) Drugs may only be supplied to patients who have been admitted to the freestanding emergency medical center.

(B) Drugs may only be supplied in accordance with the system of control and accountability established for drugs supplied from the freestanding emergency medical center; such system shall be developed and supervised by the pharmacist-in-charge or staff pharmacist designated by the pharmacist-in-charge.

(C) Only drugs listed on the approved outpatient drug list may be supplied; such list shall be developed by the pharmacist-in-charge and the medical staff and shall consist of drugs of the nature and type to meet the immediate postoperative needs of the freestanding emergency medical center patient.

(D) Drugs may only be supplied in prepackaged quantities not to exceed a 72-hour supply in suitable containers and appropriately prelabeled (including necessary auxiliary labels) by the pharmacy, provided, however that topicals and ophthalmics in original manufacturer's containers may be supplied in a quantity exceeding a 72-hour supply.

(E) At the time of delivery of the drug, the practitioner shall complete the label, such that the prescription container bears a label with at least the following information:

(i) date supplied;

(ii) name of practitioner;

(iii) name of patient;

(iv) directions for use;

(v) brand name and strength of the drug; or if no brand name, then the generic name of the drug dispensed, strength, and the name of the manufacturer or distributor of the drug; and

(vi) unique identification number.

(F) After the drug has been labeled by the practitioner, the practitioner or a licensed nurse under the supervision of the practitioner shall give the appropriately labeled, prepackaged medication to the patient.

(G) A perpetual record of drugs which are supplied from the FEMCC shall be maintained which includes:

(i) name, address, and phone number of the facility;

(ii) date supplied;

(iii) name of practitioner;

(iv) name of patient;

(v) directions for use;

(vi) brand name and strength of the drug; or if no brand name, then the generic name of the drug dispensed, strength, and the name of the manufacturer or distributor of the drug; and

(vii) unique identification number.

(H) The pharmacist-in-charge, or a pharmacist designated by the pharmacist-in-charge, shall review the records at least once every seven days.

(e) Records.

(1) Maintenance of records.

(A) Every inventory or other record required to be kept under the provisions of this section (relating to Freestanding Emergency Medical Care Center) shall be:

(i) kept by the pharmacy and be available, for at least two years from the date of such inventory or record, for inspecting and copying by the board or its representative, and other authorized local, state, or federal law enforcement agencies; and

(ii) supplied by the pharmacy within 72 hours, if requested by an authorized agent of the Texas State Board of Pharmacy. If the pharmacy maintains the records in an electronic format, the requested records must be provided in a mutually agreeable electronic format if specifically requested by the board or its representative. Failure to provide the records set out in this subsection, either on site or within 72 hours, constitutes prima facie evidence of failure to keep and maintain records in violation of the Act.

(B) Records of controlled substances listed in Schedules I and II shall be maintained separately from all other records of the pharmacy.

(C) Records of controlled substances listed in Schedules III - V shall be maintained separately or readily retrievable from all other records of the pharmacy. For purposes of this subsection, readily retrievable means that the controlled substances shall be asterisked, red-lined, or in some other manner readily identifiable apart from all other items appearing on the record.

(D) Records, except when specifically required to be maintained in original or hard-copy form, may be maintained in an alternative data retention system, such as a data processing or direct imaging system, e.g., microfilm or microfiche, provided:

(i) the records in the alternative data retention system contain all of the information required on the manual record; and

(ii) the alternative data retention system is capable of producing a hard copy of the record upon the request of the board, its representative, or other authorized local, state, or federal law enforcement or regulatory agencies.

(2) Outpatient records.

(A) Only a registered pharmacist may receive, certify, and receive prescription drug orders.

(B) Outpatient records shall be maintained as provided in §291.34 and §291.35 of this title contained in Community Pharmacy (Class A).

(C) Outpatient prescriptions, including, but not limited to, discharge prescriptions, that are written by the practitioner, must be written on a form which meets the requirements of the Act, §562.006. Medication order forms or copies thereof do not meet the requirements for outpatient forms.

(D) Controlled substances listed in Schedule II must be written on an electronic prescription form in accordance with the Texas Controlled Substances Act, §481.075, and rules promulgated pursuant to the Texas Controlled Substances Act, unless exempted by the Texas Controlled Substances Rules, 37 TAC §13.74. Outpatient prescriptions for Schedule II controlled substances that are exempted from the official prescription requirement must be manually signed by the practitioner.

(3) Patient records.

(A) Each original medication order or set of orders issued together shall bear the following information:

(i) patient name;

(ii) drug name, strength, and dosage form;

(iii) directions for use;

(iv) date; and

(v) signature or electronic signature of the practitioner or that of his or her authorized agent, defined as a licensed nurse employee or consultant/full or part-time pharmacist of the FEMCC.

(B) Original medication orders shall be maintained with the medication administration record in the medical records of the patient.

(C) Controlled substances records shall be maintained as follows.

(i) All records for controlled substances shall be maintained in a readily retrievable manner.

(ii) Controlled substances records shall be maintained in a manner to establish receipt and distribution of all controlled substances.

(D) Records of controlled substances listed in Schedule II shall be maintained as follows.

(i) Records of controlled substances listed in Schedule II shall be maintained separately from records of controlled substances in Schedules III, IV, and V, and all other records.

(ii) A FEMCC pharmacy shall maintain a perpetual inventory of any controlled substance listed in Schedule II.

(iii) Distribution records for Schedule II - V controlled substances floor stock shall include the following information:

(I) patient's name;

(II) practitioner who ordered drug;

(III) name of drug, dosage form, and strength;

(IV) time and date of administration to patient and quantity administered;

(V) signature or electronic signature of individual administering controlled substance;

(VI) returns to the pharmacy; and

(VII) waste (waste is required to be witnessed and cosigned, manually or electronically, by another individual).

(E) Floor stock records shall be maintained as follows.

(i) Distribution records for Schedules III - V controlled substances floor stock shall include the following information:

(I) patient's name;

(II) practitioner who ordered controlled substance;

(III) name of controlled substance, dosage form, and strength;

(IV) time and date of administration to patient;

(V) quantity administered;

(VI) signature or electronic signature of individual administering drug;

(VII) returns to the pharmacy; and

(VIII) waste (waste is required to be witnessed and cosigned, manually or electronically, by another individual).

(ii) The record required by clause (i) of this subparagraph shall be maintained separately from patient records.

(iii) A pharmacist shall review distribution records with medication orders on a periodic basis to verify proper usage of drugs, not to exceed 30 days between such reviews.

(F) General requirements for records maintained in a data processing system are as follows.

(i) If an FEMCC pharmacy's data processing system is not in compliance with the board's requirements, the pharmacy must maintain a manual recordkeeping system.

(ii) Requirements for backup systems. The facility shall maintain a backup copy of information stored in the data processing system using disk, tape, or other electronic backup system and update this backup copy on a regular basis to assure that data is not lost due to system failure.

(iii) Change or discontinuance of a data processing system.

(I) Records of distribution and return for all controlled substances and nalbuphine (Nubain). A pharmacy that changes or discontinues use of a data processing system must:

(-a-) transfer the records to the new data processing system; or

(-b-) purge the records to a printout which contains the same information as required on the audit trail printout as specified in subparagraph (G)(ii) of this paragraph. The information on this printout shall be sorted and printed by drug name and list all distributions/returns chronologically

(II) Other records. A pharmacy that changes or discontinues use of a data processing system must:

(-a-) transfer the records to the new data processing system; or

(-b-) purge the records to a printout which contains all of the information required on the original document.

(III) Maintenance of purged records. Information purged from a data processing system must be maintained by the pharmacy for two years from the date of initial entry into the data processing system.

(iv) Loss of data. The pharmacist-in-charge shall report to the board in writing any significant loss of information from the data processing system within 10 days of discovery of the loss.

(G) Data processing system maintenance of records for the distribution and return of all controlled substances and nalbuphine (Nubain) to the pharmacy.

(i) Each time a controlled substance, or nalbuphine (Nubain) is distributed from or returned to the pharmacy, a record of such distribution or return shall be entered into the data processing system.

(ii) The data processing system shall have the capacity to produce a hard-copy printout of an audit trail of drug distribution and return for any strength and dosage form of a drug (by either brand or generic name or both) during a specified time period. This printout shall contain the following information:

(I) patient's name and room number or patient's facility identification number;

(II) prescribing or attending practitioner's name;

(III) name, strength, and dosage form of the drug product actually distributed;

(IV) total quantity distributed from and returned to the pharmacy;

(V) if not immediately retrievable via electronic image, the following shall also be included on the printout:

(-a-) prescribing or attending practitioner's address; and

(-b-) practitioner's DEA registration number, if the medication order is for a controlled substance.

(iii) An audit trail printout for each strength and dosage form of these drugs distributed during the preceding month shall be produced at least monthly and shall be maintained in a separate file at the facility. The information on this printout shall be sorted by drug name and list all distributions/returns for that drug chronologically.

(iv) The pharmacy may elect not to produce the monthly audit trail printout if the data processing system has a workable (electronic) data retention system which can produce an audit trail of drug distribution and returns for the preceding two years. The audit trail required in this clause shall be supplied by the pharmacy within 72 hours, if requested by an authorized agent of the Texas State Board of Pharmacy, or other authorized local, state, or federal law enforcement or regulatory agencies.

(H) Failure to maintain records. Failure to provide records set out in this subsection, either on site or within 72 hours for whatever reason, constitutes prima facie evidence of failure to keep and maintain records.

(I) Data processing system downtime. In the event that an FEMCC pharmacy which uses a data processing system experiences system downtime, the pharmacy must have an auxiliary procedure which will ensure that all data is retained for on-line data entry as soon as the system is available for use again.

(4) Distribution of controlled substances to another registrant. A pharmacy may distribute controlled substances to a practitioner, another pharmacy, or other registrant, without being registered to distribute, under the following conditions.

(A) The registrant to whom the controlled substance is to be distributed is registered under the Controlled Substances Act to dispense that controlled substance.

(B) The total number of dosage units of controlled substances distributed by a pharmacy may not exceed 5.0% of all controlled substances dispensed by the pharmacy during the 12-month period in which the pharmacy is registered; if at any time it does exceed 5.0%, the pharmacy is required to obtain an additional registration to distribute controlled substances.

(C) If the distribution is for a Schedule III, IV, or V controlled substance, a record shall be maintained which indicates:

(i) the actual date of distribution;

(ii) the name, strength, and quantity of controlled substances distributed;

(iii) the name, address, and DEA registration number of the distributing pharmacy; and

(iv) the name, address, and DEA registration number of the pharmacy, practitioner, or other registrant to whom the controlled substances are distributed.

(D) If the distribution is for a Schedule I or II controlled substance, the following is applicable.

(i) The pharmacy, practitioner, or other registrant who is receiving the controlled substances shall issue Copy 1 and Copy 2 of a DEA order form (DEA 222C) to the distributing pharmacy.

(ii) The distributing pharmacy shall:

(I) complete the area on the DEA order form (DEA 222C) titled "To Be Filled in by Supplier";

(II) maintain Copy 1 of the DEA order form (DEA 222C) at the pharmacy for two years; and

(III) forward Copy 2 of the DEA order form (DEA 222C) to the divisional office of the Drug Enforcement Administration.

(5) Other records. Other records to be maintained by the pharmacy include:

(A) a permanent log of the initials or identification codes which will identify each pharmacist by name. The initials or identification code shall be unique to ensure that each pharmacist can be identified, i.e., identical initials or identification codes cannot be used;

(B) Copy 3 of DEA order form (DEA 222C), which has been properly dated, initialed, and filed, and all copies of each unaccepted or defective order form and any attached statements or other documents;

(C) a hard copy of the power of attorney to sign DEA 222C order forms (if applicable);

(D) suppliers' invoices of dangerous drugs and controlled substances; a pharmacist shall verify that the controlled drugs listed on the invoices were actually received by clearly recording his/her initials and the actual date of receipt of the controlled substances;

(E) supplier's credit memos for controlled substances and dangerous drugs;

(F) a hard copy of inventories required by §291.17 of this title (relating to Inventory Requirements) except that a perpetual inventory of controlled substances listed in Schedule II may be kept in a data processing system if the data processing system is capable of producing a hard copy of the perpetual inventory on-site;

(G) hard-copy reports of surrender or destruction of controlled substances and/or dangerous drugs to an appropriate state or federal agency;

(H) a hard-copy Schedule V nonprescription register book;

(I) records of distribution of controlled substances and/or dangerous drugs to other pharmacies, practitioners, or registrants; and

(J) a hard copy of any notification required by the Texas Pharmacy Act or these rules, including, but not limited to, the following:

(i) reports of theft or significant loss of controlled substances to DEA, DPS, and the board;

(ii) notification of a change in pharmacist-in-charge of a pharmacy; and

(iii) reports of a fire or other disaster which may affect the strength, purity, or labeling of drugs, medications, devices, or other materials used in the diagnosis or treatment of injury, illness, and disease.

(6) Permission to maintain central records. Any pharmacy that uses a centralized recordkeeping system for invoices and financial data shall comply with the following procedures.

(A) Controlled substance records. Invoices and financial data for controlled substances may be maintained at a central location provided the following conditions are met.

(i) Prior to the initiation of central recordkeeping, the pharmacy submits written notification by registered or certified mail to the divisional director of the Drug Enforcement Administration as required by the Code of Federal Regulations, Title 21, §1304(a), and submits a copy of this written notification to the Texas State Board of Pharmacy. Unless the registrant is informed by the divisional director of the Drug Enforcement Administration that permission to keep central records is denied, the pharmacy may maintain central records commencing 14 days after receipt of notification by the divisional director.

(ii) The pharmacy maintains a copy of the notification required in this subparagraph.

(iii) The records to be maintained at the central record location shall not include executed DEA order forms, prescription drug orders, or controlled substance inventories, which shall be maintained at the pharmacy.

(B) Dangerous drug records. Invoices and financial data for dangerous drugs may be maintained at a central location.

(C) Access to records. If the records are kept on microfilm, computer media, or in any form requiring special equipment to render the records easily readable, the pharmacy shall provide access to such equipment with the records.

(D) Delivery of records. The pharmacy agrees to deliver all or any part of such records to the pharmacy location within two business days of written request of a board agent or any other authorized official.

This 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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Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
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For further information, please call: (512) 305-8037

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PART 16. TEXAS BOARD OF PHYSICAL THERAPY EXAMINERS

CHAPTER 329. LICENSING PROCEDURE

22 TAC §329.6

The Texas Board of Physical Therapy Examiners proposes amendments to §329.6, Licensure by Endorsement. The amendments would eliminate specific score requirements for different time periods, allowing persons currently licensed in another state to be licensed by endorsement in Texas without retaking the exam due to differences in passing score requirements prior to 1994.

John P. Maline, Executive Director, has determined that for the first five-year period the amendments are in effect there will be no additional costs to state or local governments as a result of enforcing or administering the amendments.

Mr. Maline has also determined that for each year of the first five-year period the amendments are in effect the public benefit will be greater access to physical therapy services, as there will be less onerous requirements for licensure by endorsement in Texas. Mr. Maline has determined that there will be no costs or adverse economic effects to small or micro businesses, therefore an economic impact statement or regulatory flexibility analysis is not required for the amendments. There are no anticipated costs to individuals who are required to comply with the amendments as proposed.

Comments on the proposed amendments may be submitted to Nina Hurter, PT Coordinator, Texas Board of Physical Therapy Examiners, 333 Guadalupe, Suite 2-510, Austin, Texas 78701; email: nhurter@mail.capnet.state.tx.us. Comments must be received no later than 30 days from the date these proposed amendments are published in the *Texas Register.*

The amendments are proposed under the Physical Therapy Practice Act, Title 3, Subtitle H, Chapter 453, Texas Occupations Code, which provides the Texas Board of Physical Therapy Examiners with the authority to adopt rules consistent with this Act to carry out its duties in administering this Act.

Title 3, Subtitle H, Chapter 453, Texas Occupations Code is affected by the amendments.

§329.6. Licensure by Endorsement.

(a) Eligibility. The board may issue a license by endorsement to an applicant currently licensed in another state, District of Columbia, or territory of the United States, if they have not previously held a permanent license issued by this board.

(b) Requirements. An applicant seeking licensure by endorsement must:

(1) meet the requirements as stated in §329.1 of this title (relating to General Licensure Requirements and Procedures); [~~and~~]

(2) submit a passing score on the National Physical Therapy Examination sent directly to the board by the board-approved reporting service, or scores on the Registry Examination sent directly to the board by the American Physical Therapy Association; and [~~. The applicant's score must meet one of the conditions listed in subparagraphs (A) - (C) of this paragraph:~~]

[~~(A) The applicant must have passed the national examination given on or after January 1, 1993, with the score required by the board for that exam.~~]

[~~(B) The applicant must have obtained a score of 1.5 standard deviations below the nationwide mean on an examination given prior to January 1, 1993.~~]

[~~(C) The applicant must have obtained a score of 75% or higher for the Registry Examination taken prior to September 1971; and~~]

(3) submit verification of licensure in good standing from all states in which the applicant holds or has held a license. This verification must be sent directly to the board by the licensing board in that jurisdiction.

(c) Provisional licensure. The board may grant a provisional license under the conditions listed in paragraphs (1) and (2) of this subsection [~~below~~]. The applicant must submit the provisional license fee as set by the executive council, and meet all other requirements of licensure by examination or endorsement as set by the board. The board may not grant a provisional license to an applicant with disciplinary action in their licensure history. The provisional license is valid for 180 days, or until a permanent license is issued or denied, whichever is first. The conditions under which the board may grant a provisional license are:

(1) The applicant is applying for licensure by endorsement, and there is a delay in the submission of required documents outside the applicant's control; or

(2) The applicant has previously held a Texas license and is currently licensed in another state that has licensing requirements substantially equivalent to those of Texas, but has not worked as a PT or PTA for the two years prior to application for a license in Texas, and must submit to reexamination to restore the Texas license as stated in §341.1 of this title (relating to Requirements for Renewal).

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

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

TRD-200905645
John P. Maline
Executive Director
Texas Board of Physical Therapy Examiners
Earliest possible date of adoption: January 24, 2010
For further information, please call: (512) 305-6900

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CHAPTER 347. REGISTRATION OF PHYSICAL THERAPY FACILITIES

22 TAC §347.4

The Texas Board of Physical Therapy Examiners proposes amendments to §347.4, Requirements for Registration Application. The amendments mirror changes to the fee structure for facility registration and renewal, specifically the elimination of the division between primary and additional facilities. The amendments also remove the requirement for notarization of signatures on forms required for facility registration and renewal.

John P. Maline, Executive Director, has determined that for the first five-year period the amendments are in effect there will be no additional costs to state or local governments as a result of enforcing or administering the amendments.

Mr. Maline has also determined that for each year of the first five-year period the amendments are in effect the public benefit will be a simpler facility registration program and less confusion

over fees and the relationship of one facility to another. Mr. Maline has determined that there may be adverse economic effects on some small or micro businesses, and therefore provided an economic impact statement that was published in the October 2, 2009, issue of the *Texas Register* (34 TexReg 6822) with the proposal to change the facility registration and renewal fees at 22 TAC §§651.1 - 651.3. There are no anticipated costs to individuals who are required to comply with the amendments as proposed.

Comments on the proposed amendments may be submitted to Nina Hurter, PT Coordinator, Texas Board of Physical Therapy Examiners, 333 Guadalupe, Suite 2-510, Austin, Texas 78701; email: nhurter@mail.capnet.state.tx.us. Comments must be received no later than 30 days from the dates proposed amendments are published in the *Texas Register.*

The amendments are proposed under the Physical Therapy Practice Act, Title 3, Subtitle H, Chapter 453, Texas Occupations Code, which provides the Texas Board of Physical Therapy Examiners with the authority to adopt rules consistent with this Act to carry out its duties in administering this Act.

Title 3, Subtitle H, Chapter 453, Texas Occupations Code is affected by the amendments.

§347.4. Requirements for Registration Application.

(a) Each registration application must include:

(1) name of the facility;

(2) physical/street address of the facility;

(3) mailing address, if different from the street address;

(4) name of the owner;

(5) type of ownership;

(6) identification/contact information for the facility owner as follows:

(A) Sole proprietor

(i) name, home address, date of birth, social security number of the sole proprietor

(ii) federal employer identification number if applicable

(B) Partnership

(i) name, home address, date of birth, social security number of the managing partner

(ii) federal employer identification number

(C) Corporation

(i) names, home addresses, dates of birth, and social security numbers of managing officers (for purposes of this subsection, managing officers are defined as the top four executive officers, including the corporate officer in charge of physical therapy facility operations);

(ii) federal employer identification number

(D) Governmental entity (federal, state, local)

(i) name, home address, date of birth, social security number of the individual completing the application

(ii) federal employer identification number

(7) the name and license number of the physical therapist in charge and his or her [~~notarized~~] signature;

(8) names and license numbers of all PTs and PTAs who practice in the facility;

(9) the social security number and [~~notarized~~] signature of the owner, managing partner or officer, or person authorized to complete the registration application;

(10) the non-refundable application fee, as set by the executive council.

(b) If one or more facilities are owned by an individual, partnership, corporation, or other entity, the board requires a separate application and application fee [~~one primary facility application and an additional facility application~~] for each facility [~~additional site~~] registered.

(c) All of the facilities owned by an individual, partnership, corporation or other entity will receive synchronized expiration dates. A [~~An additional~~] facility that registers less than six months before the first [~~primary~~] facility's registration expires will receive an expiration date in the same month as the first facility [~~primary~~], but in the following year. A [~~An additional~~] facility that registers six or more months before the first [~~primary~~] facility's expiration date will receive the same expiration date as the first [~~primary~~] facility.

(d) A physical therapy facility that has not been registered previously must complete the registration process and have the registration certificate in hand before the first patient treatment.

(e) The facility application is valid for one year after it is received by the board.

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

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John P. Maline
Executive Director
Texas Board of Physical Therapy Examiners
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For further information, please call: (512) 305-6900

22 TAC §347.9

The Texas Board of Physical Therapy Examiners proposes amendments to §347.9, Renewal of Registration. The amendments mirror changes to the fee structure for facility registration and renewal, specifically the elimination of the division between primary and additional facilities. The amendments also remove the requirement for notarization of signatures on forms required for facility registration and renewal.

John P. Maline, Executive Director, has determined that for the first five-year period the amendments are in effect there will be no additional costs to state or local governments as a result of enforcing or administering the amendments.

Mr. Maline has also determined that for each year of the first five-year period the amendments are in effect the public benefit will be a simpler facility registration program and less confusion over fees and the relationship of one facility to another. Mr. Maline has determined that there may be adverse economic effects on some small or micro businesses, and therefore provided an economic impact statement that was published in the October

2, 2009, issue of the *Texas Register* (34 TexReg 6822) with the proposal to change the facility registration and renewal fees at 22 TAC §§651.1 - 651.3. There are no anticipated costs to individuals who are required to comply with the amendments as proposed.

Comments on the proposed amendments may be submitted to Nina Hurter, PT Coordinator, Texas Board of Physical Therapy Examiners, 333 Guadalupe, Suite 2-510, Austin, Texas 78701; email: nhurter@mail.capnet.state.tx.us. Comments must be received no later than 30 days from the date these proposed amendments are published in the *Texas Register.*

The amendments are proposed under the Physical Therapy Practice Act, Title 3, Subtitle H, Chapter 453, Texas Occupations Code, which provides the Texas Board of Physical Therapy Examiners with the authority to adopt rules consistent with this Act to carry out its duties in administering this Act.

Title 3, Subtitle H, Chapter 453, Texas Occupations Code is affected by the amendments.

§347.9. Renewal of Registration.

(a) The owner of a physical therapy facility must renew the registration annually. Licensees may not provide physical therapy services in a facility if the registration is not current.

(b) Requirements to renew a facility registration are:

(1) a renewal application signed by the owner, managing partner or officer, or a person authorized by the owner to complete the renewal;

(2) a list of all PTs and PTAs working at the facility, including license and social security numbers;

(3) the renewal fee as set by the executive council, and any late fees which may be due; and

(4) a physical therapist in charge form with the [~~notarized~~] signature of the physical therapist.

(c) The renewal date of a [~~primary~~] facility registration is the last day of the month in which the registration was originally issued, or as synchronized with the first facility registered by an owner. [~~The renewal date for an additional facility will be the same as the renewal date for the primary facility.~~]

(d) The board will notify a facility at least 30 days prior to the registration expiration date. The facility bears the responsibility for ensuring that the registration is renewed. Failure to receive notification from the board does not exempt the facility from paying the renewal fee in a timely manner.

(e) The facility renewal certificate must be displayed with the original certificate and is the property of the board.

(f) A facility will be allowed to renew without a late fee if the renewal application and fee are received prior to the expiration date. However, the board will not issue the renewal certificate prior to the receipt of the signed [~~and notarized~~] physical therapist in charge form and a list of the name(s) of the PTs and PTAs working at that facility. Physical therapy services may not be provided at the facility until the certificate is displayed in a prominent location in the facility where it is available for inspection by the public.

This 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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John P. Maline
Executive Director
Texas Board of Physical Therapy Examiners
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For further information, please call: (512) 305-6900

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22 TAC §347.15

The Texas Board of Physical Therapy Examiners proposes amendments to §347.15, Disciplinary Action. The amendments mirror changes to the fee structure for facility registration and renewal, specifically the elimination of the division between primary and additional facilities.

John P. Maline, Executive Director, has determined that for the first five-year period the amendments are in effect there will be no additional costs to state or local governments as a result of enforcing or administering the amendments.

Mr. Maline has also determined that for each year of the first five-year period the amendments are in effect the public benefit will be a simpler facility registration program and less confusion over fees and the relationship of one facility to another. Mr. Maline has determined that there may be adverse economic effects on some small or micro businesses, and therefore provided an economic impact statement that was published in the October 2, 2009, issue of the *Texas Register* (34 TexReg 6822) with the proposal to change the facility registration and renewal fees at 22 TAC §§651.1 - 651.3. There are no anticipated costs to individuals who are required to comply with the amendments as proposed.

Comments on the proposed amendments may be submitted to Nina Hurter, PT Coordinator, Texas Board of Physical Therapy Examiners, 333 Guadalupe, Suite 2-510, Austin, Texas 78701; email: nhurter@mail.capnet.state.tx.us. Comments must be received no later than 30 days from the date these proposed amendments are published in the *Texas Register.*

The amendments are proposed under the Physical Therapy Practice Act, Title 3, Subtitle H, Chapter 453, Texas Occupations Code, which provides the Texas Board of Physical Therapy Examiners with the authority to adopt rules consistent with this Act to carry out its duties in administering this Act.

Title 3, Subtitle H, Chapter 453, Texas Occupations Code is affected by the amendments.

§347.15. Disciplinary Action.

(a) The board may assign disciplinary action to a registered facility for violation of the Act or rules. The disciplinary action may include: revocation or suspension of the registration; probation; penalty fees; or other appropriate disciplinary action.

(b) The processing of complaints against applicants for registered facilities, or registered facilities, is accomplished in accordance with Chapter 343 of this title (relating to Contested Case Procedure).

(c) A revocation or suspension of a registration affects all facilities registered by one owner [~~under one primary registration~~].

This 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 December 7, 2009.

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John P. Maline
Executive Director
Texas Board of Physical Therapy Examiners
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For further information, please call: (512) 305-6900

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PART 39. TEXAS BOARD OF PROFESSIONAL GEOSCIENTISTS

CHAPTER 850. TEXAS BOARD OF PROFESSIONAL GEOSCIENTISTS SUBCHAPTER D. ADVISORY OPINIONS

22 TAC §§850.100 - 850.105

The Texas Board of Professional Geoscientists (TBPG or Board) proposes new §§850.100 - 850.105, regarding advisory opinions. These rules are being proposed to allow the Board to issue Advisory Opinions. Section 850.100 addresses subjects of Advisory Opinions and states that the Board shall prepare an Advisory Opinion regarding an interpretation of the Act or as an application of the Act regarding a specified existing or factual situation. Section 850.101 specifies the type of information that should be included on written requests for Advisory Opinions. Section 850.102 allows the Board to issue an Advisory Opinion on its own accord. Section 850.103 details the process for receiving, reviewing and processing requests for Advisory Opinions. Section 850.104 requires the Board to classify, number and compile a summary on the agency website of each final Advisory Opinion issued. Section 850.105 requires the Board to respond to requests for Advisory Opinions within 180 days after the Board receives the written request unless the Board affirmatively states its reason for not responding to the request within the time period or for not responding to the request at all.

Charles Horton, Interim Executive Director of the TBPG, has determined that for the first five-year period the sections are in effect there will be no additional costs to state or local government as a result of enforcing or administering these sections.

For each year of the first five years that the proposed sections will be in effect, Mr. Horton has determined that the public benefit will be enhancement of the professional practice of geoscience by ensuring that qualified and licensed persons and entities practice geoscience before the public. The establishment of Board issued Advisory Opinions will promote enhanced understanding of and compliance with the Texas Geoscience Practice Act and Board rules.

Mr. Horton has also determined that proposing new §§850.100 - 850.105 will not have a fiscal impact on licensed individuals or registered firms. Mr. Horton has determined that there will be no costs or adverse economic effects to small or micro-businesses by the proposed rules, and an impact statement is not required.

Comments on this proposal may be submitted in writing to: Molly B. Roman, Texas Board of Professional Geoscientists, P.O. Box 13225, Austin, Texas 78711, (512) 936-4405. Comments may also be submitted electronically to mroman@tbpg.state.tx.us or faxed to (512) 936-4409. Comments must be submitted no later than 30 days from the date the proposed new sections are published in the *Texas Register.* All requests for a public hearing on the proposed sections submitted under the Administrative Procedure Act must be received by Ms. Roman no more than 15 calendar days after notice of proposed new sections has been published in the *Texas Register.*

The new sections are proposed under the Texas Occupations Code §1002.151, which authorizes the Board to adopted and enforce rules consistent with the Texas Geoscience Practice Act and necessary for the performance of its duties, and §1002.353, which authorizes the Board to issue Advisory Opinions.

The new sections implement the Texas Occupations Code §1002.151 and §1002.353.

§850.100. Subject of an Advisory Opinion.

On its own initiative or at the request of any interested person, the Board shall prepare a written advisory opinion about:

(1) an interpretation of the Act; or

(2) the application of the Act to a person in regard to a specified existing or hypothetical factual situation.

§850.101. Request for an Advisory Opinion.

(a) A request for an advisory opinion shall include, at a minimum, sufficient information in order for the Board to provide a complete response to the request. The requestor must provide the following, as applicable:

(1) requestor contact information;

(2) affected section(s) of the Act and/or Board rules;

(3) description of the situation;

(4) reason advisory opinion is requested;

(5) parties or stakeholders that will be affected by the opinion, if known; and

(6) any known, pending litigation involving the situation.

(b) A request for an advisory opinion shall be in writing. A written request may be mailed, sent via electronic mail, hand-delivered, or faxed to the Board at the agency office.

§850.102. Board Initiated Opinion.

When a majority of the Board determines that an opinion would be in the public interest or in the interest of any person or persons within the jurisdiction of the Board, the Board may on its own motion issue an advisory opinion.

§850.103. Receipt, Review, and Processing of a Request.

(a) The Board, through the appropriate committee, shall review all requests for advisory opinions.

(b) Upon receipt of a request for an advisory opinion, Executive Director will date stamp the request, issue an Advisory Opinion Request (AOR) tracking number, and make a preliminary determination on the Board's jurisdiction regarding the request.

(c) The Executive Director will review the request to determine if the request can be answered by reference to the plain language of a statute or a Board rule, or if the request has already been answered by the Board.

(d) If the Executive Director determines the Board has no jurisdiction or the request can be answered by reference to a statute, Board rule, or previous opinion, the Executive Director shall prepare a written response for the appropriate committee addressed to the person

making the request that cites the jurisdictional authority, the language of the statute or rule, or the prior determination.

(e) The appropriate committee shall review all requests for advisory opinions and may:

(1) approve jurisdiction and reference responses, as applicable, and report a summary of these actions to the full Board for ratification; or

(2) determine the request warrants an advisory opinion and to proceed with developing an advisory opinion.

(f) If a request warrants an advisory opinion, the appropriate committee shall determine if further information is needed to draft an advisory opinion. If additional information is needed, the committee shall determine what information is needed and instruct the Executive Director to obtain expert resources, hold stakeholder meetings, or perform other research and investigation as necessary to provide the information required to draft an advisory opinion and report back to the committee.

(g) If during the process, the committee determines that the request is one the Board cannot answer, then the committee shall have the Executive Director provide written notification to the person making the request of the reason the request will not be answered and this response shall be ratified by the full Board.

(h) When sufficient information exists, the appropriate committee shall draft an advisory opinion and post the request and draft opinion on the agency website and in the *Texas Register* for comments.

(i) Draft opinions shall be posted for at least 30 days and any interested person may submit written comments concerning an advisory opinion request. Comments submitted should reference the AOR number.

(j) Upon completion of the comment period, the appropriate committee shall consider any comments made and draft a final opinion recommendation to be presented for review and adoption by the full Board.

(k) The full Board shall review and adopt the advisory opinion or determine if further revisions are required and refer the request back to the appropriate committee with guidance on proceeding with completing the request.

(l) Each final advisory opinion adopted by the full Board shall be published in summary form in the *Texas Register.*

(m) To reconsider or revise an issued advisory opinion, the Board shall process the reconsideration or revision as a new request and follow the process as set forth in this section.

§850.104. Compilation of Advisory Opinions.

The Board shall number and classify each final advisory opinion issued and shall annually compile a summary of advisory opinions in a single reference document made available on the Internet. The Executive Director may also publish and provide copies of advisory opinions in other formats as may be in the public interest.

§850.105. Time Period.

The Board shall respond to requests for an advisory opinion within 180 days after the date the Board receives the written request unless the Board affirmatively states the Board's reason for not responding to the request within 180 days or for not responding to the request at all.

This 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 December 14, 2009.

TRD-200905824
Charles Horton
Interim Executive Director
Texas Board of Professional Geoscientists
Earliest possible date of adoption: January 24, 2010
For further information, please call: (512) 936-4405

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CHAPTER 851. TEXAS BOARD OF PROFESSIONAL GEOSCIENTISTS LICENSING RULES

The Texas Board of Professional Geoscientists (TBPG or Board) proposes new §§851.40 - 851.46 regarding the Geoscientist-in-Training (GIT) program, an amendment to §851.80 concerning fees, and an amendment to §851.106 concerning responsibility to the geoscience profession.

New §851.40 is being proposed to establish a Geoscientist-in-Training (GIT) designation and certification for individuals who meet the necessary education requirements and who have passed an examination on the fundamentals of geosciences. New §851.41 establishes the necessary qualifications for obtaining a GIT certificate, including educational requirements, passing a Board approved examination, a supporting letter of reference, and payment of the application fee. New §851.42 describes the process and submission requirements for GIT application and certification, including submission of the Board approved application, official academic transcripts, one letter of support attesting to the individual's moral character, and payment of the fee as established by the Board. New §851.43 addresses that the GIT certificate may be renewed annually for a period of up to eight years, unless granted at the discretion of the Board. New §851.44 describes the appropriate use of the "Geoscientist-in-Training" or "GIT" title, and that it is not to be used in conjunction with the word "licensed". New §851.45 describes the relationship of the GIT certification to licensure of Professional Geoscientists. New §851.46 describes the ability of the Board to take appropriate disciplinary action including the revocation of a GIT certificate.

An amendment to §851.80 is being proposed to establish an initial application fee of $25 and a subsequent annual renewal fee of $25 for a Geoscientist-in-Training (GIT) certificate. Section 851.106 is being amended to require geoscientists to report to the Board any known or suspected violation of the Texas Geoscience Practice Act or Board rules.

Charles Horton, Interim Executive Director of the TBPG, has determined that for the first five-year period the proposed rules are in effect there will be no additional costs to state or local government as a result of enforcing or administering these sections.

For each of the first five years that the proposed rules will be in effect, Mr. Horton has determined that the public benefit will be enhancement of the professional practice of geoscience by ensuring that qualified and licensed persons and entities practice geoscience before the public. The establishment of a Geoscientist-in-Training program will improve the professionalism and quality of geoscientists by expanding the training opportunities available to geoscientists prior to their licensure. The proposed amendment requiring geoscientists to report to the Board any

known or suspected violations of the Act or Board rules assists the Board in its mission to protect public health, safety, and welfare in Texas.

Mr. Horton has determined that proposing new §§851.40 - 851.46 and amending §851.106 will not have a fiscal impact on licensed individuals or registered firms. Mr. Horton has also determined that amending §851.80 to establish an initial application fee and annual renewal fee for the Board's Geoscientist-in-Training Certificate will not have a fiscal impact on licensed individuals or registered firms, as it is anticipated that these new fees will be paid by the geoscientist-in-training, who by definition is not an individual licensed by the Board or a firm registered by the Board. Mr. Horton has determined that there will be no costs or adverse economic effects to small or micro-businesses by the proposed rules and amendments and an impact statement is not required.

Comments on these proposals may be submitted in writing to: Molly B. Roman, Texas Board of Professional Geoscientists, P.O. Box 13225, Austin, Texas 78711, (512) 936-4405. Comments may also be submitted electronically to mroman@tbpg.state.tx.us or faxed to (512) 936-4409. Comments must be submitted no later than 30 days from the date the rule proposals are posted in the *Texas Register.* All requests for a public hearing on the proposed section submitted under the Administrative Procedure Act must be received by Ms. Roman no more than 15 calendar days after notice of rule proposals to this chapter have been published in the *Texas Register.*

SUBCHAPTER A. LICENSING

22 TAC §§851.40 - 851.46

These rules are proposed under the Texas Occupations Code §1002.151, which authorizes the Board to adopt and enforce rules consistent with the Texas Geoscience Practice Act and necessary for the performance of its duties, §1002.152, which authorizes the Board to set reasonable and necessary fees, and §1002.352, which authorizes the Board to establish a Geoscientist-in-Training program.

The proposed rules implement the Texas Occupations Code §§1002.151, 1002.152, and 1002.352.

§851.40. Geoscientist-in-Training Designation.

Individuals who meet the educational requirements of §1002.255(a)(2)(A) of the Act and have successfully passed an examination as specified in §851.41(a)(2) are eligible to apply for Geoscientist-In-Training (GIT) certification. This certification does not entitle an individual to practice as a licensed Professional Geoscientist.

§851.41. Geoscientist-in-Training Qualifications.

(a) To be eligible for obtaining a Geoscientist-in-Training (GIT) certificate, an applicant must meet the following qualifications:

(1) Has met the educational requirements as established in §851.25(a) of this chapter.

(2) Has successfully passed the examination established by the Board designed to demonstrate that the applicant has mastered the basic knowledge needed within the geosciences profession. Applicable examinations are:

(A) the fundamentals examination of ASBOG for geologists

(B) the fundamentals examination of CSSE for soil scientists

(C) the Texas Geophysics Examination for geophysicists

(3) Has a supporting letter addressing the applicant's ethical character.

(4) Has paid the application fee as set by the Board and published in §851.80 of this chapter.

(b) If for any reason the Board is not satisfied that an applicant is eligible in all respects for certification, it may deny the individual's application or it may require additional information concerning the applicant's qualifications for certification.

§851.42. Geoscientist-in-Training Application and Certification.

(a) To be certified as a Geoscientist-in-Training (GIT), an individual must:

(1) submit a GIT application in a format prescribed by the Board;

(2) submit an official academic transcript in accordance with §851.25(b);

(3) submit one letter of support as directed by the Board addressing the individual's ethical character; and

(4) pay the fee as established by the Board.

(b) A Geoscientist-in-Training certificate expires at the end of the month one year from the date of issuance, and can be renewed annually if the individual:

(1) accumulates eight or more Personal Development Hours (PDH) as described in §851.32 throughout the prior certification year to include one hour of ethics training;

(2) remains in good standing with the Board; and

(3) files for renewal of GIT certification and pays the fee established by the Board.

(c) If an applicant for GIT certification does not submit all required documents within one year of the original application date, the application shall expire and the applicant must reapply and pay a new application fee.

§851.43. Renewal of a Geoscientist-in-Training Certification.

A Geoscientist-in-Training (GIT) certification may be renewed annually for a period of up to eight years. Renewals after the eighth year of certification will be granted at the discretion of the Board.

§851.44. Use of the Title "Geoscientist-in-Training".

Individuals who are certified as a Geoscientist-in-Training may use "GIT" or "Geoscientist-in-Training" as a title after their name, providing these designations are not used in conjunction with or preceded by the work "licensed" or any other words that might lead one to believe they are licensed as a Professional Geoscientist.

§851.45. Relationship of Geoscientist-in-Training Certification to Licensure of Professional Geoscientists.

The Geoscientist-in-Training (GIT) Certification is intended as a stepping stone toward licensure as individuals are gaining acceptable geoscience experience. Individuals who are GIT certified and in good standing with the Board will only need to supply letters of reference as detailed in §851.24 of this chapter, provide evidence of experience as described in §851.23, and successfully pass the appropriate practice exam of ASBOG and CSSE. The degree program, coursework and transcripts are evaluated during the application phase for GIT Certification, and shall not be re-evaluated upon application for licensure as a Professional Geoscientist.

§851.46. Revocation of Certification.

The Board reserves the right to take appropriate disciplinary action including the revocation of certification granted pursuant to this chapter for failure to comply with the ethical standards found elsewhere in this chapter.

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

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TRD-200905820
Charles Horton
Interim Executive Director
Texas Board of Professional Geoscientists
Earliest possible date of adoption: January 24, 2010
For further information, please call: (512) 936-4405

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22 TAC §851.80

These amendments are proposed under the Texas Occupations Code §1002.151, which authorizes the Board to adopt and enforce rules consistent with the Texas Geoscience Practice Act and necessary for the performance of its duties, §1002.152, which authorizes the Board to set reasonable and necessary fees, and §1002.352, which authorizes the Board to establish a Geoscientist-in-Training program.

The proposed amendments implement the Texas Occupations Code §§1002.151, 1002.152, and 1002.352.

§851.80. Fees.

(a) - (n) (No change.)

(o) Initial Application for Geoscientist-in-Training Certificate--$25.

(p) Annual Renewal of Geoscientist-in-Training Certificate--$25.

This 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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Charles Horton
Interim Executive Director
Texas Board of Professional Geoscientists
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For further information, please call: (512) 936-4409

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SUBCHAPTER B. CODE OF PROFESSIONAL CONDUCT

22 TAC §851.106

This amendment is proposed under the Texas Occupations Code §1002.151, which authorizes the Board to adopt and enforce rules consistent with the Texas Geoscience Practice Act and necessary for the performance of its duties, and §1002.153, which allows the Board to adopt a code of professional conduct that is binding upon all license holders.

The proposed amendment implements the Texas Occupations Code §1002.151 and §1002.153.

§851.106. Responsibility to the Geoscience Profession.

(a) - (c) (No change.)

(d) A Professional Geoscientist shall remain mindful of his/her obligation to the profession and to protect public health, safety, and welfare and shall report to the Board known or suspected violations of the Act or the Rules of the Board.

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

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Interim Executive Director
Texas Board of Professional Geoscientists
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For further information, please call: (512) 936-4405

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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 101. GENERAL AIR QUALITY RULES

SUBCHAPTER A. GENERAL RULES

30 TAC §101.27

The Texas Commission on Environmental Quality (commission) proposes an amendment to §101.27.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULE

The commission collects annual fees from sources that are subject to the permitting requirements of Title IV or V of the 1990 Federal Clean Air Act Amendments (FCAAA) as required by Texas Health and Safety Code (THSC), Texas Clean Air Act (TCAA), §382.0621, Operating Permit Fee. The existing rule language in §101.27 structures the emissions fees as a billed system and the emissions fee rate per ton is adjusted annually based on the rate of change of the consumer price index (CPI). The revenue collected from the emissions fee is deposited in the Operating Permits Fees Account 5094.

As part of its air program activities, the commission implements an approved federal operating permit program (FCAAA, Titles IV and V, hereinafter referred to as "Title V"). As part of that approval, the commission is required to demonstrate that the fees collected from Title V sources are sufficient to support the Title V program. Additionally, this fee must be dedicated for use

only on Title V activities. This fee is commonly referred to as the air emissions fee and is currently set at $33.71 per ton for Fiscal Year 2010.

Since the air emissions fees are to be collected from Title V sources to support the Title V program, the commission is proposing to require only the owners or operators of Title V sources to be assessed an air emissions fee. Approximately 400 entities that are not Title V sources are paying an air emissions fee because they satisfy the criteria in the existing rule language to be assessed an air emissions fee. Federal regulations have been promulgated requiring certain emission sources such as municipal solid waste landfills and air curtain incinerators to obtain Title V permits; however, there are approximately 456 of these types of entities that do not meet the criteria in the existing rule language to be assessed an air emissions fee.

SECTION DISCUSSION

In addition to the proposed amendment associated with this rulemaking, various stylistic non-substantive changes are included to update rule language to current Texas Register style and format requirements. Such changes include appropriate and consistent use of acronyms, section references, rule structure, and certain terminology. These changes are non-substantive and generally are not specifically discussed in this preamble.

The proposed revision to §101.27(a), concerning applicability, would require the owners or operators of Title V sources to be subject to an air emissions fee and improve the readability of this subsection. The proposed rule revision would delete the nine applicability requirements in the current rule language and include a requirement for the owner or operator of an account that must obtain a Title V permit to be subject to an emissions fee. The intent of this proposed language is to require only the owners or operators of Title V sources to be subject to an emissions fee.

The proposed revision to §101.27(b), concerning self reported/billed information, would improve the readability of this subsection. The intent of this proposed amendment is to clarify that the completed emissions/inspection fees basis form must be returned to agency within 60 calendar days of the date the agency sends the emissions/inspection fees information packet.

The proposed revision to §101.27(c), concerning requesting an emissions/inspection fees information packet, would provide a procedure for those account owners or operators who do not receive the fee information packet described in proposed subsection (b). The intent of this proposed amendment is to set a date by which every account owner or operator that did not receive an emissions/inspection fees information packet by June 1 is to notify the commission and request a fee information packet. The language would also include a provision for new account owners or operators who begin operation during the fiscal year to request a packet within 30 calendar days of beginning operation.

The proposed revision to §101.27(d), concerning payment, would improve the readability of this subsection by clarifying the different methods of payment that are accepted by the commission.

The proposed revision to §101.27(e), concerning due date, would improve the readability of this subsection by clarifying that the payment of the entire emissions fee amount is due within 30 calendar days of the date of the invoice.

The proposed revision to §101.27(f), concerning basis for fees, would improve the readability of this subsection. Section 101.27(f) currently states that the emissions fee is based on the allowable levels and/or actual emissions at the account. This proposed revision would include certified registered emissions in a site's allowable levels, would define the allowable levels as those that are in effect when the fee is due, and would define the actual emissions as the emissions from all regulated pollutants emitted at the site during the last full calendar year preceding the beginning of the fiscal year that a fee is due. This proposed rule revision would clarify that the basis for the emissions fee should include the emissions from all operating conditions, including all emissions from emissions events and maintenance, startup, and shutdown activities. The proposed rule language would allow the owner or operator of an account to use all of the actual emissions from the site in lieu of the allowable levels in determining the basis for the emissions fee as long as a complete and verifiable emissions inventory was submitted; however, if a complete and verifiable emissions inventory was not submitted, the emissions fee would be based on all of the allowable levels. The intent of this proposed rule language is to clarify how the basis for the emissions fee is determined.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Jeff Horvath, Analyst, Strategic Planning and Assessment Section, has determined that for the first five-year period the proposed rule is in effect, no significant fiscal implications are anticipated for the agency or other units of state or local government as a result of administration or enforcement of the proposed rule.

The proposed rulemaking would simplify the emissions fee applicability requirements and the basis for determining the emissions fee. The intent of the proposed rulemaking is to align the commission's rule with THSC, §382.0621 and 40 Code of Federal Regulations (CFR) §70.9 requiring the owner and/or operator of a Title V source to pay annual fees that are sufficient to cover all direct and indirect costs for administering the federal operating permit program.

Current agency rules require the owner or operator of a regulated entity to be assessed an emissions fee if the regulated entity is operated at any time during the fiscal year for which the fee is assessed, and if one or more of nine specific conditions are met. The conditions allow the emissions fee to be assessed to more entities than just those who operate under a Title V permit. The proposed rule would remove these conditions. If adopted, this change will reduce the number of regulated entities assessed an emissions fee by approximately 400 regulated entities. These entities would include rock crushers, asphalt plants, compressor stations, and others.

There will also be an increase in the number of entities subject to the emissions fee due to recent federal regulations that now require certain emission sources such as municipal solid waste landfills and incinerators to obtain Title V permits. Because federal rules also require the owner and/or operator of a Title V source to pay annual fees sufficient to cover all direct and indirect costs for administering the federal operating permit program, these entities will also be subject to the emissions fee.

Overall, the proposed rule is expected to result in an increase and decrease in agency emissions fee revenue. The net effect of the proposed rule is anticipated to be a loss of revenue for the agency, but this loss is not expected to be significant.

The emissions fee for each applicable regulated entity is based on their actual emissions and/or their potential to emit levels for each regulated pollutant. A maximum of 4,000 tons for each regulated pollutant is used in determining the basis for the emis-

sions fee. The emissions fee rate per ton is adjusted each fiscal year by the rate of change of the CPI as published by the United States Bureau of Labor and Statistics in accordance with 40 CFR Part 70. The average used to predict the increase of the CPI is 3% each fiscal year. The actual increase of the CPI is likely to be slightly lower than 3%, but this number is used for budgeting purposes for regulated entities subject to the fee.

It is projected that if the proposed rulemaking is adopted, approximately 400 regulated non-Title V entities will no longer be assessed an emissions fee, resulting in a loss of agency revenue. Since the emissions fee rate per ton is adjusted annually based on the rate of change of the CPI, the expected overall loss is predicted to increase by 3% each year. However, there are an estimated 405 air curtain incinerators and 51 municipal solid waste facilities that will be assessed the emissions fee because they are now subject to the Title V permitting requirements due to recent federal changes. This change will result in additional fee revenue. The overall fiscal implications are reflected in Figure 1 of this preamble. The revenue loss to the Operating Permit Fees Account 5094 for the first five years the proposed rule is in effect is not anticipated to be significant. Total revenue from the operating permit emissions fees exceeds $30 million each year.

Figure 1: 30 TAC Chapter 101--Preamble

Local Government Costs

There are estimated to be 31 governmental entities that own or operate a municipal solid waste landfill and five governmental entities that own or operate air curtain incinerators that will be subject to Title V permitting requirements. Based on an average of 50 tons per year of non-methane organic compounds at municipal solid waste landfills, the estimated emissions fee assessed for the first year for each landfill is estimated to be approximately $1,800. Adjusting the fee rate per ton by the expected increase of the CPI of 3% per year, the emissions fee assessed for the next four years is expected to be $1,854, $1,910, $1,967, and $2,026 for each landfill.

Based on 30 tons of actual emissions from air curtain incinerators, the estimated emissions fee assessed for the first year for each incinerator is estimated to be $1,000. Adjusting the fee rate per ton by the expected increase of the CPI of 3% per year, the emissions fee assessed for the next four years is expected to be $1,030, $1,061, $1,093, and $1,126 for each incinerator. Total estimated costs to units of local government for additional emissions fees are reflected in Figure 2 of this preamble and are not anticipated to be significant.

Figure 2: 30 TAC Chapter 101--Preamble

PUBLIC BENEFITS AND COSTS

Mr. Horvath has also determined that for each year of the first five years the proposed rule is in effect, the public benefit anticipated from the change seen in the proposed rule will be a potential reduction in air emissions from municipal solid waste landfills and air curtain incinerators as well as more simple and clear rules regarding the assessment of emissions fees to support the Title V permitting program.

In general, no significant fiscal implications are anticipated for businesses or individuals as a result of the implementation or enforcement of the proposed rule.

The proposed rule is anticipated to reduce the number of regulated entities that will be assessed an emissions fee as approximately 400 regulated entities not required to obtain a Title V permit will no longer be assessed an emissions fee. It is anticipated that 20 privately owned municipal solid waste landfills will be subject to Title V requirements and thus an emissions fee, and that 400 privately owned air curtain incinerators will be subject to Title V requirements and thus an emissions fee.

Based on the average of 50 tons per year of non-methane organic compounds at municipal solid waste landfills, the emissions fee assessed for the first year is approximately $1,800 per regulated landfill. Adjusting the fee rate per ton by the expected increase of the CPI of 3% per year, the emissions fee assessed for the next four years is expected to be $1,854, $1,910, $1,967, and $2,026. Based on 30 tons of actual emissions from air curtain incinerators, the emissions fee assessed for the first year is approximately $1,000 per regulated incinerator. Adjusting the fee rate per ton by the expected increase of the CPI of 3% per year, the emissions fee assessed for the next four years is expected to be $1,030, $1,060, $1,093, and $1,126. Total estimated costs to privately owned landfills and incinerators for additional emissions fees as well as estimated savings to facilities no longer subject to the emissions fees are reflected in Figure 3 of this preamble. The net impact of the proposed rule to all privately owned entities would be a reduction in fees.

Figure 3: 30 TAC Chapter 101--Preamble

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

Overall, no adverse fiscal implications are anticipated for small or micro-businesses as a result of the implementation or administration of the proposed rule. The proposed rule is expected to affect approximately 800 small or micro-businesses overall, with 400 of them estimated to be owners or operators of air curtain incinerators. The other 400 are assumed to be those non-Title V entities that will no longer be assessed an emissions fee. Owners or operators of air curtain incinerators are anticipated to realize an increase in costs due to the emissions fee assessment, but those costs could be mitigated through the use of alternative methods in lieu of using an air curtain incinerator since the fee is based upon the total actual emissions and/or its potential to emit levels for each regulated pollutant. It is also assumed that the owners and operators of the air curtain incinerators will raise their fees to customers in order to recoup their costs.

Cost savings are anticipated for those non-Title V entities that will no longer be assessed an emissions fee. These businesses include rock crushers, asphalt plants, and compressor stations. The overall impact of the proposed rulemaking is a reduction in fees assessed to small or micro-businesses as illustrated in Figure 4 of this preamble.

Figure 4: 30 TAC Chapter 101--Preamble

SMALL BUSINESS REGULATORY FLEXIBILITY ANALYSIS

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rule is necessary to comply with federal law and are consistent with the public health, safety, environmental, and economic welfare of the state. Federal rules require entities permitted under Title V requirements to remit annual fees to support the Title V permit program. Any proposed alternative to reduce or remove the fee would not be consistent with the environmental and economic welfare of the state because there would not be an incentive to reduce the level of emissions released into the atmosphere or to recover agency costs associated with the Title V program.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rule does not adversely affect a local economy in a material way for the first five years that the proposed rule is in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the proposed rulemaking action is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that 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 amendment to Chapter 101 is not intended to protect the environment or reduce risks to human health from environmental exposure to air pollutants. Therefore, the commission finds that it is not a "major environmental rule". Additionally, the fee collected under the proposed revision to Chapter 101 generally should 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. The proposed rule change will simplify the rule requirements and ensure that only Title V sources are required to pay the emissions fee. The proposed change will also require Title V sources that have not been included in the rule previously to pay the Title V emissions fee.

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 does not meet any of these four applicability requirements of a "major environmental rule." Specifically, the emissions fee is required under federal law to be sufficient to support the permit program under Title V of the FCAAA (42 United States Code (USC), §§7651 *et seq* and §§7661 *et seq).* The emissions fee is also required by state law, THSC, TCAA, §382.0621 and §382.0622, to be sufficient to support the Title V programs. This proposed rulemaking does not exceed an express requirement of federal or state law. The proposed rulemaking does not exceed a requirement of a delegation agreement, but the emissions fee is specifically required by EPA's approval of the Title V programs to the commission. The proposed rulemaking was not developed solely under the general powers of the agency but was specifically developed and authorized under TCAA, §§382.011, 382.017, 382.0621, and 382.0622, and generally under TCAA, §§382.001 *et seq.*

The commission invites public comment regarding the draft regulatory impact analysis determination during the public comment period. 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 conducted a takings impact evaluation for the proposed rule in accordance with Texas Government Code, §2007.043. The specific purpose of the proposed rulemaking is to ensure that all Title V sources are required to pay the emissions fee, and that non-Title V sources are not required to pay the emissions fee. Promulgation and enforcement of the proposed rule will not burden private, real property because this is a fee rule that supports air quality programs of the commission. Although the proposed rule revision does not directly prevent a nuisance or prevent an immediate threat to life or property, the change in the emissions fee requirements does fulfill a federal mandate under 42 USC, §§7651 *et seq* and §§7661 *et seq.* The emissions fee is also required by state law, THSC, TCAA, §382.0621 and §382.0622, to be sufficient to support the Title V programs. Consequently, the proposed change to the fee requirements is an action reasonably taken to fulfill an obligation mandated by federal and state law. Therefore, this proposed rulemaking action will not constitute a taking under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rulemaking and found the proposal is a rulemaking identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) relating to rules subject to the Coastal Management Program (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 amendment is consistent with CMP goals and policies because the rulemaking is a fee rule, which is a procedural mechanism for paying for commission programs; will not have direct or significant adverse effect on any coastal natural resource areas; will not have a substantive effect on commission actions subject to the CMP; and promulgation and enforcement of the amendment will not violate (exceed) any standards identified in the applicable 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

The emissions fee is required under federal law to be sufficient to support the permit program under Title V of the FCAAA. The emissions fee is also required by state law, THSC, TCAA, §382.0621 and §382.0622, to be sufficient to support the Title V programs. This proposed rulemaking does not exceed an express requirement of federal or state law. The intent of this proposed amendment is to require only the owner or operator of a regulated entity that must obtain a federal operating permit as described in 30 TAC Chapter 122 to remit to the commission an emissions fee each fiscal year.

ANNOUNCEMENT OF HEARING

The commission will hold a public hearing on this proposal in Austin on January 15, 2010, at 10:00 a.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 Ms. 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 Mr. 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 2008-025-101-EN. The comment period closes January 25, 2010. 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 Mr. Michael De La Cruz, Air Quality Division, (512) 239-0259.

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 TWC, §5.103, concerning Rules, that authorizes the commission to adopt rules necessary to carry out its powers and duties under; 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 (TCAA). 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; THSC, §382.011, concerning General Powers and Duties, that authorizes the commission to control the quality of the state's air; THSC, §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; THSC, §382.0621, concerning Operating Permit Fee, which requires the commission to collect fees for sources subject to Titles IV or V of the Federal Clean Air Act Amendments; §382.0622, concerning Clean Air Act Fees, which restricts the use of Clean Air Act fees; and the entire TCAA (§§382.001 *et seq),* which provides authority for all of the air quality programs which the fees are necessary to support.

The proposed amendment implement THSC, §§382.002, 382.011, 382.012, 382.017, 382.0621, and 382.0622.

§101.27. Emissions Fees.

(a) Applicability. The owner or operator of an [~~each~~] account that is required to obtain a federal operating permit as described in Chapter 122 of this title (relating to Federal Operating Permits Program) [~~to which this rule applies~~] shall remit to the commission an emissions fee each fiscal year. A fiscal year is defined as the period from September 1 through August 31. A fiscal year, having the same number as the next calendar year, begins on the September 1 prior to that calendar year. Each account will be assessed a separate emissions fee. An account subject to both an emissions fee and an inspection fee, under §101.24 of this title (relating to Inspection Fees), is required to pay only the greater of the two fees. [~~Each account will be assessed a separate emissions fee. Provisions of this section apply to all accounts, including accounts which have not been assigned specific commission identification numbers. The owner or operator of an account subject to an emissions fee requirement is responsible for contacting the commission to obtain an identification number.~~] The commission will not initiate the combination or separation of accounts solely for fee assessment purposes. If an account is operated at any time during the fiscal year that a [~~for which the~~] fee is being assessed, a full emissions fee is due. If the commission is notified in writing that the account is not and will not be in operation during that fiscal year, a fee will not be due. [~~All regulated air pollutants, as defined in subsection (f)(3) of this section, including, but not limited to, those emissions from point and fugitive sources during normal operations with the exception of (for applicability purposes only) hydrogen, oxygen, carbon dioxide, water, nitrogen, methane, and ethane, are used to determine applicability of this section. In accordance with rules promulgated by EPA in 40 Code of Federal Regulations (CFR) Part 70, concerning the use of fugitive emissions in major source determinations, fugitive emissions shall be considered toward applicability of this section only for those source categories listed in 40 CFR §51.166(b)(1)(iii). For purposes of this section, an affected account shall have met one or more of the following conditions:~~]

[~~(1) the account emits or has the potential to emit, at maximum operational or design capacity, 100 tons per year (tpy) or more of any single air pollutant;~~]

[~~(2) the account emits or has the potential to emit, at maximum operational or design capacity, 50 tpy or more of volatile organic compounds (VOC) or nitrogen oxides (NOx) and is located in any serious ozone nonattainment area listed in §101.1 of this title (relating to Definitions);~~]

[~~(3) the account emits or has the potential to emit, at maximum operational or design capacity, 25 tpy or more of VOC or NO x and is located in any severe ozone nonattainment area listed in §101.1 of this title;~~]

[~~(4) the account emits ten tpy or more of a single hazardous air pollutant, as defined in FCAA, §112;~~]

[~~(5) the account emits an aggregate of 25 tpy or more of hazardous air pollutants, as defined in FCAA, §112;~~]

[~~(6) the account is subject to the National Emission Standards for Hazardous Air Pollutants (40 CFR Part 61) that apply to nontransitory sources;~~]

[~~(7) the account is subject to the control requirements or emissions limitations for New Source Performance Standards (40 CFR Part 60);~~]

[~~(8) the account is subject to the Prevention of Significant Deterioration (40 CFR Part 52) requirements; or~~]

[~~(9) the account is subject to the Acid Deposition provisions in the FCAA Amendments of 1990, Title IV.~~]

(b) Self reported/billed information. Emissions/inspection fees information packets will be mailed to each [~~affected~~] account owner or operator prior to the fiscal year that a [~~for which the~~] fee is due. The completed emissions/inspection fees basis form must [~~shall~~] be returned to the address specified on the emissions/inspection fees basis form within 60 calendar days of the date the agency sends the emissions fees information packet. The completed emissions/inspection fees basis form must [~~shall~~] include, at least, the company name, mailing address, site name, all commission [~~Texas Commission on~~

Environmental Quality (TCEQ)] identification numbers, applicable Standard Industrial Classification (SIC) category, the emissions of all regulated air pollutants at the account for the reporting period, and the name and telephone number of the person to contact in case questions arise regarding the fee payment. If more than one SIC category can apply to an account, the category reported must [shall] be the [that] one with the highest associated fee as listed in §101.24 of this title. Subsequent to a review of the information submitted, a billing statement of the fee assessment will be sent to the account owner or operator.

(c) Requesting fee information packet. If an account owner or operator has not received the fee information packet described in subsection (b) of this section by June 1 prior to the fiscal year that a fee is due, the owner or operator of the account shall notify the commission by July 1 prior to the fiscal year that a fee is due. For accounts that begin or resume operation after September 1, the owner or operator of the account shall request an information packet within 30 calendar days prior to commencing operation.

[(1) For fiscal year 2003, if an account which is subject to the emissions fee in this section has not received the information packet described in subsection (b) of this section by November 1, 2002, the owner or operator of the account shall notify the commission by December 1, 2002. For accounts which begin operation after November 1, the owner or operator of the account shall request an information packet within 30 days of commencing operation.]

[(2) For subsequent fiscal years, if an account which is subject to the emissions fee in this section has not received the information packet described in subsection (b) of this section by June 1 prior to the fiscal year in which the fee is due, the owner or operator of the account shall notify the commission by July 1 prior to the fiscal year in which the fee is due. For accounts which begin operation after September 1, the owner or operator of the account shall request an information packet within 30 days of commencing operation.]

(d) Payment. Fees must be remitted by check, certified check, electronic funds transfer, or money order [made payable to the TCEQ] and sent to the [TCEQ] address printed on the billing statement.

(e) Due date. Payment of the emissions fee is due within 30 calendar days of the date the agency sends a statement of the assessment to the account [facility] owner or operator. [If an account commences or resumes operation during the fiscal year in which the fee is assessed, the full emissions fee will be due prior to commencement or resumption of operations.]

(f) Basis for fees.

(1) The fee must [shall] be based on allowable levels and/or actual emissions at the account [during the last full calendar year preceding the beginning of the fiscal year for which the fee is assessed]. For purposes of this section, allowable levels [the term "allowable levels"] are those limits as specified in an enforceable document such as a permit, certified registration of emissions, or Commission Order that [which] are in effect during the fiscal year that a fee is due and actual emissions are the emissions of all regulated pollutants emitted from the account during the last full calendar year preceding the beginning of the fiscal year that a fee is due [on the date the fee is due]. Under no circumstances must [shall] the fee basis be less than the actual emissions at the account. The fee applies to the regulated pollutant emissions at the account, including those emissions from point and fugitive sources. The fee basis must [shall] include emissions during all operational conditions, including all emissions from emissions events and maintenance, startup, and shutdown activities as described in Subchapter F of this chapter (relating to Emissions Events and Scheduled Maintenance, Startup, and Shutdown Activities). [The basis for calculating fees for emissions from upset events and scheduled or unscheduled maintenance, startup, or shutdown activities shall include all such events and all quantities of emissions, whether reportable or recordable under rule in Chapter 101, Subchapter F of this title.] Although certain fugitive emissions are excluded for applicability determination purposes under subsection (a) of this section, all fugitive emissions must be considered for fee calculations after applicability of the fee has been established. A maximum of 4,000 tons of each regulated pollutant will be used for fee calculations. The fee for each fiscal year is set at the following rates.

Figure: 30 TAC §101.27(f)(1)

[Figure: 30 TAC §101.27(f)(1)]

(2) The emissions tonnage for the account for fee calculation purposes will be the sum of those allowable levels and/or actual emissions for individual emission points or process units at the account rounded up to the nearest whole number, as follows.

(A) Where there is an enforceable document such as a permit, certified registration of emissions, or a Commission Order establishing allowable levels for individual emission points or process units, the actual emissions from all individual emission points and process units at the account may be used to calculate the fee basis only if a complete and verifiable emission inventory for the account is submitted as described in §101.10 of this title (relating to Emissions Inventory Requirements). Where a complete and verifiable emissions inventory is not submitted, the executive director may direct that the fee be based on all of the allowable levels for the account. [Where there is an enforceable document, such as a permit or Commission Order, establishing allowable levels, actual emissions may be used only if a completed Emissions Inventory Questionnaire for the account is submitted with the fee payment. For stacks or vents, the inventory must include verifiable data based on continuous emission monitor measurements, other continuously monitored values, such as fuel usage and fuel analysis, or stack testing performed during normal operations using EPA-approved methods and quality-assured by the executive director. All measurements, monitored values, or testing must have been performed during the basis year as defined in paragraph (1) of this subsection or if not performed during the basis year, must be representative of the basis year as defined in paragraph (1) of this subsection. Actual emission rates may be based upon calculations for fugitive sources, flares, and storage tanks. Actual production, throughput, and measurement records must be submitted, along with complete documentation of calculation methods. Thorough justification is required for all assumptions made and factors used in such calculations. If the actual emission rate submitted for fee purposes is less than 60% of the allowable emission rate, an explanation of the discrepancy must be submitted. Where inadequate or incomplete documentation is submitted, the executive director may direct that the fee be based on allowable levels. Where a complete and verifiable inventory is not submitted, allowable levels shall be used.]

(B) Where there is not an enforceable document[,] such as a permit, certified registration of emissions, or a Commission Order[,] establishing allowable levels for individual emissions points or process units; actual emissions from all individual emission points and process units must [shall] be used to calculate the fee basis. Actual production, throughput, or measurement records must be submitted along with complete documentation of calculation methods. Thorough justification is required for all assumptions made and emission factors used in such calculations.

(3) For purposes of this section, the term "regulated pollutant" must [shall] include any volatile organic compound [VOC], any pollutant subject to Federal Clean Air Act (FCAA) [FCAA], §111, any pollutant listed as a hazardous air pollutant under FCAA, §112, each

pollutant that [~~for which~~] a national primary ambient air quality standard has been promulgated (including carbon monoxide), and any other air pollutant subject to requirements under commission rules, regulations, permits, orders of the commission, or court orders.

(g) Nonpayment of fees. Each emissions fee payment must be paid at the time and in the manner and amount provided by this subchapter. Failure to remit the full emissions fee by the due date must [~~shall~~] result in enforcement action under Texas Water Code, §7.178. The provisions of this section, as first adopted and amended thereafter, are and must [~~shall~~] remain in effect for purposes of any unpaid fee assessments, and the fees assessed in accordance with such provisions as adopted or as amended remain a continuing obligation.

(h) Late payments. The agency shall impose interest and penalties on owners or operators of accounts who fail to make payment of emissions fees when due in accordance with Chapter 12 of this title (relating to Payment of Fees).

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

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

TRD-200905763
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
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For further information, please call: (512) 239-2548

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SUBCHAPTER C. VOLUNTARY SUPPLEMENTAL LEAK DETECTION PROGRAM

30 TAC §§101.150, 101.151, 101.153, 101.155

The Texas Commission on Environmental Quality (commission) proposes new §§101.150, 101.151, 101.153, and 101.155.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

House Bill (HB) 1526 of the 80th Legislature (2007), codified in Texas Health and Safety Code, §382.401, and in Texas Water Code, §5.752(2), requires the commission to establish by rule a program that allows the owner or operator of a facility to voluntarily use as a supplemental detection method any leak detection method that has been incorporated and adopted by the United States Environmental Protection Agency (EPA) into a program for detecting leaks or emissions of air contaminants. The only known contaminant for which alternative leak detection technology is applicable is Volatile Organic Compounds (VOC). On December 22, 2008, EPA adopted its rule regarding Alternative Work Practice to Detect Leaks from Equipment (73 *Federal Register* 78199).

These rules would provide incentives for participation in a voluntary leak detection program. Incentives would include enforcement discretion and compliance history-based penalty reductions.

These new rules will not be submitted as a revision to the State Implementation Plan (SIP) under the Federal Clean Air Act, codified at 42 United States Code, §7401 *et seq.* This incentive program is not required by federal law or by the existing Texas SIP.

This rulemaking project addresses leaks from components or equipment that are not subject to the commission's regulatory program for leak detection and repair (LDAR) components. Leaks from LDAR components will be addressed through the commission's rulemaking in 30 TAC Chapter 115 for Alternative Work Practice (AWP) standards (Rule Project 2009-030-115-EN) to incorporate an AWP similar to the work practice adopted by the EPA. The AWP uses similar imaging-based technology for required fugitive leak detection.

SECTION BY SECTION DISCUSSION

The commission proposes new §101.150, Purpose and Applicability, which describes the purpose of new Subchapter C regarding the Voluntary Supplementary Leak Detection program. It sets forth the applicable facilities and equipment that may be included in the program.

The commission proposes new §101.150(a), which describes the program as a means to encourage, through incentives, the use of alternative leak detection technology with subsequent timely repairs that are not part of a Method 21 LDAR program.

The commission proposes new §101.150(b), which provides a scope of equipment or components that are eligible for this program. The scope is written by exception, where all equipment or components except that under a required fugitive monitoring program, or that required by permit or rule to use the alternative leak detection method may qualify for the program.

The commission proposes new §101.151, Voluntary Supplemental Leak Detection Definitions, which defines terms used in this new subchapter. This section defines alternative leak detection technology, imaging, leak, optical gas imaging instrument, repair, and supplemental detection method for the express purposes of this program.

The commission proposes new §101.153, Voluntary Supplemental Leak Detection Program, that describes the general program objectives, elements of an approvable program, exceptions, repair, and recordkeeping requirements for the owner or operator participating in this program.

The commission proposes new §101.153(a), which describes the general program to encourage supplementary LDAR.

The commission proposes new §101.153(b), which outlines the minimum requirements for an owner or operator to qualify to include annual surveys, minimum equipment specifications, and operator training requirements when optical gas imaging technology is used. Equipment specifications are consistent with EPA's specifications for imaging equipment in their AWP rules.

The commission proposes new §101.153(c), which lists the types of emissions and leak records that cannot be used under this program. Emissions and leak records that are excluded from use in this program include those that were part of an investigation, records of audits conducted under The Texas Environmental, Health, and Safety Audit Privilege Act, and emissions from equipment or facilities that lack authorization.

The commission proposes new §101.153(d), which describes the minimum requirements for LDAR activities to be met in order to qualify for the program incentives. These requirements include a 30-day repair deadline, and that the leak and its repair had not caused a nuisance as defined in §101.4.

The commission proposes new §101.153(e), which describes the records required by the owner or operator conducting leak detection under this program. These records include information that supports the elements of an approvable program, and each LDAR made in accordance with this subchapter.

The commission proposes new §101.155, Program Incentives, which describes how the commission will provide incentives that encourage voluntary supplemental leak detection, and conditions upon which those incentives will be awarded.

The commission proposes new §101.155(1), which provides enforcement discretion to the owner or operator. For the purposes of this subchapter, enforcement discretion means the executive director shall not seek to address a violation through an order that includes an administrative penalty for that violation.

The commission proposes new §101.155(2), which acknowledges the owner or operator's participation in this program may be reflected on the facility's compliance history in accordance with Chapter 60. Specifically, facilities using alternative technologies under the new rule and complying with all necessary actions in the rule may receive credit for participation in a voluntary pollution reduction program. Participation in this program will not act as a component which calculates into the compliance history score. Participation in this program will be reflected on the compliance history report and act as a mitigating factor when a facility has a classification of poor performer. According to 30 TAC §60.2(e)(3), "the executive director shall evaluate mitigating factors for a site classified as a poor performer." The evaluation to mitigate a facility from a poor performer to an average performer is processed within the Enforcement Division with input from other areas of the agency prior to the annual posting of compliance history classifications to the commission's website. In addition, the Enforcement Division may evaluate a facility for mitigation in the event that a compliance history appeal is submitted by the owner or operator of the facility, per 30 TAC §60.3(e).

HB 1526 states that the commission may offer other incentives that are not included in these rules. For example, the commission has implemented an on-site technical assistance program as authorized by Texas Health and Safety Code, §361.509(a)(7), which authorizes the commission to provide to business and industry, as resources allow, on-site assistance in identifying potential source reduction and waste minimization techniques and practices, and in conducting internal source reduction and waste minimization audits. Because this is an established program which is available to all regulated entities regardless of whether alternative leak detection technology is used, it is not included as part of this rule.

Also, HB 1526 provides that credits or offsets to the facility's emissions reduction requirements based on the emissions reductions achieved by voluntary use of alternative leak detection technology may be an incentive. In order to create credits and offsets under state and federal law, they must be creditable, quantifiable, enforceable, permanent reductions that are also surplus reductions (they must not be relied upon to meet other requirements). The commission is not including this as a possible incentive because the alternate leak detection technology cannot speciate or quantify emissions, and the use of the technology and associated repairs cannot ensure that emission reductions are permanent. Additionally, the use of the technology cannot ensure that the emission reductions are not being implemented to meet another state or federal requirement. Leaks of unauthorized emissions, even if repaired, cannot qualify as creditable emissions.

HB 1526 also requires the commission to limit reporting requirements only to those components that are not repairable within the commission's established reasonable repair time, and to provide exemptions from commission enforcement for certain leaks. However, to maintain the integrity of, and compliance with, the Texas SIP and the Title V Permitting Program under the Federal Clean Air Act, the commission cannot implement these incentives. The Texas SIP includes reporting requirements for emissions associated with leaks and repair of leaks, such as for emissions inventories in §101.10 and excess emissions in §101.201 and §101.211. Texas' approved Title V permitting program requires deviation reporting under 30 TAC §122.145. Also, the Texas Title V program requires a set frequency of compliance certification reviews and on-site investigations to satisfy the Compliance Monitoring Strategy as required by EPA. Failure to satisfy that strategy could result in EPA identifying concerns regarding the administration of the program. Therefore, scheduling of compliance inspections was not addressed as an incentive in this proposed rulemaking.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

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 implement a voluntary program using criteria and methodologies currently used in similar on-demand investigations and current prioritization strategies for investigation and enforcement. No additional staff resources will be required for this new voluntary program.

PUBLIC BENEFITS AND COSTS

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 compliance with state law and greater protection of the environment and public health and safety through the reduction of VOC emissions that would otherwise not be detected.

The proposed rules will not have a significant fiscal impact on individuals or businesses. Participation in the supplemental leak detection program will be voluntary. Facilities that process, store, or transfer VOCs are typically owned by large businesses. If a business chooses to voluntarily implement a supplemental leak detection program under the proposed rules, it could spend as much as $108,000 for a camera, associated hardware, camera maintenance, training (for four operators), and recordkeeping in the first year of implementation. In years two through five, annual costs for maintenance and required training could be as much as $9,000.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rules since participation in the supplemental leak detection program is voluntary and most small businesses do not own or operate facilities that would benefit from participation in this voluntary program. If a small business does implement a supplemental leak detection program, it would experience the same costs as those experienced by a large business.

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 state law and are not expected to adversely affect a small or micro-business in a material way for the first five years that the proposed rules are in effect.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking in light of the regulatory impact analysis requirements of Texas Government Code, §2001.0225, and determined that the proposed rulemaking does not meet the definition of a "major environmental rule." Furthermore, it does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). 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 new rules would implement HB 1526, 80th Legislature (2007) by developing an incentive program that allows the owner or operator of a facility to voluntarily use as a supplemental detection method any leak detection method that has been incorporated and adopted by the EPA into a program for detecting leaks or emissions of air contaminants. The proposed new rules will not adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

Further, 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. The proposed new rules do not exceed a standard set by federal law or exceed an express requirement of state law. There is no contract or delegation agreement that covers the topic that is the subject of this rulemaking. Finally, this rulemaking was not developed solely under the general powers of the commission, but is authorized by specific sections of the Texas Health and Safety Code and Texas Water Code that are cited in the STATUTORY AUTHORITY section of this preamble. Therefore, this rulemaking is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b), because the proposed new rules do not meet any of the four applicability requirements.

The commission invites public comment regarding the draft regulatory impact analysis determination during the public comment period.

TAKINGS IMPACT ASSESSMENT

The commission completed a takings impact analysis for the proposed new rules. The specific purpose of this rulemaking is to develop an incentive program that allows the owner or operator of a facility to voluntarily use as a supplemental detection method any leak detection method that has been incorporated and adopted by the EPA into a program for detecting leaks or emissions of air contaminants. Promulgation and enforcement of the proposed new rules would be neither a statutory nor a constitutional taking because they do not affect private real property. Specifically, the proposed new rules do not affect private property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of a governmental action. Therefore, the proposed new rules do not constitute a takings under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rulemaking and found the proposal is a rulemaking identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) relating to rules subject to the Coastal Management Program, and will, therefore, require that goals and policies of the Texas Coastal Management Program (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 new rules are consistent with CMP goals and policies because the rulemaking, which involves an incentive program designed to enhance the current LDAR programs for air emissions, will have no adverse environmental impact; will not have direct or significant adverse effect on any coastal natural resource areas; will not have a substantive effect on commission actions subject to the CMP; and promulgation and enforcement of the new rules will not violate (exceed) any standards identified in the applicable 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

Information submitted in support of the voluntary supplemental LDAR program at sites subject to the Federal Operating Permits (FOP) Program may be used as potential credible evidence to indicate potential noncompliance (or compliance) with FOP terms and conditions and subject to deviation reporting.

ANNOUNCEMENT OF HEARINGS

The commission will hold a public hearing on this proposal in Dallas on January 19, 2010 at 10:00 am in the Irving Library; Austin on January 20, 2010 at 10:00 am in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle; and in Houston on January 21, 2010 at 10:00 am in Conference Room B at the Houston-Galveston Area Council. 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 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 any of these hearings

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 2007-040-101-CE. The comment period closes January 25, 2010. 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 Joseph A. Janecka, P.E., Field Operations Support Division, at (512) 239-1353 or e-mail *jjanecka@tceq.state.tx.us.*

STATUTORY AUTHORITY

The new 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 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; THSC, §382.011, concerning General Powers and Duties, that authorizes the commission to control the quality of the state's air; and THSC, §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 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; THSC, §382.021, concerning Sampling Methods and Procedures, that authorizes the commission to prescribe the sampling methods and procedures to determine compliance with its rules; THSC, §382.022, concerning Investigations, that authorizes the executive director to make or require certain investigations, and THSA, §382.401, concerning Alternative Leak Detection Technology, the commission's establishment of an alternative leak detection technology incentive program; TWC, §5.752, concerning Definitions, which describes the commission's innovative programs; THSC, §5.754, concerning Classification and Use of Compliance History, that authorizes the commission to establish standards for the classification of a person's compliance history; and TWC, §7.002, concerning Enforcement Authority, that provides the commission enforcement authority.

The new sections implement THSC, §§382.002, 382.011, 382.012, 382.016, 382.017, 382.021, 382.022, and 382.401; and TWC, §§5.752, 5.754, and 7.002.

§101.150. Purpose and Applicability.

(a) Purpose. The purpose of this subchapter is to provide a program that encourages and provides incentives for voluntary monitoring of non-United States Environmental Protection Agency Method 21 Leak Detection And Repair defined equipment in Volatile Organic Compound (VOC) service, using remote sensing technologies, such as optical gas imaging technology. Participation under this subchapter is voluntary.

(b) Applicability. The following sources are eligible for participation in the program - any authorized equipment or facilities in VOC service, including processing, storage, and transfer:

(1) that are not subject to a required fugitive monitoring program; or

(2) where an alternative leak detection method is not the monitoring method required in a permit or rule.

§101.151. Voluntary Supplemental Leak Detection Definitions.

(a) Alternative leak detection technology--Technology other than that specified by the United States Environmental Protection Agency Method 21, including optical gas imaging technology, designed to detect emissions of air contaminants.

(b) Imaging--A means or process of making emissions visible that may otherwise be invisible to the naked eye.

(c) Leak--For purposes of this subchapter, a leak is any emissions imaged by an optical gas imaging instrument, as defined in this section.

(d) Optical gas imaging instrument--An instrument that makes emissions visible that may otherwise be invisible to the naked eye.

(e) Repair--The adjustment or alteration of a component in order to eliminate a leak.

(f) Supplemental detection method--Any leak detection method that supplements or adds to an existing technology approved by the executive director such as 40 Code of Federal Regulations Part 60, Appendix A-7, Method 21 monitoring program.

§101.153. Voluntary Supplemental Leak Detection Program.

(a) General program objective. Owners or operators are encouraged to voluntarily and routinely use an alternative leak detection technology to detect and repair leaks not otherwise detectable.

(b) Elements of an approvable program. In order to be considered for approval a program must include, at a minimum:

(1) A schedule for leak surveys to be conducted at least once per year.

(2) If optical gas imaging is the supplemental detection method used, then the leak detection devices shall meet the following specifications:

(A) the requirements of 40 Code of Federal Regulations (CFR) §60.18(i)(1) (December 22, 2008); and

(B) the requirements of the daily instrument check as specified in 40 CFR §60.18(i)(2) (December 22, 2008).

(3) The daily instrument check must be performed by each person that is performing imaging for that day.

(4) If optical gas imaging is the supplemental detection method used, any person that performs the supplemental leak detection of this subchapter shall comply with the following minimum training requirements:

(A) The operator of the optical gas imaging instrument must receive a minimum of 24 hours of initial training on the specific

make and model of the optical gas imaging instrument before using the instrument for the purposes of this supplemental leak detection.

(B) Operators using optical gas imaging instruments for this supplemental leak detection shall comply with one of the following requirements for on-going training purposes:

(i) operators shall attend an annual eight-hour refresher training class on the optical gas imaging instrument used for this supplemental leak detection; or

(ii) operators shall maintain a minimum of 100 hours per calendar year of hands-on operational experience with the model of optical gas imaging instrument used for the supplemental leak detection. Operators electing this option shall maintain a written log of the operator's operational experience with the optical gas imaging instrument.

(c) Exceptions. The following information cannot be used to support a program incentive under this subchapter:

(1) where the leak was independently detected, or an investigation of the leak was initiated by the executive director or personnel of any air pollution program with jurisdiction, before the leak was detected by the owner or operator;

(2) information resulting from an audit performed under the Texas Environmental, Health, and Safety Audit Privilege Act; and

(3) emissions from equipment or facilities constructed or modified without authorization.

(d) Repair.

(1) Repairs must be completed within 30 days of the leak detected by the alternative leak detection technology; and

(2) The leak and its repair must not have caused a nuisance (as defined in §101.4 of this title (relating to Nuisance).

(e) Recordkeeping. The owner or operator participating in this program shall maintain records on site, or at a pre-determined off-site location, for five years. Records must be available for inspection by the executive director or local air pollution control program with jurisdiction upon request. The records must include:

(1) If optical gas imaging is the supplemental detection method used:

(A) digital recordings of the leak when first observed;

(B) recordings which document the successful repair of the equipment or component;

(C) all digital recordings shall be saved in a non-proprietary file format; and

(D) the digital recordings shall contain information readily available from the camera including date, time, and camera settings.

(2) Documentation demonstrating compliance with approvable program elements listed in subsection (b)(1) - (4) of this section.

(3) The records will include information on the completion of the repair sufficient to demonstrate compliance with this program.

§101.155. Program Incentives.

If leaks are detected and repairs are completed and recorded in compliance with this subchapter, one or both of the following incentives will be awarded:

(1) Enforcement discretion; or

(2) Compliance history-based penalty reductions. The participation of the owner or operator in this program may be applied to the Compliance History in a manner consistent with Chapter 60 of this title (relating to Compliance History).

This 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 December 11, 2009.

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Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
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CHAPTER 115. CONTROL OF AIR POLLUTION FROM VOLATILE ORGANIC COMPOUNDS

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes amendments to §§115.322 - 115.326, 115.352 - 115.357, 115.781, 115.782, and 115.786 - 115.788. The commission also proposes new §115.358 and §115.784.

The amended and new sections of Chapter 115 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

On December 22, 2008, the EPA finalized an alternative work practice using optical gas imaging instruments to detect fugitive emission leaks from equipment. The EPA now allows the use of the alternative work practice for numerous federal leak detection and repair (LDAR) regulations in 40 Code of Federal Regulations (CFR) Parts 60, 61, 63, and 65. Because of overlapping state rules and permit requirements with fugitive emission LDAR programs, many facilities will not be able to use the federal alternative work practice until Texas fugitive emission LDAR rules are revised and, if necessary, the sites obtain permit revisions to allow the use of the alternative work practice. This proposed rulemaking would amend the Chapter 115 fugitive emissions rules to incorporate an alternative work practice similar to the work practice adopted by the EPA in December 2008. New Source Review (NSR) air permit LDAR requirements are a separate regulatory requirement from the Chapter 115 fugitive emissions rules and this rulemaking would not change any site's applicable permit LDAR requirements. If this rulemaking is adopted, companies wanting to use the alternative work practice would still need to change the facility's permit LDAR requirements through the normal NSR process.

Fugitive emission LDAR rules in Chapter 115 fall under two general categories and all are incorporated in the SIP. Subchapter D, Divisions 2 and 3 are general volatile organic compounds (VOC) fugitive emission LDAR rules and were implemented to satisfy reasonably available control technology (RACT) requirements of the Federal Clean Air Act (FCAA). The highly-reactive volatile

organic compounds (HRVOC) fugitive emission LDAR rules are in Subchapter H, Division 3 and were implemented as part of the Houston-Galveston-Brazoria (HGB) attainment demonstration for the one-hour ozone National Ambient Air Quality Standard (NAAQS). The proposed rulemaking revises Subchapter D, Divisions 2 and 3, and Subchapter H, Division 3 to incorporate an alternative work practice similar to the alternative work practice adopted by the EPA. Subchapter D, Division 2 applies to petroleum refineries in Gregg, Nueces, and Victoria Counties. Subchapter D, Division 3 applies to the following facility types in the Beaumont-Port Arthur (BPA), Dallas-Fort Worth (DFW), El Paso, and HGB areas as defined in §115.10: petroleum refineries; synthetic organic chemical, polymer, resin, or methyl-tert-butyl ether manufacturing processes; or natural gas/gasoline processing operations. Subchapter H, Division 3 applies to the following facility types in the HGB area as defined in §115.10 that HRVOC is a raw material, intermediate, final product, or in a waste stream: petroleum refineries; synthetic organic chemical, polymer, resin, or methyl-tert-butyl ether manufacturing processes; or natural gas/gasoline processing operations.

The alternative work practice is not a different test method that can be just referenced as an alternate to the method traditionally used for performing LDAR screening with a hydrocarbon analyzer, EPA Method 21. At the current state of technology, the optical gas imaging instruments used for the alternative work practice are not capable of determining concentration levels. Therefore, optical gas imaging instruments cannot be directly compared to the hydrocarbon analyzers used with Method 21. Because optical gas imaging instruments may not be as sensitive as Method 21 hydrocarbon analyzers, it is possible that some smaller leaks may go undetected under an alternative work practice monitoring program. The fundamental premise of the alternative work practice adopted by the EPA is that more frequent monitoring with optical gas imaging instruments will allow larger leaks to be detected and repaired faster than the leak might have been under the traditional LDAR work practice. While some smaller leaks might not be detected by optical gas imaging instruments, the overall control level under an alternative work practice approach using optical gas imaging instruments is considered to be equivalent or superior to the traditional work practice using Method 21. This principle makes the alternative work practice more similar to an alternative means of control rather than an alternative test method. Additional detail concerning the EPA's analyses justifying the use of the alternative work practice can be found in the December 22, 2008, issue of the *Federal Register* (73 FR 78199).

The Chapter 115 alternative work practice being proposed by the commission is optional. Owners or operators of sites subject to the Chapter 115 fugitive emission LDAR rules may choose to use the alternative work practice or continue using the current traditional work practice. In addition, because optical gas imaging instruments have limitations regarding the chemicals that can be detected, the commission is not proposing an "all-in or all-out" approach. Even within the same unit at a site, there may be different components in VOC service that an optical gas imaging instrument is not capable of detecting sufficient VOC species to be effectively used under the alternative work practice. Therefore, companies must have sufficient flexibility to evaluate which components can be monitored according to the Chapter 115 alternative work practice and which components must be monitored according to the traditional Method 21 work practice.

Because the alternative work practice is a type of alternate means of control under the Chapter 115 fugitive emission LDAR rules, additional revisions to the rules are necessary beyond just referencing the federal alternative work practice in order to properly integrate the alternative work practice into the rules. As much as possible, the commission has attempted to mirror the alternative work practice adopted by the EPA. For example, the optical gas imaging instrument specifications in 40 CFR §60.18(i) are incorporated by reference and the frequencies for performing the alternative work practice are identical to the frequencies in Table 1 to Subpart A of 40 CFR Part 60. However, certain aspects of the alternative work practice adopted by the EPA are not consistent with the requirements of the Chapter 115 rules. In addition, there are components of the federal alternative work practice that may not provide adequate enforceability to ensure that the alternative work practice would be effectively implemented. Therefore, the commission is proposing some additional requirements to help ensure proper enforceability and effectiveness of the Chapter 115 alternative work practice. These issues and additional requirements are discussed in greater detail in the SECTION BY SECTION DISCUSSION portion of this preamble.

In the final alternative work practice adopted by the EPA, an annual Method 21 screening is required for all components that are monitored according to the EPA alternative work practice. One of the EPA's indicated purposes of this annual Method 21 screening requirement was to assess the extent that small leaks are undetected by the alternative work practice and become larger leaks (73 FR 78202). The commission agrees with the EPA's intent behind this requirement and proposes to incorporate this requirement into the Chapter 115 alternative work practice; however, the commission is proposing an option for this annual Method 21 monitoring requirement for certain components subject to Subchapter H, Division 3 if the components are monitored according to the Chapter 115 alternative work practice but are not subject to federal LDAR regulations in 40 CFR Parts 60, 61, 63, or 65. Additional detail on this option is provided in the SECTION BY SECTION DISCUSSION portion of this preamble. The commission is not proposing to incorporate the requirement to submit the annual Method 21 screening data to the EPA electronically that is specified in 40 CFR §60.18(i)(5). Sites subject to federal LDAR regulations in 40 CFR Parts 60, 61, 63, or 65 would still be required to comply with this electronic reporting requirement if the owner or operator is using the alternative work practice for compliance with those federal LDAR regulations.

Demonstrating Noninterference under FCAA, Section 110(l)

The commission provides the following information to clarify why the inclusion of the Chapter 115 alternative work practice would not negatively impact the status of the state's progress towards attainment with the ozone NAAQS.

Subchapter D, Divisions 2 and 3

As discussed elsewhere in this preamble, the general VOC fugitive emission LDAR rules in Subchapter D, Divisions 2 and 3 were implemented to satisfy RACT requirements under the FCAA. The applicable leak definition in Subchapter D, Division 2 under the traditional Method 21 work practice is 10,000 parts per million by volume (ppmv). The applicable leak definitions in Subchapter D, Division 3 under the traditional Method 21 work practice are 10,000 ppmv for pump seals and compressor seals, and 500 ppmv for all other components subject to the division. When finalizing the federal alternative work practice, the EPA indicated (73 FR 78202) that the most stringent leak definition, 500 ppmv, was used to determine the leak threshold of 60 grams per hour (g/hr) for the alternative work practice.

The EPA is allowing the federal alternative work practice for federal LDAR regulations in 40 CFR Parts 60, 61, 63, and 65 down to the 500 ppmv leak threshold, which is equivalent to the 500 ppmv specified for most components in Division 3, and is significantly more stringent that the 10,000 ppmv specified for Division 2 and for pump seals and compressor seals in Division 3. The Chapter 115 alternative work practice is based on the same instrument specifications and has the same requirements for determining frequency based on detection sensitivity. Therefore, the commission contends that allowing the Chapter 115 alternative work practice for sources subject to Subchapter D, Divisions 2 and 3 would be at least equivalent to and in some instances more stringent than the current work practice in these rules.

Subchapter H, Division 3

As discussed elsewhere in this preamble, the HRVOC fugitive emission LDAR rules in Subchapter H, Division 3 were implemented as part of the HGB attainment demonstration for the one-hour ozone NAAQS. The applicable leak definition in Subchapter H, Division 3 under the traditional Method 21 work practice is 500 ppmv. As discussed elsewhere in this preamble, this leak threshold is equivalent to the leak threshold used by the EPA to establish the leak threshold for the federal alternative work practice and the proposed Chapter 115 alternative work practice incorporates the same specifications of the federal alternative work practice. Therefore, the leak definition in the HRVOC fugitive emission LDAR rules is equivalent to the leak definition that the EPA has already allowed in the federal alternative work practice. However, certain control requirements in the HRVOC fugitive rules are not tied specifically to the leak definition. For example, §115.782(b)(1) requires that a first attempt to repair a leak detected over 10,000 ppmv is required within one business day and the leak must be repaired no later than seven calendar days after the leak is detected. Leaks that are 10,000 ppmv or less are subject to a less stringent first attempt requirement of within five calendar days and must be repaired no later than 15 calendar days after the leak is detected. As discussed elsewhere in this preamble, optical gas imaging instruments are not capable of determining the concentration of the leak; therefore, an owner or operator using the alternative work practice would not be capable of determining whether a leak is greater than the 10,000 ppmv threshold in §115.782(b)(1). This rapid repair time for leaks larger than 10,000 ppmv is one requirement that makes the HRVOC rules more effective than traditional LDAR regulations. In order to ensure there is no potential backsliding on this and similar requirements, the proposed amendments to the HRVOC fugitive rules in Division 3 specify that the owner or operator must comply with the more stringent requirement unless the owner or operator performs a Method 21 test to demonstrate the leak concentration is less than the threshold specified in the rule. Additional detail regarding these specific requirements of the HRVOC fugitive rules is provided in SECTION BY SECTION DISCUSSION portion of this preamble.

Another component of the HRVOC fugitive rules designed to improve effectiveness of the LDAR programs is the third-party audits required by §115.788. The commission is proposing to retain the third-party audit requirement for sites using the Chapter 115 alternative work practice. As discussed in the SECTION BY SECTION DISCUSSION portion of this preamble, the third-party audit field survey and data review requirements are modified to account for the difference between the work practices. However, whether the site is using the Method 21 traditional work practice or the Chapter 115 alternative work practice, the intent of the third-party audit is fundamentally the same: to help ensure effective implementation of the work practice. The commission contends that allowing the Chapter 115 alternative work practice for sources subject to Subchapter H, Division 3 and retaining the specific requirements that make the HRVOC rules more effective than traditional LDAR regulations would be at least equivalent to the current work practice in these rules.

SECTION BY SECTION DISCUSSION

In addition to the proposed amendments and new sections associated with the rulemaking for the Chapter 115 alternative work practice, various stylistic non-substantive changes are included to update rule language to current Texas Register style and format requirements. Such changes include appropriate and consistent use of acronyms, section references, rule structure, and certain terminology. These changes are non-substantive and generally are not specifically discussed in this preamble. Comments received regarding existing rule language that are not related to incorporating the alternative work practice into Chapter 115 or to the specific proposed non-substantive changes discussed in this preamble will not be considered and no changes will be made based on such comments.

SUBCHAPTER D, PETROLEUM REFINING, NATURAL GAS PROCESSING, AND PETROCHEMICAL PROCESSES

DIVISION 2, FUGITIVE EMISSION CONTROL IN PETROLEUM REFINERIES IN GREGG, NUECES, AND VICTORIA COUNTIES

Section 115.322, Control Requirements

The commission proposes to amend paragraph (1) to specify that if the owner or operator elects to use the alternative work practice in proposed new §115.358, the definition of a leak for the purposes of §115.322(1) is the definition in §115.358. In addition, the proposed new language in paragraph (1) also specifies that any leak detected from a component subject to the division is still considered to be a leak for the purposes of paragraph (1) even if the owner or operator did not specifically select the component for monitoring using the alternative work practice. This additional provision ensures that any leaks detected through the alternative work practice on components subject to Subchapter D, Division 2 would be repaired in a timely manner consistent with the rule requirements. This language is consistent with the requirement of the alternative work practice in 40 CFR §60.18(h)(2), which requires that any leak detected using the alternative work practice must be identified for repair as required in the applicable federal subpart.

The proposed amendment to paragraph (2) would allow owners or operators that elect to use the alternative work practice to use either the alternative work practice or the normal monitoring method required by the division (e.g., Method 21) to verify that the component has been repaired. Finally, the proposed amendment to paragraph (5) specifies that if the owner or operator chooses to use the alternative work practice to satisfy the monitoring option for components in liquid service under paragraph (5), then the frequency of monitoring must be as specified in proposed new §115.358.

Section 115.323, Alternate Control Requirements

The commission proposes to amend §115.323 to add a new paragraph (3) to allow owners or operators of a site subject to Subchapter D, Division 2 to use the alternative work practice in proposed new §115.358 as an alternate to hydrocarbon analyzer monitoring.

Section 115.324, Inspection Requirements

The proposed changes to §115.324 add a new paragraph (8) to specify additional provisions that apply if the owner or operator elects to use the alternative work practice in §115.358. Proposed new subparagraph (A) requires that the frequency of monitoring when using the alternative work practice must be as specified in §115.358, except as specified in proposed new subparagraph (C). Proposed new subparagraph (B) prohibits the use of the alternative monitoring schedule in §115.324(7) for any components monitored according to the alternative work practice. Proposed new subparagraph (C) specifies that if the owner or operator uses the alternative work practice to conduct the monitoring required for relief valves under §115.324(5), the 24-hour time limitation in §115.324(5) still applies. The commission also proposes a new subparagraph (D) that specifies that if the executive director determines there is an excessive number of leaks in a given area of the refinery that the alternative work practice is used, then the executive director may require an increase in the frequency of the monitoring under the alternative work practice. The executive director already has this discretion for the normal Method 21 work practice under existing §115.324(7)(B), and the proposed new subparagraph (D) would ensure that the executive director has this same discretion under the alternative work practice.

Section 115.325, Testing Requirements

The proposed changes to §115.325 include updating the reference to Method 21 in paragraph (1) to the current version of this method and to reference the current appendix citation used by the EPA, 40 CFR Part 60, Appendix A-7. The commission also proposes to add a new paragraph (3) to specify that the alternative work practice in §115.358 is an approved method for this purposes of this division. The existing paragraph (3), regarding minor modifications to the test methods, is proposed to be renumbered as paragraph (4).

Section 115.326, Recordkeeping Requirements

The commission proposes to amend §115.326 to incorporate recordkeeping requirements for sites using the alternative work practice. The proposed changes to paragraph (1) would require the owner or operator to update and resubmit the monitoring plan if the owner or operator elects to use the alternative work practice. Proposed new subparagraphs (A) and (B) would require the updated plan to identify the units being monitored according to the alternative work practice and include the frequency of monitoring used for the alternative work practice. Proposed changes to paragraph (2) include specifying that if the owner or operator elects to use the alternative work practice in §115.358, then the log required under paragraph (2) must include all leaks detected using the alternative work practice. Subparagraph (E) is proposed to be revised to specify that the results of monitoring for components monitored according to the alternative work practice must be maintained according to proposed new paragraph (4). Subparagraph (F), regarding the records of the calibration of the monitoring equipment, is proposed to be revised to clarify that records of the daily instrument check for the alternative work practice must be maintained according to proposed new paragraph (4). The proposed amendment to subparagraph (I) adds the alternative work practice in §115.358 to the list for identifying which method was used to detect the leak.

The commission proposes to add a new paragraph (4) to include specific additional recordkeeping requirements if the owner or operator elects to use the alternative work practice in §115.358 for compliance with the division. Except where noted in this preamble, these recordkeeping requirements mirror the recordkeeping requirement in the federal alternative work practice in 40 CFR §60.18. Proposed new subparagraph (A) requires the owner or operator to maintain a list of each component that is monitored according to the alternative work practice. Proposed new subparagraph (B) requires records of the detection sensitivity level selected from the table in §115.358. Proposed new subparagraphs (C) and (D) require records of the analysis used to determine the component in contact with lowest mass fraction of detectable chemicals and the technical basis for the mass fraction of the detectable chemicals, both of which are required for the daily instrument check procedure referenced in §115.358. Records of the daily instrument check are required under proposed new subparagraph (E). Clause (i) requires records of the flow meter reading of the leak used in the daily instrument check and the distance from which the leak was imaged. Clause (ii) requires a video record with a date and time stamp of the daily instrument check for each configuration of the optical gas imaging instrument as well as each operator of the instrument. Clause (iii) requires records of the names of each operator performing the daily instrument check. The proposed requirements to maintain records of the names of the operators performing the daily instrument check and the video records for each operator performing the check is in addition to the recordkeeping specified for the alternative work practice in 40 CFR §60.18. As discussed elsewhere in this preamble, this requirement to link the operator of the optical gas imaging instrument to the monitoring work and instrument quality assurance procedures is necessary to ensure proper enforcement and effectiveness of the Chapter 115 alternative work practice. The commission is requesting comment on this additional recordkeeping requirement.

The commission proposes a new subparagraph (F) to require recordkeeping of the leak survey results from using the alternative work practice in §115.358. Proposed new clause (i) requires that a video record be used to document the leak survey results and the results of the recheck to verify the leak has been repaired, if the alternative work practice was used to perform this recheck. The proposed language regarding the video results of the recheck is more specific than the video recordkeeping requirements in 40 CFR §60.18(i)(4); however, this is necessary to document that the leak has been repaired as required by the rule and is consistent with the existing requirement in §115.326(2)(G)(iv) for the Method 21 work practice. Proposed subclause (I) specifies that the video records must include a time and date stamp for each monitoring event and proposed subclause (II) requires that each component must be identifiable in the video records. These requirements are consistent with the recordkeeping requirements for the alternative work practice in 40 CFR §60.18. The EPA did not provide any specific guidance on how to demonstrate compliance with the requirement in subclause (II) that each component must be identifiable in the video records. The language that the EPA used in 40 CFR §60.18(i)(4)(vi) is that the "video record can be used to meet the recordkeeping requirements of the applicable subparts if each piece of regulated equipment selected for this work practice can be identified in the video record" (73 FR 78210). The commission does not expect this requirement is intended to imply that each component must be flagged or marked in the video record, but rather that each component the alternative work practice is used for must be clearly visible in the video record and that the owner or operator must be capable of specifically identifying these components in the video record when requested. The commission is requesting comment on the adequacy of this

recordkeeping requirement as well as the commission's interpretation of 40 CFR §60.18(i)(4)(vi). In addition, the commission proposes a new clause (ii) to require records of the names of each operator performing the leak survey for each event. As discussed elsewhere in this preamble, the commission is proposing this additional recordkeeping requirement to link the operator of the optical gas imaging instrument to the monitoring work to ensure proper enforcement and effectiveness of the Chapter 115 alternative work practice. The commission is requesting comment on this additional recordkeeping requirement.

Proposed new subparagraph (G) includes recordkeeping requirements for the annual Method 21 screening required by §115.358(f). These recordkeeping requirements include the equipment screened, the concentration measured according to Method 21, the date and time of the Method 21 screening, and the calibrations required by Method 21. These proposed recordkeeping requirements are similar to the recordkeeping requirements specified by the EPA in 40 CFR §60.18(i)(4)(vii) (73 FR 78211).

Proposed new subparagraph (H) requires that the owner or operator maintain records of the training required by proposed new §115.358(h), which is a requirement not included in the alternative work practice in 40 CFR §60.18. As discussed elsewhere in this preamble, the commission is proposing training requirements to ensure that operators performing the alternative work practice have an adequate understanding of the principles of optical gas imaging to ensure effective use of the alternative work practice. The commission also proposes a new subparagraph (I) to require the owner or operator to maintain records of the optical gas imaging instrument manufacturer's operating parameters. While this recordkeeping requirement is not included in the alternative work practice in 40 CFR §60.18, maintaining the records of these parameters is necessary for commission investigators to verify that the owner or operator is actually operating the instrument in accordance with the manufacturer's operating parameters as required by proposed new §115.358(d) and 40 CFR §60.18(i)(3), and ensure proper enforcement of the Chapter 115 alternative work practice.

Finally, the commission is proposing to renumber the existing paragraph (4), regarding the retention schedule and availability of records, to proposed paragraph (5). Any additional records required for compliance with the alternative work practice would be subject to the five-year retention schedule in paragraph (5) and must be made available to authorized representatives of the executive director, EPA, or local air pollution control agencies with jurisdiction.

DIVISION 3, FUGITIVE EMISSION CONTROL IN PETROLEUM REFINING, NATURAL GAS/GASOLINE PROCESSING, AND PETROCHEMICAL PROCESSES IN OZONE NONATTAINMENT AREAS

Section 115.352, Control Requirements

The commission proposes to amend paragraph (1) to add a new subparagraph (C) that specifies if the owner or operator elects to use the alternative work practice in proposed new §115.358, the definition of a leak for the purposes of §115.352(1) is the definition in §115.358. In addition, the proposed new language in subparagraph (C) also specifies that any leak detected from a component subject to the division is still considered to be a leak for the purposes of paragraph (1) even if the owner or operator did not specifically select the component for monitoring using the alternative work practice. This additional provision ensures that any leaks detected through the alternative work practice on components subject to Subchapter D, Division 3 would be repaired in a timely manner consistent with the rule requirements. This language is consistent with the requirement of the alternative work practice in 40 CFR §60.18(h)(2) that requires that any leak detected using the alternative work practice must be identified for repair as required in the applicable federal subpart. The proposed amendment to paragraph (2) would allow owners or operators that elect to use the alternative work practice to use either the alternative work practice or the normal monitoring method required by the division (e.g., Method 21) to verify that the leak has been repaired. The commission also proposes to revise paragraphs (7) and (9) to update references to §115.356(4), which is proposed to be renumbered to §115.356(5).

Section 115.353, Alternate Control Requirements

The commission proposes to amend §115.353 to incorporate the existing language in §115.353 into a new subsection (a). The proposed changes also add a new subsection (b) to allow owners or operators of a site subject to Subchapter D, Division 3 to use the alternative work practice in proposed new §115.358 as an alternative to hydrocarbon analyzer monitoring.

Section 115.354, Monitoring and Inspection Requirements

The commission proposes minor revisions to §115.354(1)(C) and (3) to update references. The proposed amendment to paragraph (1)(C) would update the reference to §115.356(4) to be consistent with proposed renumbering of that section. The commission also proposes to revise paragraph (3) to update the reference for Method 21 to the current appendix citation used by the EPA (40 CFR Part 60, Appendix A-7).

The commission proposes to amend paragraph (10) to clarify that the requirement to record screening concentrations and to use a default pegged value of 100,000 ppmv for pegged readings does not apply if the owner or operator is using the alternative work practice in §115.358 unless a corresponding measurement with a hydrocarbon gas analyzer was performed with the optical gas imaging instrument.

The commission proposes a new paragraph (13) to list specific provisions that apply if the owner or operator elects to use the alternative work practice in §115.358 for compliance with the division. Proposed new subparagraph (A) requires that the frequency for monitoring using the alternative work practice must be as specified in §115.358 and proposed new subparagraph (B) prohibits the alternative monitoring schedules in paragraphs (7) and (8) for any components that the owner or operator is using the alternative work practice. Proposed new subparagraph (C) specifies that if the owner or operator uses the alternative work practice to satisfy the hydrocarbon gas analyzer monitoring requirements in paragraphs (4) and (11), then the time limitations in those paragraphs would continue to apply, i.e., the monitoring under paragraph (4) must be performed within 24 hours and the monitoring under paragraph (11) must be performed within 30 days.

The commission proposes a new subparagraph (D) regarding components considered difficult to monitor under the alternative work practice. Subparagraph (D) specifies that if a component is within a class of equipment that the owner or operator is using the alternative work practice for and the component meets all other conditions to be considered acceptable for using the alternative work practice in §115.358, then the component can only be classified as difficult-to-monitor if using the alternative work practice would cause the operator of the optical gas imaging instrument

to be elevated more than two meters above a permanent support surface or require a confined space entry permit in order to image the component. Because the alternative work practice uses remote sensing optical gas imaging instruments, the standard of what is considered difficult-to-monitor is different if the owner or operator is using the alternative work practice. Components may still be classified as difficult-to-monitor under the proposed rule if the operator would be required to be elevated more than two meters or require a confined space entry permit to be within the range of the optical gas imaging instrument that is demonstrated by the daily instrument check. If a component is considered difficult-to-monitor under the alternative work practice, the owner or operator may use either Method 21 or the alternative work practice to perform the monitoring at the normal frequency for difficult-to-monitor components under paragraph (1), i.e., annually. If the owner or operator does classify any components as difficult-to-monitor under the alternative work practice, those components must be identified as such in the list of difficult-to-monitor components required under §115.352(7). The intent of this provision is to acknowledge that components traditionally difficult to monitor under the normal Method 21 work practice may be easier to monitor under the alternative work practice using remote sensing optical gas imaging instruments. The commission is requesting comment on this provision regarding difficult-to-monitor components under the alternative work practice.

The commission proposes a new subparagraph (E) to specify that if the owner or operator elects to use the alternative work practice, components may still be classified as unsafe-to-monitor as allowed by paragraph (1)(C). Use of the alternative work practice may not necessarily reduce the risk to monitoring personnel; therefore, the commission is not proposing any rule language that might set specific requirements for determining components to be unsafe-to-monitor under the alternative work practice. If a component is classified as unsafe-to-monitor under the alternative work practice, the provisions in paragraph (1)(C) regarding monitoring frequency, maintaining a list of safe-to-monitor components, and monitoring during safe-to-monitor times would continue to apply. However, the owner or operator may choose to use the alternative work practice to satisfy the monitoring requirement for unsafe-to-monitor components as specified in paragraph (1)(C) using either Method 21 or the alternative work practice.

The commission also proposes a new subparagraph (F) that specifies that if the executive director determines that there is an excessive number of leaks in a given process area that the alternative work practice is used, then the executive director may require an increase in the frequency of the monitoring under the alternative work practice. The executive director already has this discretion for the normal Method 21 work practice under existing §115.354(6) and the proposed new subparagraph (F) would ensure that the executive director has this same discretion under the alternative work practice.

Section 115.355, Approved Test Methods

The proposed revisions to §115.355 include updating the reference to Method 21 in paragraph (1) to the current appendix citation used by the EPA, 40 CFR Part 60, Appendix A-7. The commission also proposes to add a new paragraph (3) to specify that the alternative work practice in §115.358 is an approved method for the purposes of the division. The existing paragraphs (3) and (4), regarding minor modifications to the test methods and equivalent determinations for vapor pressure data, are proposed to be renumbered as paragraphs (4) and (5), respectively.

Section 115.356, Recordkeeping Requirements

The commission proposes to amend §115.356 to revise the language regarding maintaining records either electronically or in hard copy form to specify that any video records necessary for compliance with the alternative work practice must be maintained electronically. The proposed changes to paragraph (2)(E)(i) revise the language to update the reference to Method 21 to the current appendix citation used by the EPA, 40 CFR Part 60, Appendix A-7, and add the alternative work practice in §115.358 to the list of methods in paragraph (2)(E)(i).

The commission proposes a new paragraph (4) to include specific additional recordkeeping requirements if the owner or operator elects to use the alternative work practice in §115.358 for compliance with the division. Except where noted in this preamble, these recordkeeping requirements mirror the recordkeeping requirement in the federal alternative work practice in 40 CFR §60.18. Proposed new subparagraph (A) requires the owner or operator to maintain a list of all components that are monitored according to the alternative work practice. Proposed new subparagraph (B) requires records of the detection sensitivity level selected from the table in §115.358. Proposed new subparagraphs (C) and (D) require records of the analysis used to determine the component in contact with the lowest mass fraction of detectable chemicals and the technical basis for the mass fraction of the detectable chemicals, respectively, both of which are required for the daily instrument check procedure referenced in §115.358. Records of the daily instrument check are required under proposed new subparagraph (E). Clause (i) requires records of the flow meter reading of the leak used in the daily instrument check and the distance from which the leak was imaged. Clause (ii) requires a video record with a date and time stamp of the daily instrument check for each configuration of the optical gas imaging instrument as well as each operator of the instrument used that day. Clause (iii) requires records of the names of each operator performing the daily instrument check. The proposed requirements to maintain records of the names of the operators performing the daily instrument check and the video records for each operator performing the check is in addition to the recordkeeping specified for the alternative work practice in 40 CFR §60.18. As discussed elsewhere in this preamble, this requirement to link the operator of the optical gas imaging instrument to the monitoring work and instrument quality assurance procedures is necessary to ensure proper enforcement and effectiveness of the Chapter 115 alternative work practice. The commission is requesting comment on this additional recordkeeping requirement.

The commission proposes a new subparagraph (F) to require records of the leak survey using the alternative work practice in §115.358. Proposed new clause (i) requires that a video record be used to document the leak survey and the results of the recheck to verify the leak has been repaired, if the alternative work practice was used to perform this recheck. The proposed language regarding the video results of the recheck is more specific than the video recordkeeping requirements in 40 CFR §60.18(i)(4); however, this is necessary to document that the leak has been repaired as required by the rule and is consistent with the existing requirement in §115.356(2)(E)(v) for the Method 21 work practice. Proposed new subclause (I) specifies that the video record must include a time and date stamp for each monitoring event and subclause (II) requires that each component must be identifiable in the video record. As discussed elsewhere in this preamble, the commission is requesting comment on the adequacy of this recordkeeping

requirement as well as the commission's interpretation of 40 CFR §60.18(i)(4)(vi), which is the basis of this recordkeeping requirement. In addition, the commission proposes a new clause (ii) to keep records of the name of each operator performing the leak survey for each event. As discussed elsewhere in this preamble, the commission is requesting comment on this additional recordkeeping requirement.

Proposed new subparagraph (G) includes recordkeeping requirements for the annual Method 21 screening required by §115.358(f). These recordkeeping requirements include the equipment screened, the concentration measured according to Method 21, the date and time of the Method 21 screening, and the calibrations required by Method 21. These proposed recordkeeping requirements are similar to the recordkeeping requirements specified by the EPA in 40 CFR §60.18(i)(4)(vii) (73 FR 78211).

Proposed new subparagraph (H) requires that the owner or operator maintain records of the training required by proposed new §115.358(h), which is a requirement not included in the alternative work practice in 40 CFR §60.18. As discussed elsewhere in this preamble, the commission is proposing training requirements to ensure that operators performing the alternative work practice have an adequate understanding of the principles of optical gas imaging to ensure effective use of the alternative work practice. The commission also proposes a new subparagraph (I) to require the owner or operator to maintain records of the optical gas imaging instrument manufacturer's operating parameters. As discussed elsewhere in this preamble, the additional requirement is necessary for commission investigators to verify that the owner or operator is actually operating the instrument in accordance with the manufacturer's operating parameters as required by proposed new §115.358(d) and 40 CFR §60.18(i)(3) and ensure proper enforcement of the Chapter 115 alternative work practice.

Finally, the commission is proposing to renumber the existing paragraph (4), regarding the retention schedule and availability of records, to paragraph (5). Any additional records required for compliance with the alternative work practice would be subject to the five-year retention schedule in paragraph (5) and must be made available to authorized representatives of the executive director, EPA, or local air pollution control agencies with jurisdiction.

Section 115.357, Exemptions

The commission proposes to amend paragraph (8) to specify that the exemption in paragraph (8) cannot be claimed for any component that the alternative work practice in §115.358 is used on unless a Method 21 test is also performed to demonstrate that the leak concentration is less than 10,000 ppmv. The component must also continue to be monitored with both the alternative work practice and Method 21 at the frequency required by the alternative work practice. This is necessary because the exemption requires the component be repaired within 15 calendar days if the leak concentration exceeds 10,000 ppmv. As discussed elsewhere in this preamble, optical gas imaging instruments are not currently capable of quantifying emissions. Because the alternative work practice is not able to verify that the leak is below 10,000 ppmv, the component must continue to be monitored according to Method 21 to demonstrate the leak concentration is below 10,000 ppmv in order to qualify for the exemption. The proposed changes to paragraph (8) also revise the language to update the reference to Method 21 to the current appendix citation used by the EPA, 40 CFR Part 60, Appendix A-7.

Section 115.358, Alternative Work Practice

The commission proposes new §115.358 to include the specific definitions and general requirements associated with using the alternative work practice under Chapter 115. Proposed new subsection (a) provides the applicability of the section and allows the use of the Chapter 115 alternative work practice for sites subject to Subchapter D, Division 3 or a site subject to any other division of Chapter 115 when that division specifically allows the use of the alternative work practice in §115.358. For the purposes of this rulemaking, the commission is only proposing to allow the alternative work practice under Subchapter D, Divisions 2 and 3, and Subchapter H, Division 3. However, this applicability approach would allow the commission to more easily apply the use of the alternative work practice in other divisions of Chapter 115, if appropriate. The proposed applicability also only allows the use of the alternative work practice for any components with a leak definition of 500 ppmv or greater, which is consistent with the alternative work practice in 40 CFR §60.18. While the rules included in this rulemaking do not currently have any leak definitions less than 500 ppmv, including this provision makes the Chapter 115 alternative work practice consistent with 40 CFR §60.18 and avoids any potential future issues should the commission adopt a new rule with a leak definition less than 500 ppmv.

Proposed new subsection (b) provides definitions that are specific to the alternative work practice in §115.358. The new terms that would be defined in proposed subsection (b) include *imaging, optical gas imaging instrument, repair, and leak.* The definitions for these terms mirror the definitions in 40 CFR §60.18(g)(3) - (6). The terms *applicable subpart* and *equipment* in 40 CFR §60.18(g)(1) and (2) are not necessary for the purposes of the alternative work practice in Chapter 115 and are not included in this proposed rule.

Proposed new subsection (c) includes the specifications for any optical gas imaging instrument used for the alternative work practice. Under proposed paragraph (1), the commission proposes to incorporate by reference the instrument specifications in 40 CFR §60.18(i)(1) (December 22, 2008). Proposed paragraph (2) would incorporate by reference the daily instrument check in 40 CFR §60.18(i)(2) (December 22, 2008). In addition, the commission proposes an additional requirement in paragraph (2) that the daily instrument check procedure must be performed by each individual that would be performing imaging using the alternative work practice for that day. While this is not a requirement of the alternative work practice in 40 CFR §60.18, the commission considers the ability of the individual to operate the optical gas imaging instrument to be an integral part of the effectiveness of this technology. The sensitivity of optical gas imaging instruments is affected by various settings on the instrument that the operator must adjust given the specific conditions (e.g., distance, background, etc.). The expertise of the operator is critical in making these adjustments to find the optimal settings of the instrument for the given conditions. The alternative work practice adopted by the EPA in 40 CFR §60.18 does not acknowledge this aspect of the technology. Therefore, the commission is proposing this requirement to link the daily instrument check to the individuals who would perform the alternative work practice as a necessary quality assurance measure to ensure that the personnel using the optical gas imaging instrument have demonstrated the ability to operate the instrument and make the necessary adjustments appropriately. The commission is requesting comment on this additional requirement.

The commission proposes a new subsection (d) to specify the leak survey procedure for using optical gas imaging instruments to screen components for leaks. The language proposed for subsection (d) is similar to the leak survey procedure described in 40 CFR §60.18(i)(3). Consistent with the procedure in 40 CFR §60.18(i)(3), proposed subsection (d) requires the optical gas imaging instrument to be operated to image every component selected for the alternative work practice in accordance with the instrument manufacturer's operating parameters. While this general requirement to follow the manufacturer's operating parameters does not provide specific procedures for the use of optical gas imaging instruments and may raise concerns regarding enforceability, as discussed elsewhere in this preamble, operators of optical gas imaging instruments must adjust the instrument given the specific conditions at the time when imaging a component. Therefore, prescriptive procedures for the operation of optical gas imaging instruments would likely be an impediment to the proper use of the technology. Consistent with the alternative work practice in 40 CFR §60.18, proposed subsection (d) requires that all emissions imaged by the optical gas imaging instrument are considered to be leaks and subject to the repair requirements of the applicable division. Proposed subsection (d) also requires that all emissions visible to the naked eye during the leak survey are also considered to be leaks and subject to repair, which is also consistent with the alternative work practice in 40 CFR §60.18. While not specifically included in 40 CFR §60.18, subsection (d) also specifies that the owner or operator shall not image a component during the leak survey at a distance greater than the distance demonstrated by the same instrument operator during the daily instrument check. Distance is a factor for the sensitivity and effectiveness of optical gas imaging instruments and the instrument specifications in 40 CFR §60.18(i)(1)(i) imply this by requiring the instrument to provide "an image of the potential leak points for each piece of equipment at both the detection sensitivity level and within the distance used in the daily instrument check..." The commission's intent by specifically requiring this in subsection (d) is to make this expectation clear for the purpose of enforcing the alternative work practice in Chapter 115. The commission is requesting comment on the interpretation of 40 CFR §60.18(i)(1)(i) and on the distance restriction in proposed new subsection (d).

Proposed new subsection (e) specifies the frequency requirements for using the alternative work practice under Chapter 115. The frequencies in the table in proposed paragraph (1) are based on the detection sensitivity level selected; bi-monthly for 60 g/hr, semi-quarterly for 85 g/hr, and monthly for 100 g/hr. These frequencies and detection sensitivity levels match Table 1 to 40 CFR Part 60, Subpart A, for the alternative work practice in 40 CFR §60.18. Monitoring with alternative work practice must be performed according to the frequency corresponding to the selected detection sensitivity level. Similar to the table in 40 CFR Part 60, the table in §115.358(e)(1) defines the terms *bi-monthly, semi-quarterly, and monthly.* In order to provide clarity to the rule, the commission proposes to define these terms with more specificity than defined by the EPA. *Bi-monthly* would be defined as every other calendar month. *Semi-quarterly* would be defined as twice per calendar quarter, but at least 30 days apart. *Monthly* would be defined as once per calendar month. Proposed paragraph (2) specifies that alternative monitoring frequencies for good performance (e.g., alternative frequencies if the percent leakers is less than 2%) are not allowed for the alternative work practice; however, the proposed language would allow alternative frequencies for other purposes when specifically allowed by the applicable division. This proposed language deviates slightly from the alternative work practice in 40 CFR §60.18. The EPA discussed the issue of difficult-to-monitor and unsafe-to-monitor in response to comments (73 FR 78205), and the commission agrees with the EPA that the components that can be considered difficult-to-monitor or unsafe-to-monitor may change under the alternative work practice. However, the EPA did not address such issues in the regulation under 40 CFR §60.18(h)(5) and (6). Therefore, the commission is proposing the clarifying language in §115.358(e)(2) to make clear that the alternative work practice may be used for certain cases such as difficult-to-monitor components if the applicable division specifically allows such use. The commission is requesting comment on this provision.

Consistent with the annual Method 21 requirement in 40 CFR §60.18(h)(7), the commission proposes a new subsection (f) to require annual Method 21 screening for any component monitored according to the alternative work practice. Proposed new §115.358(f) requires that each component monitored with the alternative work practice must be monitored once per calendar year using Method 21 at the leak definition in the applicable division. Similar to the requirement in 40 CFR §60.18(h)(7), proposed paragraph (1) allows the owner or operator to select the specific monitoring period (e.g., the first quarter), but subsequent Method 21 monitoring must be performed every 12 months from the initial monitoring period.

The commission also proposes a new subsection (g) to include a notification requirement if the owner or operator elects to use the alternative work practice in proposed new §115.358. This notice requirement is not included in 40 CFR §60.18; however, commission investigators conduct routine LDAR investigations and the notice requirement is necessary to allow investigators to prepare appropriately for the site investigation due to the distinct differences between the standard Method 21 work practice and the alternative work practice in proposed new §115.358. Different monitoring equipment and a different investigation protocol would be needed for a LDAR investigation at a site using the alternative work practice. The initial notice would be required to be submitted in writing to the appropriate regional office at least 30 days prior to implementation of the alternative work practice. Proposed new paragraph (1) lists the content requirements of the written notification, including: identification of each unit that the alternative work practice would be used for; the specific categories of components and number of components in those categories that are monitored according to the alternative work practice; and the date that the owner or operator plans to implement the alternative work practice. Proposed new paragraph (2) would require the owner or operator to resubmit the notice within 30 days if use of the alternative work practice was expanded to a different process unit. It is not the commission's intent that the owner or operator be required to resubmit the notification on a component by component basis. The commission is requesting comment on this additional notice requirement.

Finally, proposed new subsection (h) includes minimum training requirements for operators of optical gas imaging instruments used for the Chapter 115 alternative work practice. The commission acknowledges that the EPA did not include training requirements in the alternative work practice in 40 CFR §60.18. As discussed elsewhere in this preamble, the experience and ability of the instrument operator is critical to the proper operation and effective use of optical gas imaging instruments. The commission's intent for these proposed initial and on-going training requirements is to provide assurance that operators of optical gas imaging instruments under the alternative work practice have at least basic skills training to properly and effectively use

the instruments. Effective use of the alternative work practice may be severely compromised if operators are not adequately trained in the operation of the instrument and in interpreting the image generated by the optical gas imaging instrument. At this time, it is not the commission's intent to establish a certification program or to require that the training provider be pre-approved by the commission. The commission is proposing to establish minimum time requirements for the training but not specific details of the training contents. The initial training requirements are included in proposed new paragraph (1), which specifies a minimum of 24 hours of training on the specific make and model of the optical gas imaging instrument before using the instrument for the alternative work practice. This proposed training requirement is based on training already provided by a manufacturer of optical gas imaging instruments. Proposed paragraph (2) would require on-going training for operators and would provide two options. Operators could either attend an annual eight-hour refresher training class or maintain a minimum of 100 hours per calendar year of hands-on experience with the optical gas imaging instrument. A written log of the operator's operational experience would be required if the minimum 100 hours per calendar year option is selected. The commission is not specifically aware of a training provider with an established eight-hour refresher class; however, the commission does not expect that establishing this annual refresher class would be a significant burden for potential training providers or companies using the alternative work practice. Additionally, the commission is not requiring the training be provided by an independent third party or specifically by the manufacturer of the instrument. The commission is requesting comments on the necessity and the adequacy of these minimum training requirements.

SUBCHAPTER H, HIGHLY-REACTIVE VOLATILE ORGANIC COMPOUNDS

DIVISION 3, FUGITIVE EMISSIONS

Section 115.781, General Monitoring and Inspection Requirements

The commission proposes to amend §115.781 to incorporate various changes to allow the use of the alternative work practice in §115.358 under the HRVOC fugitive emissions rules. The proposed amendment to subsection (b)(9) would specify that if the owner or operator elects to use the alternative work practice in proposed new §115.358, the definition of a leak is the definition in §115.358. In addition, the proposed new language would also specify that this includes any leak detected from a component that is subject to the division even if the owner or operator did not specifically select the component for alternative work practice monitoring. As discussed elsewhere in this preamble, this additional provision ensures that any leaks detected through the alternative work practice on components subject to Subchapter H, Division 3 would be repaired in a timely manner and is consistent with the alternative work practice in 40 CFR §60.18. The commission also proposes to amend subsection (b)(10) to specify that the requirement to record monitored screening concentrations or record a default pegged value of 100,000 ppmv does not apply to monitoring using an optical gas imaging instrument under the alternative work practice. This proposed change is necessary because optical gas imaging instruments are not capable of determining screening concentrations.

The commission proposes a new subsection (h) to list specific provisions that apply if the owner or operator elects to use the alternative work practice in §115.358. Proposed new paragraph (1) requires that the frequency for monitoring using the alternative work practice must be as specified in §115.358 and proposed new paragraph (2) prohibits the alternative monitoring schedules in subsection (f) for any components that the owner or operator is using the alternative work practice. Proposed new paragraph (3) specifies that if the owner or operator uses the alternative work practice to satisfy the hydrocarbon gas analyzer monitoring requirements in subsections (b)(4) or (e) then the time limitations in those paragraphs would continue to apply.

The commission proposes new paragraphs (4) and (5) regarding components considered difficult-to-monitor or unsafe-to-monitor under the alternative work practice. Paragraph (4) would specify that if a component is within a class of equipment that the owner or operator is monitoring using the alternative work practice and the component meets all other conditions to be considered acceptable for using the alternative work practice in §115.358, then the component can only be classified as difficult-to-monitor if using the alternative work practice would cause the operator of the optical gas imaging instrument to be elevated more than two meters above a permanent support surface or require a confined space entry permit in order to image the component. This proposed provision is similar to other proposed amendments in Subchapter D, Divisions 2 and 3 regarding difficult-to-monitor and unsafe-to-monitor components under the alternative work practice. Proposed new paragraph (5) would specify that if the owner or operator elects to use the alternative work practice, components may still be classified as unsafe-to-monitor as allowed by paragraph (7)(A). As discussed elsewhere in this preamble, the intent of these provisions is to acknowledge that components traditionally difficult to monitor under the normal Method 21 work practice may be easier to monitor under the alternative work practice using remote sensing optical gas imaging instruments but that use of the alternative work practice may not necessarily reduce the risk to monitoring personnel. The commission is requesting comment on these provisions regarding difficult-to-monitor and unsafe-to-monitor components under the alternative work practice.

In addition, the commission is proposing a new paragraph (6) to allow an alternative frequency for performing the annual Method 21 testing required under §115.358(f) for components subject to subsection (b)(3) that are not subject to a Method 21 monitoring requirement under 40 CFR Parts 60, 61, 63, or 65. Proposed subparagraph (A) would require the owner or operator to perform a Method 21 test to determine the leak concentration on any component that a leak was detected using the alternative work practice. The owner or operator would be required to perform the Method 21 test the same day that the leak was detected using the alternative work practice. Proposed subparagraph (B) would only allow the alternative Method 21 frequencies under paragraph (2) if the percent leaking components for all components selected under the option is less than 2.0%. Proposed subparagraph (C) would set the alternative frequencies for the scheduled Method 21 screening for components that qualify for the option under paragraph (6) to be the same as the existing alternative frequencies under subsection (f). Proposed subparagraph (C) would also allow the Method 21 test required under proposed subparagraph (A) to satisfy the regularly scheduled Method 21 test under subparagraph (C). A proposed new subparagraph (D) would also require the owner or operator to include notice of electing this option in the notification required under proposed new §115.358(g). The commission's intent for this provision is to encourage performing a Method 21 test when leaks are detected using the optical gas imaging instruments. As discussed elsewhere in this preamble, optical gas imaging in-

struments are not capable of quantifying fugitive emissions. Performing a Method 21 test on the leak when it is detected using the alternative work practice would provide a basis for quantifying the leak for emissions inventory purposes. While the EPA did indicate in the December 22, 2008, issue of the *Federal Register* (73 FR 78207) that the EPA planned to work with stakeholders to develop the necessary tools for quantification under the alternative work practice, the EPA has not provided a timeline for when this guidance will be developed and issued.

The commission recognizes that requiring a Method 21 test on detected leaks in addition to the annual Method 21 test under 40 CFR §60.18(h)(7) would present a significant fiscal disincentive for owners or operators deciding whether to use the alternative work practice; therefore, the commission is not proposing to require the additional Method 21 test on all detected leaks. Additionally, based on the commission's current delegation for 40 CFR Part 60, the commission cannot relax the annual Method 21 requirement under 40 CFR §60.18(h)(7) for any component that is subject to a Method 21 monitoring requirement under 40 CFR Parts 60, 61, 63, or 65 and that the owner or operator elects to use the alternative work practice. Therefore, this proposed option is limited to the components listed in §115.781(b)(3) that are not subject to a federal LDAR regulation Method 21 requirement. The commission is requesting comment on the proposed alternative schedule for the annual Method 21 requirement for the components under subsection (b)(3) if the alternative work practice is used and whether the proposed option should be considered for other components subject to this division or to Subchapter D, Divisions 2 or 3 that are not subject to 40 CFR Parts 60, 61, 63, or 65.

Section 115.782, Procedures and Schedule for Leak Repair and Follow-up

The commission proposes a new subsection (b)(3) to specify that for any leak detected from a component that the owner or operator uses the alternative work practice in proposed new §115.358, a first attempt to repair must be made within one business day after detecting the leak and the component must be repaired no later than seven calendar days after detection. As discussed elsewhere in this preamble, optical gas imaging instruments are not capable of quantifying emissions. An owner or operator using the alternative work practice would not be able to determine whether a leak is over the 10,000 ppmv trigger for rapid repair times in subsection (b)(1) if the optical gas imaging instrument is the only measuring device used. Therefore, any leaks detected using the alternative work practice must be assumed to be over 10,000 ppmv and subject to the same rapid repairs as subsection (b)(1). The rapid repair times of this provision are an integral part of the HRVOC fugitive emission rules that enhance the overall effectiveness of the rule. This conservative approach would ensure that allowing the alternative work practice under Subchapter H, Division 3 does not result in backsliding. The proposed new subsection (b)(3) would allow the owner or operator the option to measure the leak concentration using Method 21 to demonstrate the leak is not over 10,000 ppmv, provided the Method 21 test was performed on the same day that the leak was detected using the alternative work practice. If the Method 21 test demonstrates the leak is 10,000 ppmv or less, then the standard repair times in subsection (b)(2) would apply.

While not related to incorporating the alternative work practice into Chapter 115, the commission proposes to restructure and clarify specific parts of §115.782(c)(1)(B) to update the rule language structure to current Texas Register and agency format requirements. Additional language is proposed to be added to subparagraph (B) to clarify that there are three different options under subparagraph (B): meet the conditions of both clauses (i) and (ii); meet the conditions of clause (iii); or meet the conditions of clause (iv). Minor nonsubstantive language changes are proposed to clauses (i) - (iv) to improve the readability of the rule language and do not change the meaning or requirements of the rule. In addition, to account for use of the alternative work practice under the rule, the commission proposes to amend §115.782(c)(1)(B)(i)(II) to require the owner or operator to use the 100,000 ppmv pegged emission rate values in Tables 2-13 and 2-14 in Section 2.3.3 of the EPA guidance document "Protocol for Equipment Leak Emission Estimates" for any leak detected using the alternative work practice that a corresponding Method 21 test is not performed on that specific leak. This proposed change is necessary because, as discussed elsewhere in this preamble, optical gas imaging instruments are not capable of quantifying a leak. Therefore, the proposed rule would require the owner or operator to use the pegged rates in the EPA guidance document unless a Method 21 test was performed on that same leak to determine the leak concentration for use in the correlation equations required under subclause (II).

The commission proposes to move the existing language in clause (iii) regarding the time restrictions for extraordinary efforts to proposed new subclause (I) and (II). The time restrictions for leaks detected over 10,000 ppmv are proposed to be moved to new subclause (I), and the restrictions for all other leaks are proposed to be moved to new subclause (II). In addition, the commission proposes a new subclause (III) to establish the time restrictions for extraordinary efforts on leaks detected using the alternative work practice. Proposed new subclause (III) would set the restrictions for leaks detected using the alternative work practice the same as leaks over 10,000 ppmv. If the owner or operator performs a Method 21 test and demonstrates the leak was 10,000 ppmv or less, then the time restrictions would be the same as in subclause (II) for leaks not over 10,000 ppmv. As discussed elsewhere in this preamble, this conservative approach to incorporating the alternative work practice into §115.782 is necessary to ensure that the use of the alternative work practice does not result in backsliding.

While not related to incorporating the alternative work practice into Chapter 115, the commission proposes to restructure and clarify specific parts of §115.782(c)(2)(A) to update the rule language structure to current Texas Register and agency format requirements. Additional language is proposed to be added to paragraph (2) to clarify that the owner or operator may choose to meet either the conditions of subparagraph (A) or (B). Minor nonsubstantive language changes are proposed to clauses (i) and (ii) to improve the readability of the rule language and do not change the meaning or requirements of the rule.

In addition, the commission proposes to move the existing language in clause (i) regarding the time restrictions for extraordinary efforts to proposed new subclauses (I) and (II). The time restrictions for leaks detected over 10,000 ppmv are proposed to be moved to new subclause (I), and the restrictions for all other leaks are proposed to be moved to new subclause (II). The commission proposes a new subclause (III) to establish the time restrictions for extraordinary efforts on leaks detected using the alternative work practice. Proposed new subclause (III) would set the restrictions for leaks detected using the alternative work practice the same as leaks over 10,000 ppmv, unless the owner or operator performs a Method 21 test and demonstrates the leak was 10,000 ppmv or less, and then the time restrictions would

be the same as in subclause (II). As discussed elsewhere in this preamble, this proposed change is necessary to ensure that the use of the alternative work practice does not result in backsliding under the rule.

The commission proposes a new subsection (d) to clarify when a leak is considered repaired. Proposed new paragraph (1) specifies that for any component that the alterative work practice is used on, the component is considered repaired when demonstrated to no longer have a leak, after adjustments or alterations to the component, by either using an optical gas imaging instrument as specified in §115.358 or Method 21 at the leak definition specified in §115.781(b)(9). This proposed provision would allow the owner or operator to verify that the leak has been repaired with either the alternative work practice in §115.358 or Method 21, which is consistent with the approach in 40 CFR §60.18. Proposed new paragraph (2) would specify that for all other components, the leak is considered repaired when demonstrated to no longer have a leak, after adjustments or alterations, by the normal monitoring method required by the division.

Section 115.784, Alternate Control Requirements

The commission proposes a new §115.784, relating to Alternate Control Requirements, to provide for alternate means of control. Proposed new subsection (a) would specify that the executive director may approve alternate methods of demonstrating and documenting compliance with the control requirements or exemption criteria consistent with §115.910. While this provision is not specifically necessary for incorporating the alternative work practice in Subchapter H, Division 3, the proposed additional provision would clarify that the alternate means of control provision in §115.910 are an available option under the division. Proposed new subsection (b) would allow owners or operators of a site subject to Subchapter H, Division 3 to use the alternative work practice in proposed new §115.358 as an alternative to hydrocarbon analyzer monitoring.

Section 115.786, Recordkeeping Requirements

The commission proposes to amend subsection (c), regarding the reports required to be submitted to the Houston regional office. The proposed amendment to paragraph (3) would clarify that the information required under paragraph (3) is only required if a hydrocarbon gas analyzer was used to determine the leak. A proposed new paragraph (4) would require that if the alternative work practice was used, then the report must indicate that the leak was determined according to the alternative work practice and the date that the leak was detected. The existing paragraphs (4) and (5) are proposed to be renumbered to paragraphs (5) and (6), respectively.

The commission proposes a new subsection (f) to include specific additional recordkeeping requirements if the owner or operator elects to use the alternative work practice in §115.358. Except where noted in this preamble, these recordkeeping requirements mirror the recordkeeping requirement in the federal alternative work practice in 40 CFR §60.18. Proposed new paragraph (1) would require the owner or operator to maintain a list of each component that is monitored according to the alternative work practice. Proposed new paragraph (2) would require records of the detection sensitivity level selected from the table in §115.358. Proposed new paragraphs (3) and (4) would require records of the analysis used to determine the component in contact with lowest mass fraction of detectable chemicals and the technical basis for the mass fraction of the detectable chemicals, respectively, both of which are required for the daily instrument check procedure referenced in §115.358. Records of the daily instrument check would be required under proposed new paragraph (5). Subparagraph (A) requires records of the distance and flow meter reading that the leak was imaged for the daily instrument check. Subparagraph (B) requires a video record with a date and time stamp of the daily instrument check for each configuration of the optical gas imaging instrument as well as the name of each operator of the instrument used that day. Subparagraph (C) requires records of the name of each operator performing the daily instrument check. As discussed elsewhere in this preamble, this requirement to link the operator of the optical gas imaging instrument to the monitoring work and instrument quality assurance procedures is necessary to ensure proper enforcement and effectiveness of the Chapter 115 alternative work practice. The commission is requesting comment on this additional recordkeeping requirement.

The commission proposes a new paragraph (6) to require records of the leak survey results from using the alternative work practice in §115.358. Proposed new subparagraph (A) requires that a video record be used to document the leak survey results and the results of the recheck to verify the leak has been repaired, if the alternative work practice was used to perform this recheck. The proposed language regarding the video results of the recheck is more specific than the video recordkeeping requirements in 40 CFR §60.18(i)(4); however, this is necessary to document that the leak has been repaired as required by the rule. Clause (i) specifies that the video record must include a time and date stamp for each monitoring event and clause (ii) requires that each component must be identifiable in the video record. As discussed elsewhere in this preamble, the commission is requesting comment on the adequacy of this recordkeeping requirement as well as the commission's interpretation of 40 CFR §60.18(i)(4)(vi), which is the basis of this recordkeeping requirement. In addition, the commission proposes a new subparagraph (B) to require records of the names of each operator performing the leak survey for each event. As discussed elsewhere in this preamble, the commission is requesting comment on this additional recordkeeping requirement.

Proposed new paragraph (7) includes recordkeeping requirements for the annual Method 21 screening required by §115.358(f). These recordkeeping requirements include the components screened, the concentration measured according to Method 21, the date and time of the Method 21 screening, and the calibrations required by Method 21. These proposed recordkeeping requirements are similar to the recordkeeping requirements specified by the EPA in 40 CFR §60.18(i)(4)(vii) (73 FR 78211).

Proposed new paragraph (8) requires that the owner or operator maintain records of the training required by proposed new §115.358(h). As discussed elsewhere in this preamble, the commission is proposing training requirements to ensure that operators performing the alternative work practice have an adequate understanding of the principles of optical gas imaging to ensure effective use of the alternative work practice.

The commission proposes a new paragraph (9) to include recordkeeping if the owner or operator elects to use the alternative frequencies for the annual Method 21 allowed under proposed new §115.781(h)(6). As discussed elsewhere in this preamble, the commission is proposing an alternative schedule for performing the annual Method 21 for the specific components subject to §115.781(b)(3) that are monitored according to the

Chapter 115 alternative work practice but are not subject to a federal LDAR regulation in 40 CFR Parts 60, 61, 63, or 65. The proposed recordkeeping requirements under subparagraphs (A) and (B) for this option include maintaining a list of the components included in the alternative schedule and the percent leaking components for the specific population of components included in the alternative schedule.

The commission also proposes a new paragraph (10) to require the owner or operator to maintain records of the optical gas imaging instrument manufacturer's operating parameters. As discussed elsewhere in this preamble, the additional requirement is necessary for commission investigators to verify that the owner or operator is actually operating the instrument in accordance with the manufacturer's operating parameters as required by proposed new §115.358(d) and 40 CFR §60.18(i)(3) and ensure proper enforcement of the Chapter 115 alternative work practice.

Finally, the commission proposes to reletter the existing subsection (f), regarding the records retention schedule and availability of records, to subsection (g).

Section 115.787, Exemptions

The commission proposes minor revisions to §115.787. Subsection (a) is proposed to be revised to correct the reference to §115.786(f), which is proposed to be relettered to §115.786(g). Additionally, the commission proposes to revise §115.787(g), regarding the exemption from the third-party audit requirements of §115.788, to change the exemption language from 100 components to 100 valves. The audit provisions in §115.788 are specific to valves in HRVOC service. It was not the commission's intent that sites with less than 100 valves in HRVOC service be subject to the audit requirements of §115.788. The commission does not consider this change substantive or backsliding as this proposed change is consistent with the commission's original intent for the third-party audit requirement.

Section 115.788, Audit Provisions

The commission proposes to amend §115.788 to incorporate provisions for the alternative work practice in §115.358. The commission is proposing to retain the third-party audit requirement for sites that are using the alternative work practice on valves in HRVOC service. The intent of the third-party audit is to require an independent third-party verification that the owner or operator is performing the leak detection procedures as required by the rule. This third-party verification enhances the effectiveness of the facility's LDAR program by identifying issues with the facility's normal monitoring practice and enables the owner or operator to take corrective action. The third-party audit is equally beneficial when the alternative work practice is used. Additionally, removing the third-party audit requirements for sites using the alternative work practice may be viewed by the EPA as backsliding. The proposed rule would retain the third-party audit requirement; however, the audit must be performed in the same manner as the procedure used by the owner or operator of the site. Using a Method 21 audit field survey to verify the company's alternative work practice results, or alternatively, using the alternative work practice to verify the company's Method 21 results, would not serve the intended purpose of the third-party audit. Therefore, the commission proposes the following revisions to account for use of the alternative work practice in the audit provisions in §115.788. Minor non-substantive revisions are also proposed to improve the structure and readability of the rule language and do not change the meaning or requirements of the rule.

The commission proposes to amend subsection (a)(2)(D) to prohibit the use of the alternative work practice in §115.358 by the independent third-party organization if the normal monitoring method for valves in HRVOC service is according to Method 21. The commission also proposes to amend subsection (c) to specify that the notification required under subsection (c) must identify whether the audit will be conducted using Method 21 or the alternative work practice in §115.358. The proposed amendment to subsection (e) would specify that if the independent third-party audit results indicate deficiencies in the implementation of Method 21 or in the implementation of the alternative work practice in §115.358, the owner or operator shall submit a corrective action plan with the audit report to the TCEQ's Houston regional office.

The commission proposes a new subsection (h) to set specific requirements for the third-party audit if the owner or operator is using the alternative work practice for valves in HRVOC service. Proposed new paragraph (1) would require that the field survey be conducted as specified in §115.788(a)(2), except that the independent third-party organization shall perform the field survey according to the alternative work practice in §115.358. Proposed new paragraph (2) would establish different criteria for the data review required in §115.788(a)(3) because the current criteria are specific to the implementation of Method 21 and would not have any applicability under the alternative work practice. Under proposed paragraph (2), the independent third-party organization would conduct a review of all data and video generated by the monitoring personnel in the previous monitoring interval specified in §115.358. Proposed subparagraph (A) would require a review of the records to verify that: 1) the optical gas imaging instrument meets the requirements in §115.358, 2) the daily instrument check was performed as required in §115.358, and 3) the monitoring personnel have satisfied the training requirements. Proposed new subparagraph (B) would also require the review to include identification of any: 1) instances that components were imaged at a distance greater than demonstrated during the daily instrument check, 2) instances that the optical gas imaging instrument was not operated in accordance with the manufacturer's operating parameters, and 3) leaking components in the video records that were not identified as leaking by the routine monitoring personnel. Proposed new subparagraph (C) would replace the report content requirements in §115.788(a)(3)(A) and (B) with the third-party organization's review based on the requirements of proposed new §115.788(h)(2)(A) and (B).

While the commission expects that owners or operators implementing the alternative work practice would likely attempt to use the alternative work practice as widely as possible to be cost effective, there is a possibility that a site may have some valves in HRVOC service monitored according to Method 21 and some according to the alternative work practice. Therefore, the commission proposes a new §115.788(h)(3) to specify that if this situation does occur, the owner or operator shall perform the third-party audit based on the how the majority of valves in HRVOC service are monitored. The commission is not proposing to require both audit approaches if both monitoring work practices are used. Proposed new paragraph (3) also specifies that the population of valves used for the field survey must only include those valves monitored according to the method used in the field survey, i.e., either the valves monitored according to Method 21, or the valves monitored according to the alternative work practice.

Finally, the commission proposes to reletter the existing subsection (h), regarding the executive director's authority to specify additional corrective action, as a new subsection (i).

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. No additional staff resources would be required for the implementation of the proposed rules.

The EPA finalized the federal alternative work practice program in December 2008. EPA's rules established an alternative work practice using gas imaging technology to detect fugitive emission leaks from equipment. The EPA allowed use of the alternative work practice for numerous federal LDAR regulations in 40 CFR Parts 60, 61, 63, and 65. Because of overlapping state rules and permit requirements for fugitive emission controls, many facilities will not be able to use the alternative work practice unless Texas fugitive emission LDAR rules are revised. The proposed rules would not require the use of the alternative work practice; rather they would be an additional method available for companies to use in detecting fugitive emissions. Companies can choose either to use the alternative work practice or to continue using the current Method 21-based work practice already required by rule which uses hydrocarbon analyzers.

Petroleum refineries; natural gas or gasoline processing operations; and synthetic organic chemical, polymer, resin, and methyl-tert-butyl ether manufacturing processes in Gregg, Nueces, and Victoria Counties and in the HGB, DFW, BPA, and El Paso areas would be able to use the alternative work practice. The alternative work practice uses optical gas imaging instruments which allows 3,000 components per hour to be evaluated compared to 500 components per hour with current LDAR work practices. Use of the alternative work practice could result in an 83% reduction in measurement time even though optical gas imaging instruments do not determine emission concentration and may not be as sensitive as Method 21 hydrocarbon analyzers in detecting small leaks. The alternative work practice is expected to be used to detect large leaks more quickly leading to faster repair of those leaks.

The proposed Chapter 115 alternative work practice rules are not expected to have a fiscal impact on governmental entities since they do not typically own or operate the types of facilities affected by the proposed rulemaking.

PUBLIC BENEFITS AND COSTS

Nina Chamness also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules would be protection of the environment and public health and safety by providing an efficient alternative method for the reduction of VOC and HRVOC emissions.

The proposed rules are not expected to have a significant fiscal impact on individuals or businesses. Participation in the alternative work practice program would be voluntary. Petroleum refineries in Gregg, Nueces, and Victoria Counties; petroleum refineries, natural gas/gasoline processing operations; and synthetic organic chemical, polymer, resin, and methyl-tert-butyl ether manufacturing processes in the HGB, DFW, BPA, and El Paso areas already required by Chapter 115 to measure fugitive emissions would be affected by this rule. Staff estimates that there are approximately 146 to 221 privately-owned and operated facilities in these areas of the state that would be able to choose the alternative work practice. Owners or operators choosing to use the alternative work practice can purchase equipment, train their personnel, and conduct the measurements; or contract with other entities to provide this service.

Use of the alternative work practice could result in an 83% reduction in measurement time even though optical gas imaging instruments do not determine emission concentration and may not be as sensitive as Method 21 hydrocarbon analyzers in detecting small leaks. The alternative work practice is expected to be used to detect large leaks more quickly leading to faster repair of those leaks.

If a business chooses to use the alternative work practice under the proposed rules, it could spend as much as $108,000 for a camera, associated hardware, camera maintenance, training (for four operators), and recordkeeping in the first year of implementation. The initial training, a proposed requirement in this rulemaking that is not included in the federal alternative work practice, is estimated to be $7,800. In years two through five, annual costs for maintenance and required training could be as much as $9,000, with $4,000 for the required training and the remaining $5,000 for maintenance. Alternatively, a business could use an outside contractor for detecting fugitive emissions using the alternative work practice. Assuming a $37 per hour labor rate for a contracted measurement technician and an 83% reduction in measurement time, staff estimates that the alternative work practice would cost $12.33 per thousand components measured versus $74 for the current Method 21 practice. This could result in estimated savings of $61.67 per thousand components measured.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rules since participation in the alternative work practice is voluntary and most small businesses do not own or operate the types of facilities that would benefit from the alternative work practice. If a small business does implement the alternative work practice, it would experience the same costs and cost savings as those experienced by large businesses.

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 state law and are not expected to 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 rule-

making action 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, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The intent of the proposed rulemaking is to protect the environment, but no adverse effects are anticipated.

Further, 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.

The rulemaking implements requirements of 42 United States Code (USC), §7410, which requires states to adopt a SIP that provides for "implementation, maintenance, and enforcement" of the NAAQS in each air quality control region of the state. While 42 USC, §7410 does not require specific programs, methods, or reductions to meet the standard, a SIP must include "enforceable emission limitations and other control measures, means or techniques." It is true that the 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 will be brought into attainment on schedule. The proposed rulemaking would allow for the use of an alternative work practice, and its use is optional. Owners or operators of sites subject to the Chapter 115 fugitive emission LDAR rules may choose to use the alternative work practice or continue using the current traditional work practice. In addition, because optical gas imaging instruments have limitations regarding the chemicals that can be detected, the commission is not proposing an "all-in or all-out" approach. Even within the same unit at a site, there may be different components in VOC service that an optical gas imaging instrument is not capable of detecting sufficient VOC species to be effectively used under the alternative work practice. Therefore, companies must have sufficient flexibility to evaluate which components the Chapter 115 alternative work practice is appropriate and which components the traditional Method 21 work practice is still necessary. In the *Demonstrating Noninterference under FCAA, Section 110(l)* section, the commission clarifies why the inclusion of the Chapter 115 alternative work practice would not negatively impact the status of the state's attainment with the ozone NAAQS. For sources subject to Subchapter D, Divisions 2 and 3, the alternative work practice would be at least equivalent to and in some instances more stringent than the current work practice in these rules. For sources subject to Subchapter H, Division 3, use of the alternative work practice with retention of the specific requirements that make the HRVOC rules more effective than traditional LDAR regulations would be at least equivalent to the current work practice in these rules. Therefore, this rulemaking is proposed to meet and not exceed requirements of federal law.

As discussed, this rulemaking action provides an option that supplements the implementation of the 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 Texas Health and Safety Code (THSC), Chapter 382, Texas Clean Air Act, 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, 382.017, and 382.021. 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 rules would allow owners or operators of sites subject to the Chapter 115 fugitive emission LDAR rules to choose to use the alternative work practice or continue using the current traditional work practice. Specifically, the proposed new and amended rules would 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. Use of the alternative work practice does not affect private real property, and therefore, allowing this option does not constitute a taking. Consequently, this rulemaking action does not meet the definition of a taking 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.

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 Actions and Rules Subject to the Coastal Management Program (CMP) and therefore, requires 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 would 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 proposed new and amended sections in Chapter 115, Subchapter D, Divisions 2 and 3, and Subchapter H, Division 3 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 if the owner or operator elects to use the optional alternative work practice specified in this proposed rulemaking.

ANNOUNCEMENT OF HEARINGS

The commission will hold public hearings on this proposal in Irving on January 19, 2010, at 2:00 p.m. at the Irving Central Library Auditorium located at 801 West Irving Boulevard; in Austin on January 20, 2010, at 2:00 p.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle; and in Houston on January 21, 2010, at 2:00 p.m. in Conference Room A at the Houston-Galveston Area Council located at 3555 Timmons Lane, Suite 120. 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 each hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearings 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 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 2009-030-115-EN. The comment period closes January 25, 2010. 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 Robert Gifford of the Air Quality Division at (512) 239-3149.

SUBCHAPTER D. PETROLEUM REFINING, NATURAL GAS PROCESSING, AND PETROCHEMICAL PROCESSES

DIVISION 2. FUGITIVE EMISSION CONTROL IN PETROLEUM REFINERIES IN GREGG, NUECES, AND VICTORIA COUNTIES

30 TAC §§115.322 - 115.326

STATUTORY AUTHORITY

The 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 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 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 amended sections are also proposed under 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 amended sections implement THSC, §§382.002, 382.011, 382.012, 382.016, 382.017, 382.021, and FCAA, 42 USC, §§7401 *et seq.*

§115.322. Control Requirements.

For Gregg, Nueces, and Victoria Counties, no person shall operate a petroleum refinery without complying with the following requirements.

(1) No component may [~~shall~~] be allowed to have a volatile organic compound (VOC) leak as defined in §101.1 of this title (relating to Definitions) for more than 15 calendar days after the leak is found, except as provided in paragraph (2) of this section. If the owner or operator elects to use the alternative work practice specified in §115.358 of this title (relating to Alternative Work Practice), the definition of a leak for the purposes of this paragraph is as specified in §115.358 of this title, including any leak detected using the alternative work practice on a component that is subject to the requirements of this division but not specifically selected for alternative work practice monitoring.

(2) A first attempt at repair must [~~shall~~] be made no later than five calendar days after the leak is found, and the component must [~~shall~~] be repaired no later than 15 calendar days after the leak is found, unless the repair of a component would require a unit shutdown that [~~which~~] would create more emissions than the repair would eliminate. A component in gas/vapor or light liquid service is considered to be repaired when it is monitored with an instrument using [~~Test~~] Method 21 and shown to no longer have a leak after adjustments or alterations to the component. A component in heavy liquid service is considered to be repaired when it is monitored by audio, visual, and olfactory means and shown to no longer have a leak after adjustments or alterations to the component. For any component that the owner or operator uses the alternative work practice specified in §115.358 of this title, the component is considered repaired when the component is monitored using

either an optical gas imaging instrument as specified in §115.358 of this title or the normal monitoring method required under this division and is demonstrated to no longer have a leak after adjustments or alterations to the component. If the repair of a component would require a unit shutdown that [~~which~~] would create more emissions than the repair would eliminate, the repair may be delayed until the next scheduled shutdown.

(3) All leaking components, as defined in paragraph (1) of this section, that [~~which~~] cannot be repaired until the unit is shut down for turnaround must [~~shall~~] be identified for such repair by tagging. The executive director [~~at his discretion~~] may require early unit turnaround or other appropriate action based on the number and severity of tagged leaks awaiting turnaround.

(4) Except for pressure relief valves, no valves may [~~shall~~] be installed or operated at the end of a pipe or line containing a VOC, unless the pipe or line is sealed with a second valve, a blind flange, a plug, or a cap. The sealing device may be removed only while a sample is being taken or during maintenance operations, and when closing the line, the upstream valve must [~~shall~~] be closed first.

(5) Pipeline valves and pressure relief valves in gaseous VOC service must [~~shall~~] be marked in some manner that will be readily obvious to monitoring personnel. Alternatively, the owner or operator of the refinery may choose to monitor all components in liquid service on the schedule for components in gaseous service specified in §115.324(2) of this title (relating to Inspection Requirements). If the owner or operator elects to use the alternative work practice in §115.358 of this title to monitor components in liquid service, the frequency must be as specified in §115.358 of this title.

§115.323. Alternate Control Requirements.

For all affected persons in Gregg, Nueces, and Victoria Counties, the following alternate control techniques may apply.[~~:~~]

(1) Any alternate methods of demonstrating and documenting continuous compliance with the applicable control requirements or exemption criteria in this division (relating to Fugitive Emission Control in Petroleum Refineries in Gregg, Nueces, and Victoria Counties) 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.

(2) The executive director may approve an alternate monitoring method if the refinery operator can demonstrate that the alternate monitoring method satisfies the conditions of §115.324(7) of this title (relating to Inspection Requirements). Any request for an alternate monitoring method must be made in writing to the executive director.

(3) The owner or operator of a site in Gregg, Nueces, or Victoria Counties that is subject to this division may use the alternative work practice specified in §115.358 of this title (relating to Alternative Work Practice) as an optional alternative to hydrocarbon gas analyzer monitoring required under this division.

§115.324. Inspection Requirements.

For Gregg, Nueces, and Victoria Counties, the owner or operator of a petroleum refinery shall conduct a monitoring program consistent with the following provisions.[~~:~~]

(1) The owner or operator shall measure [~~Measure~~] yearly (with a hydrocarbon gas analyzer) the emissions from all:

(A) pump seals;

(B) pipeline valves in liquid service;

(C) process drains; and

(D) all valves elevated more than two meters above any permanent structure.

(2) The owner or operator shall measure [~~Measure~~] quarterly (with a hydrocarbon gas analyzer) the emissions from all:

(A) compressor seals;

(B) pipeline valves in gaseous service; and

(C) pressure relief valves in gaseous service.

(3) The owner or operator shall visually [~~Visually~~] inspect, weekly, all pump seals.

(4) The owner or operator shall measure [~~Measure~~] (with a hydrocarbon gas analyzer) the emissions from any component, except those exempted by §115.327(2) - (3) of this title (relating to Exemptions), whenever a potential leak is detected by sight, sound, or smell.

(5) The owner or operator shall measure [~~Measure~~] (with a hydrocarbon gas analyzer) emissions from any relief valve that [~~which~~] has vented to the atmosphere within 24 hours.

(6) Upon the detection of a leaking component, the owner or operator shall affix to the leaking component a weatherproof and readily visible tag, bearing an identification number and the date the leak was located. This tag must [~~shall~~] remain in place until the leaking component is repaired.

(7) The monitoring schedule of paragraphs (1) - (3) of this section may be modified as follows.[~~:~~]

(A) After completion of the required quarterly valve monitoring for a period of at least two years, the operator of a refinery may request in writing to the executive director that the valve monitoring schedule be revised based on the percent of valves leaking. The percent of valves leaking must [~~shall~~] be determined by dividing the sum of valves leaking during current monitoring and valves for which repair has been delayed by the total number of valves subject to the requirements. This request must [~~shall~~] include all data that have been developed to justify the following modifications in the monitoring schedule.[~~:~~]

(i) After [~~after~~] two consecutive quarterly leak detection periods with the percent of valves leaking equal to or less than 2.0%, an owner or operator may begin to skip one of the quarterly leak detection periods for the valves in gas/vapor and light liquid service.[~~:~~]

(ii) After [~~after~~] five consecutive quarterly leak detection periods with the percent of valves leaking equal to or less than 2.0%, an owner or operator may begin to skip three of the quarterly leak detection periods for the valves in gas/vapor and light liquid service.

(iii) Leak detection skip period requirements for any New Source Performance Standard or National Emission Standard for Hazardous Air Pollutants may be substituted for clauses (i) and (ii) of this subparagraph.

(B) If the executive director determines that there is an excessive number of leaks in any given process area, the executive director [~~he~~] may require an increase in the frequency of monitoring for that process area of the refinery.

(8) For any components that the owner or operator elects to use the alternative work practice specified in §115.358 of this title (relating to Alternative Work Practice), the following provisions apply.

(A) The frequency for monitoring of any components listed in paragraphs (1) or (2) of this section must be the frequency determined according to §115.358 of this title, except as specified in subparagraph (C) of this paragraph.

(B) The alternative monitoring schedules allowed under paragraph (7) of this section are not allowed.

(C) If the owner or operator elects to use the alternative work practice in §115.358 of this title to satisfy the hydrocarbon gas analyzer monitoring requirement of paragraph (5) of this section, the time limitation specified in paragraph (5) of this section for performing the monitoring continues to apply.

(D) If the executive director determines that there is an excessive number of leaks in any given process area that the alternative work practice is used, the executive director may require an increase in the frequency of monitoring under the alternative work practice for that process area of the refinery.

§115.325. Testing Requirements.

For all affected persons in Gregg, Nueces, and Victoria Counties, compliance with this division (relating to Fugitive Emission Control in Petroleum Refineries in Gregg, Nueces, and Victoria Counties) must [~~shall~~] be determined by applying the following test methods, as appropriate:

(1) Method 21 (40 Code of Federal Regulations Part 60, Appendix A-7 (October 17, 2000)) [~~Test Method 21 (40 CFR 60, Appendix A, effective 6/22/90)~~] for determining volatile organic compound (VOC) leaks, with the provision that the[~~. The~~] leak detection equipment can be calibrated with methane, propane, or hexane, but the meter readout must be as parts per million by volume [~~(ppmv)~~] hexane;

(2) determination of true vapor pressure using American Society for Testing and Materials [~~ASTM~~] Test Method D323-82 for the measurement of Reid vapor pressure, adjusted for 68 degrees Fahrenheit (20 degrees Celsius) in accordance with American Petroleum Institute [~~(API)~~] Publication 2517, Third Edition, 1989; [~~or~~]

(3) the alternative work practice specified in §115.358 of this title (relating to Alternative Work Practice); or

(4) [~~(3)~~] minor modifications to these test methods approved by the executive director.

§115.326. Recordkeeping Requirements.

For Gregg, Nueces, and Victoria Counties, the owner or operator of a petroleum refinery shall have the following recordkeeping requirements.

(1) The owner or operator shall submit [~~Submit~~] to the executive director a monitoring program plan. This plan must [~~shall~~] contain, at a minimum, a list of the refinery units and the quarter that the unit [~~in which they~~] will be monitored, a copy of the log book format, and the make and model of the monitoring equipment to be used. If the owner or operator elects to use the alternative work practice specified in §115.358 of this title (relating to Alternative Work Practice), the owner or operator must update and resubmit the plan to the executive director. The updated plan must also:

(A) identify which units are monitored according to the alternative work practice; and

(B) include the frequency of monitoring under the alternative work practice.

(2) The owner or operator shall maintain [~~Maintain~~] a leaking-components monitoring log for all leaks of more than 10,000 parts per million by volume (ppmv) of volatile organic compound detected by the monitoring program required by §115.324 of this title (relating to Inspection Requirements). If the owner or operator elects to use the alternative work practice specified in §115.358 of this title, the log must also be maintained for all leaks detected using the alternative work practice. This log must [~~shall~~] contain, at a minimum, the following data:

(A) the name of the process unit where the component is located;

(B) the type of component (e.g., valve or seal);

(C) the tag number of the component;

(D) the date the component was monitored;

(E) the results of the monitoring (in ppmv), except for components monitored according to the alternative work practice in §115.358 of this title, which must be maintained according to paragraph (4) of this section;

(F) a record of the calibration of the monitoring instrument, except for the daily instrument check specified in the alternative work practice in §115.358 of this title, which must be maintained according to paragraph (4) of this section;

(G) if a component is found leaking:

(i) the date that [~~on which~~] a leaking component is discovered;

(ii) the date that [~~on which~~] a first attempt at repair was made to a leaking component;

(iii) the date that [~~on which~~] a leaking component is repaired;

(iv) the date and instrument reading of the recheck procedure after a leaking component is repaired; and

(v) those leaks that cannot be repaired until turnaround and the date that [~~on which~~] the leaking component is placed on the shutdown list;

(H) the total number of components checked and the total number of components found leaking; and

(I) the test method used ([~~Test~~] Method 21, [~~or~~] sight/sound/smell, or the alternative work practice in §115.358 of this title).

(3) The owner or operator shall retain [~~Retain~~] copies of the monitoring log for a minimum of five years after the date that [~~on which~~] the record was made or the report prepared.

(4) If an owner or operator elects to use the alternative work practice in §115.358 of this title, the following records must be maintained in addition to the records required by paragraphs (1) - (3) of this section.

(A) The owner or operator shall maintain a list of each component that is monitored according to the alternative work practice of this section.

(B) The owner or operator shall maintain records of the detection sensitivity level selected from the table in §115.358(e)(1) of this title.

(C) The owner or operator shall maintain records of the analysis to determine the component in contact with the lowest mass fraction of chemicals that are detectable, as required by the daily instrument check procedure referenced in §115.358(c)(2) of this title.

(D) The owner or operator shall maintain records of the technical basis for the mass fraction of detectable chemicals used for the daily instrument check procedure referenced in §115.358(c)(2) of this title.

(E) The owner or operator shall maintain records of each daily instrument check required by §115.358(c)(2) of this title. These records include:

(i) the flow meter reading of the leak used in the daily instrument check and the distance from which the leak was imaged;

(ii) a video record, with a date and time stamp, of the daily instrument check for each configuration and operator of the optical gas imaging instrument used during monitoring; and

(iii) the name of each operator performing the daily instrument check.

(F) The owner or operator shall maintain records of the leak survey results as follows for all components that the owner or operator uses the alternative work practice in §115.358 of this title.

(i) A video record must be used to document the leak survey results and the results of the recheck to verify the leak has been repaired, if the alternative work practice is used to perform the recheck. The video record must meet the following requirements.

(I) The video record must include a time and date stamp for each monitoring event.

(II) Each component must be identifiable in the video record.

(ii) The records must include the names of each operator performing the leak survey for each monitoring event.

(G) The owner or operator shall maintain records of the annual Method 21 screening required by §115.358(f) of this title, including:

(i) the components screened;

(ii) the concentration measured according to Method 21;

(iii) the date and time of the Method 21 screening; and

(iv) the calibrations required by Method 21.

(H) The owner or operator shall maintain records of the training required by §115.358(h) of this title.

(I) The owner or operator shall maintain records of the optical gas imaging instrument manufacturer's operating parameters.

(5) [~~(4)~~] The owner or operator shall maintain [~~Maintain~~] all monitoring records for at least five years and make them available for review upon request by authorized representatives of the executive director, United States Environmental Protection Agency [~~EPA~~], or local air pollution control agencies with jurisdiction.

This 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 December 11, 2009.

TRD-200905755
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: January 24, 2010
For further information, please call: (512) 239-0177

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DIVISION 3. FUGITIVE EMISSION CONTROL IN PETROLEUM REFINING, NATURAL GAS/GASOLINE PROCESSING, AND PETROCHEMICAL PROCESSES IN OZONE NONATTAINMENT AREAS

30 TAC §§115.352 - 115.358

STATUTORY AUTHORITY

The amended and new 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 amended and new 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 amended and new 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 amended and new sections are also proposed under 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 amended and new sections implement THSC, §§382.002, 382.011, 382.012, 382.016, 382.017, 382.021, and FCAA, 42 USC, §§7401 *et seq.*

§115.352. Control Requirements.

For the Beaumont-Port Arthur, Dallas-Fort Worth, [~~Beaumont/Port Arthur, Dallas/Fort Worth,~~] El Paso, and Houston-Galveston-Brazoria [~~Houston/Galveston/Brazoria~~] areas as defined in §115.10 of this title (relating to Definitions), no person shall operate a petroleum refinery; a synthetic organic chemical, polymer, resin, or methyl-tert-butyl ether manufacturing process; or a natural gas/gasoline processing operation, as defined in §115.10 of this title, without complying with the following requirements.

(1) Except as provided in paragraph (2) of this section, no component may be allowed to have a volatile organic compound (VOC) leak for more than 15 calendar days after the leak is found that meets [~~exceeds~~] the following:

(A) for all components except pump seals and compressor seals, a screening concentration greater than 500 parts per million

by volume (ppmv) above background as methane, or the dripping or exuding of process fluid based on sight, smell, or sound; [~~and~~]

(B) for pump seals and compressor seals, a screening concentration greater than 10,000 ppmv above background as methane, or the dripping or exuding of process fluid based on sight, smell, or sound; and[~~.~~]

(C) if the owner or operator elects to use the alternative work practice specified in §115.358 of this title (relating to Alternative Work Practice), any leak detected as defined in §115.358 of this title, including any leak detected using the alternative work practice on a component that is subject to the requirements of this division but not specifically selected for alternative work practice monitoring.

(2) A first attempt at repair must be made no later than five calendar days after the leak is found and the component must be repaired no later than 15 calendar days after the leak is found, unless the repair of the component would require a unit shutdown that would create more emissions than the repair would eliminate. A component in gas/vapor or light liquid service is considered to be repaired when it is monitored with an instrument using United States Environmental Protection Agency [~~Test~~] Method 21 in 40 Code of Federal Regulations (CFR) Part 60, Appendix A-7 [~~A~~] (October 17, 2000) and shown to no longer have a leak after adjustments or alterations to the component. A component in heavy liquid service is considered to be repaired when it is inspected by audio, visual, and olfactory means and shown to no longer have a leak after adjustments or alterations to the component. For any component that the owner or operator uses the alternative work practice specified in §115.358 of this title, the component is considered repaired when the component is demonstrated to no longer have a leak after adjustments or alterations to the component by either screening using an optical gas imaging instrument as specified in §115.358 of this title or by the normal monitoring method required under this division. If the repair of a component within 15 days after the leak is detected would require a process unit shutdown that would create more emissions than the repair would eliminate, the repair may be delayed until the next scheduled process unit shutdown.

(A) Delay of repair beyond a process unit shutdown will be allowed for a component if that component is isolated from the process and does not remain in VOC service.

(B) Valves that can be safely repaired without a process unit shutdown may not be placed on the shutdown list.

(C) Delay of repair will be allowed for pumps, compressors, or agitators if the repair is completed as soon as practicable, but not later than six months after the leak was detected, and the repair requires replacing the existing seal design with:

(i) a dual mechanical seal system that includes a barrier fluid system;

(ii) a system that is designed with no externally actuated shaft penetrating the housing; or

(iii) a closed-vent system and control device that meets the requirements of §115.122(a)(2) of this title (relating to Control Requirements).

(3) All leaking components, as defined in paragraph (1) of this section, that cannot be repaired until a process unit shutdown must be identified for such repair by tagging. The executive director[~~, at his discretion,~~] may require an early process unit shutdown or other appropriate action based on the number and severity of tagged leaks awaiting a process unit shutdown.

(4) No valves may be installed or operated at the end of a pipe or line containing VOC unless the pipe or line is sealed with a second valve, a blind flange, or a tightly-fitting plug or cap. The sealing device may be removed only while a sample is being taken or during maintenance operations, and when closing the line, the upstream valve must be closed first.

(5) Construction of new and reworked piping, valves, and pump and compressor systems must conform to applicable American National Standards Institute, American Petroleum Institute, American Society of Mechanical Engineers, or equivalent codes.

(6) New and reworked underground process pipelines must contain no buried valves such that fugitive emission monitoring is rendered impractical.

(7) To the extent that good engineering practice will permit, new and reworked components must be so located to be reasonably accessible for leak-checking during plant operation. A difficult-to-monitor component is a component that cannot be inspected without elevating the monitoring personnel more than two meters above a permanent support surface or that requires a permit for confined space entry as defined in 29 CFR §1910.146 (December 1, 1998). Difficult-to-monitor components must be identified in a list to be made available upon request as specified in §115.356(5) [~~§115.356(4)~~] of this title (relating to Recordkeeping Requirements).

(8) New and reworked piping connections must be welded, flanged, or consist of pressed and permanently formed metal-to-metal seals. Screwed connections are permissible only on new piping smaller than two inches in diameter.

(9) For pressure relief valves installed in series with a rupture disk, pin, second relief valve, or other similar leak-tight pressure relief component, a pressure gauge or an equivalent device or system must be installed between the relief valve and the other pressure relief component to monitor for leakage past the first component. When leakage is detected past the first component, that component must be repaired or replaced at the earliest opportunity, but no later than the next process unit shutdown. Equivalent devices or systems must be identified in a list to be made available upon request as specified in §115.356(5) [~~§115.356(4)~~] of this title and must have been approved by the methods required by §115.353 of this title (relating to Alternate Control Requirements).

(10) Any petroleum refinery; synthetic organic chemical, polymer, resin, or methyl-tert-butyl ether manufacturing process; or natural gas/gasoline processing operation in the Houston-Galveston-Brazoria [~~Houston/Galveston/Brazoria~~] area in which a highly-reactive volatile organic compound, as defined in §115.10 of this title, is a raw material, intermediate, final product, or in a waste stream is subject to the requirements of Subchapter H of this chapter (relating to Highly-Reactive Volatile Organic Compounds) in addition to the applicable requirements of this division (relating to Fugitive Emission Control in Petroleum Refining, Natural Gas/Gasoline Processing, and Petrochemical Processes in Ozone Nonattainment Areas).

§115.353. Alternate Control Requirements.

(a) For all affected persons in the Beaumont-Port Arthur, Dallas-Fort Worth, [~~Beaumont/Port Arthur, Dallas/Fort Worth,~~] El Paso, and Houston-Galveston-Brazoria [~~Houston/Galveston~~] areas, any alternate methods of demonstrating and documenting continuous compliance with the applicable control requirements or exemption criteria in this division (relating to Fugitive Emission Control in Petroleum Refining, Natural Gas/Gasoline Processing, and Petrochemical Processes in Ozone Nonattainment Areas) 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.

(b) The owner or operator of a site subject to the requirements of this division may use the alternative work practice specified in §115.358 of this title (relating to Alternative Work Practice) as an optional alternative to hydrocarbon gas analyzer monitoring required under this division.

§115.354. Monitoring and Inspection Requirements.

All affected persons in the Beaumont-Port Arthur, Dallas-Fort Worth, [~~Beaumont/Port Arthur, Dallas/Fort Worth,~~] El Paso, and Houston-Galveston-Brazoria [~~Houston/Galveston/Brazoria~~] areas shall [~~must~~] conduct a monitoring and inspection program consistent with the following provisions.

(1) Monitor yearly (with a hydrocarbon gas analyzer) the emissions from all:

(A) process drains that receive or contact affected volatile organic compound wastewater streams as defined in Subchapter B, Division 4 of this chapter (relating to Industrial Wastewater);

(B) difficult-to-monitor components as identified in §115.352(7) of this title (relating to Control Requirements) that would otherwise be subject to more frequent monitoring under paragraph (2) of this section; and

(C) unsafe-to-monitor components that would otherwise be subject to more frequent monitoring. An unsafe-to-monitor component is a component that the owner or operator determines is unsafe to monitor because monitoring personnel would be exposed to an immediate danger as a consequence of conducting the monitoring. Components that are unsafe to monitor must be identified in a list made available upon request as specified in §115.356(5) [~~§115.356(4)~~] of this title (relating to Recordkeeping Requirements). If an unsafe-to-monitor component is not considered safe to monitor within a calendar year, then it must be monitored as soon as possible during times that are safe to monitor.

(2) Monitor each calendar quarter (with a hydrocarbon gas analyzer) the screening concentration from all:

(A) compressor seals;

(B) pump seals;

(C) accessible valves; and

(D) pressure relief valves in gaseous service.

(3) Inspect weekly, by visual, audio, and/or olfactory means, all flanges, excluding flanges that are monitored at least once each calendar year using United States Environmental Protection Agency [~~Test~~] Method 21 in 40 Code of Federal Regulations Part 60, Appendix A-7 [~~A~~] (October 17, 2000) and excluding flanges that are unsafe to inspect. Flanges that are unsafe to inspect must be identified in a list made available upon request. If an unsafe-to-inspect flange is not considered safe to inspect within the required weekly time frame, then it must be inspected as soon as possible during a time that it is safe to inspect.

(4) Monitor (with a hydrocarbon gas analyzer) emissions from any relief valve that has vented to the atmosphere within 24 hours of the release, excluding relief valves that are unsafe to monitor or difficult to monitor. Relief valves that are unsafe to monitor must be monitored as soon as possible after relieving during times that are safe to monitor. Relief valves that are difficult to monitor must be monitored within 15 days after a release.

(5) Upon the detection of a leaking component, affix to the leaking component a weatherproof and readily visible tag, bearing an identification number and the date the leak was detected. This tag must remain in place until the leaking component is repaired. Tagging of difficult-to-monitor leaking components may be done by reference tagging. The reference tag should be located as close as possible to the leaking component and should clearly identify the leaking component and its location.

(6) The monitoring schedule of paragraphs (1) - (3) of this section may be modified to require an increase in the frequency of monitoring in a given process area if the executive director determines that there is an excessive number of leaks in that process area.

(7) After completion of the required quarterly valve monitoring for a period of at least two years, the operator of a petroleum refinery; synthetic organic chemical, polymer, resin, or methyl-tert-butyl ether manufacturing process; or a natural gas/gasoline processing operation may request in writing to the executive director that the valve monitoring schedule be revised based on the percent of valves leaking. The percent of valves leaking must be determined by dividing the sum of valves leaking during the current monitoring period and valves for which repair has been delayed (including valves that have been classified as non-repairable under §115.357(8) of this title (relating to Exemptions)) by the total number of valves subject to the requirements. This request must include all data that have been developed to justify the following modifications in the monitoring schedule.

(A) After two consecutive quarterly leak detection periods with the percent of valves leaking equal to or less than 2.0%, an owner or operator may begin to skip one of the quarterly leak detection periods for the valves in gas/vapor and light liquid service.

(B) After five consecutive quarterly leak detection periods with the percent of valves leaking equal to or less than 2.0%, an owner or operator may begin to skip three of the quarterly leak detection periods for the valves in gas/vapor and light liquid service.

(8) Alternate monitoring schedules approved before November 15, 1996, under §§115.324(a)(8)(A), 115.334(3)(A), and 115.344(3)(A) of this title (relating to Inspection Requirements), as in effect December 3, 1993, are approved monitoring schedules for the purposes of paragraph (7) of this section.

(9) All component monitoring must occur when the component is in contact with process material and the process unit is in service. If a unit is not operating during the required monitoring period but a component in that unit is in contact with process fluid that is circulating or under pressure, then that component is considered to be in service and is required to be monitored. Valves must be in gaseous or light liquid service to be considered in the total valve count for alternate valve monitoring schedules of paragraph (7) of this section.

(10) Monitored screening concentrations must be recorded for each component in gaseous or light liquid service. Notations such as "pegged," "off scale," "leaking," "not leaking," or "below leak definition" may not be substituted for hydrocarbon gas analyzer results. For readings that are higher than the upper end of the scale (i.e., pegged) even when using the highest scale setting or a dilution probe, record a default pegged value of 100,000 parts per million by volume. This requirement does not apply to monitoring using an optical gas imaging instrument in accordance with §115.358 of this title (relating to Alternative Work Practice).

(11) All new connectors must be checked for leaks within 30 days of being placed in volatile organic compound service by monitoring with a hydrocarbon gas analyzer for components in light liquid and gas service and by using visual, audio, and/or olfactory means for components in heavy liquid service. Components that are unsafe to monitor or inspect are exempt from this requirement if they are monitored or inspected as soon as possible during times that are safe to monitor.

(12) All exemptions for valves with a nominal size of two inches or less expired on July 31, 1992 (final compliance date).

(13) For any components that the owner or operator elects to use the alternative work practice specified in §115.358 of this title, the following provisions apply.

(A) The frequency for monitoring of any components listed in this section must be the frequency determined according to §115.358 of this title, except as specified in subparagraph (C) of this paragraph.

(B) The alternative monitoring schedules allowed under paragraphs (7) and (8) of this section are not allowed.

(C) If the owner or operator elects to use the alternative work practice in §115.358 of this title to satisfy the hydrocarbon gas analyzer monitoring requirements of paragraphs (4) or (11) of this section, the time limitations specified in paragraphs (4) and (11) on performing the monitoring continue to apply.

(D) If the component is within a class of equipment (e.g., valves, flanges, etc.) that the owner or operator has elected to use the alternative work practice and the component meets all other conditions specified in §115.358 of this title for acceptable use of the alternative work practice, then the component may not be classified as difficult-to-monitor under §115.352(7) of this title unless in order to image the component as required by §115.358 of this title the monitoring personnel would have to be elevated more than two meters above a permanent support surface or would require a permit for confined space entry as defined in 29 Code of Federal Regulations §1910.146 (December 1, 1998). If the component does qualify as difficult-to-monitor using the alternative work practice in §115.358 of this title, the owner or operator may use either Method 21 or the alternative work practice at the monitoring frequency specified in paragraph (1) of this section. Any components classified as difficult-to-monitor under the alternative work practice must be identified as such in the list required in §115.352(7) of this title.

(E) The owner or operator that elects to use the alternative work practice in §115.358 of this title may still classify a component as unsafe-to-monitor as allowed under paragraph (1)(C) of this section if the component cannot be safely monitored using either a hydrocarbon gas analyzer or the alternative work practice. The owner or operator may use either Method 21 or the alternative work practice at the monitoring frequency specified in paragraph (1) of this section. Any components classified as unsafe-to-monitor under the alternative work practice must be identified as such in the list required in paragraph (1)(C) of this section.

(F) If the executive director determines that there is an excessive number of leaks in any given process area that the alternative work practice is used, the executive director may require an increase in the frequency of monitoring under the alternative work practice in that process area.

§115.355. Approved Test Methods.

For all affected persons in the Beaumont-Port Arthur, Dallas-Fort Worth, [~~Beaumont/Port Arthur, Dallas/Fort Worth,~~] El Paso, and Houston-Galveston-Brazoria [~~Houston/Galveston/Brazoria~~] areas, compliance with this division (relating to Fugitive Emission Control in Petroleum Refining, Natural Gas/Gasoline Processing, and Petrochemical Processes in Ozone Nonattainment Areas) must be determined by applying the following test methods, as appropriate:

(1) [~~Test~~] Method 21 (40 Code of Federal Regulations Part 60, Appendix A-7 [~~A~~] (October 17, 2000)) for determining volatile organic compound leaks;

(2) determination of true vapor pressure using American Society for Testing and Materials Test Methods D323-89, D2879, D4953, D5190, or D5191 for the measurement of Reid vapor pressure, adjusted for 68 degrees Fahrenheit (20 degrees Celsius) in accordance with American Petroleum Institute Publication 2517, Third Edition, 1989;

(3) the alternative work practice specified in §115.358 of this title (relating to Alternative Work Practice);

(4) [~~(3)~~] minor modifications to these test methods approved by the executive director; or

(5) [~~(4)~~] equivalent determinations using published vapor pressure data or accepted engineering calculations.

§115.356. Recordkeeping Requirements.

All affected persons in the Beaumont-Port Arthur, Dallas-Fort Worth, [~~Beaumont/Port Arthur, Dallas/Fort Worth,~~] El Paso, and Houston-Galveston-Brazoria [~~Houston/ Galveston/Brazoria~~] areas shall maintain the following records, either electronically or in hard copy form, except for any video records required by paragraph (4) of this section which must be maintained electronically.[~~:~~]

(1) The owner or operator shall maintain records identifying each process unit subject to fugitive monitoring in accordance with this division (relating to Fugitive Emission Control in Petroleum Refining, Natural Gas/Gasoline Processing, and Petrochemical Processes in Ozone Nonattainment Areas) including, at a minimum, the following information:

(A) the name of each process unit;

(B) a scale plot plan showing the location of each process unit;

(C) process flow diagrams for each process unit showing the general process streams and major equipment on which the components are located; and

(D) the expected volatile organic compound emissions if the process unit is shut down for repair of components or other equipment, including:

(i) the total emissions;

(ii) the calculations used; and

(iii) engineering assumptions applied;

(2) The owner or operator shall maintain records on components and process areas that contain, at a minimum, the following data:

(A) the name of the process unit where the component is located;

(B) the type of component (e.g., pump, compressor, valve, pressure relief valve, etc);

(C) all data collected in accordance with the monitoring and inspection requirements of §115.354 of this title (relating to Monitoring and Inspection Requirements) for each component required to be monitored with a hydrocarbon gas analyzer;

(D) the calibration of the monitoring instrument;

(E) if a component is found leaking, if applicable:

(i) the component identification and method of leak determination ([~~Test~~] Method 21 in 40 Code of Federal Regulations Part 60, Appendix A-7 [~~A~~] (October 17, 2000), the alternative work practice in §115.358 of this title (relating to Alternative Work Practice), sight/sound/smell, or inert gas or hydraulic testing);

(ii) the date that a leaking component is discovered;

(iii) the date that a first attempt at repair was made to a leaking component;

(iv) the date that a leaking component is repaired;

(v) the date and instrument reading of the recheck procedure after a leaking component is repaired;

(vi) the date that the leaking component is placed on the shutdown list; and

(vii) the date that the leaking component was taken out of service; and

(F) [~~maintain~~] records of any audio, visual, and olfactory inspections of connectors, but only if a leak is detected.[~~;~~]

(3) The owner or operator shall maintain records by process unit identifying and justifying each:

(A) unsafe-to-monitor component and unsafe-to-inspect flange;

(B) difficult-to-monitor component; and

(C) each exemption by component claimed under §115.357 of this title (relating to Exemptions). The components may be identified by one or more of the following methods:

(i) a plant site plan;

(ii) color coding;

(iii) a written or electronic database;

(iv) designation of process unit boundaries;

(v) some form of weatherproof identification; or

(vi) process flow diagrams that exhibit sufficient detail to identify major pieces of equipment, including major process flows to, from, and within a process unit. Major equipment includes, but is not limited to, columns, reactors, pumps, compressors, drums, tanks, and exchangers.[~~; and~~]

(4) If an owner or operator elects to use the alternative work practice in §115.358 of this title, the following records must be maintained in addition to the records required by paragraphs (1) - (3) of this section.

(A) The owner or operator shall maintain a list of all components that are monitored according to the alternative work practice of this section.

(B) The owner or operator shall maintain records of the detection sensitivity level selected from the table in §115.358(e)(1) of this title.

(C) The owner or operator shall maintain records of the analysis to determine the component in contact with the lowest mass fraction of chemicals that are detectable, as required by the daily instrument check procedure referenced in §115.358(c)(2) of this title.

(D) The owner or operator shall maintain records of the technical basis for the mass fraction of detectable chemicals used for daily instrument check procedure referenced in §115.358(c)(2) of this title.

(E) The owner or operator shall maintain records of each daily instrument check required by §115.358(c)(2) of this title. These records include:

(i) the flow meter reading of the leak used in the daily instrument check and the distance from which the leak was imaged;

(ii) a video record, with a date and time stamp, of the daily instrument check for each configuration and operator of the optical gas imaging instrument used during monitoring; and

(iii) the name of each operator performing the daily instrument check.

(F) The owner or operator shall maintain records of the leak survey results as follows for all components that the owner or operator uses the alternative work practice in §115.358 of this title.

(i) A video record must be used to document the leak survey results and the results of the recheck to verify the leak has been repaired, if the alternative work practice is used to perform the recheck. The video record must meet the following requirements.

(I) The video record must include a time and date stamp for each monitoring event.

(II) Each component must be identifiable in the video record.

(ii) The records must include the names of each operator performing the leak survey for each monitoring event.

(G) The owner or operator shall maintain records of the annual Method 21 screening required by §115.358(f) of this title, including:

(i) the components screened;

(ii) the concentration measured according to Method 21;

(iii) the date and time of the Method 21 screening; and

(iv) the calibrations required by Method 21.

(H) The owner or operator shall maintain records of the training required by §115.358(h) of this title.

(I) The owner or operator shall maintain records of the optical gas imaging instrument manufacturer's operating parameters.

(5) [~~(4)~~] The owner or operator shall maintain all monitoring records for at least five years and make them available for review upon request by authorized representatives of the executive director, United States Environmental Protection Agency, or local air pollution control agencies with jurisdiction, except that the five-year record retention requirement does not apply to records generated before December 31, 2000.

§115.357. Exemptions.

For all affected persons in the Beaumont-Port Arthur, Dallas-Fort Worth, [~~Beaumont/Port Arthur, Dallas/Fort Worth,~~] El Paso, and Houston-Galveston-Brazoria [~~Houston/Galveston/Brazoria~~] areas, the following exemptions apply.

(1) Components that contact a process fluid containing volatile organic compounds (VOC) [~~(VOCs)~~] having a true vapor pressure equal to or less than 0.044 pounds per square inch, absolute (psia) (0.3 kiloPascals) at 68 degrees Fahrenheit (20 degrees Celsius) are exempt from the instrument monitoring (with a hydrocarbon gas analyzer) requirements of §115.354(1) and (2) of this title (relating to Monitoring and Inspection Requirements) if the components are inspected by visual, audio, and/or olfactory means according to the inspection schedules specified in §115.354(1) and (2) of this title.

(2) Conservation vents or other devices on atmospheric storage tanks that are actuated either by a vacuum or a pressure of no more than 2.5 pounds per square inch, gauge (psig), pressure relief valves equipped with a rupture disk or venting to a control device, components in continuous vacuum service, and valves that are not externally regulated (such as in-line check valves) are exempt from the requirements of this division (relating to Fugitive Emission Control in Petroleum Refining, Natural Gas/Gasoline Processing, and Petrochemical Processes in Ozone Nonattainment Areas), except that each pressure relief valve equipped with a rupture disk must comply with §115.352(9) and §115.356(3)(C) of this title (relating to Control Requirements and Recordkeeping Requirements).

(3) Compressors in hydrogen service are exempt from the requirements of §115.354 of this title if the owner or operator demonstrates that the percent hydrogen content can be reasonably expected to always exceed 50.0% by volume.

(4) All pumps and compressors that are equipped with a shaft sealing system that prevents or detects emissions of VOC from the seal are exempt from the monitoring requirement of §115.354 of this title. These seal systems may include, but are not limited to, dual pump seals with barrier fluid at higher pressure than process pressure, seals degassing to vent control systems kept in good working order, or seals equipped with an automatic seal failure detection and alarm system. Submerged pumps or sealless pumps (including, but not limited to, diaphragm, canned, or magnetic driven pumps) may be used to satisfy the requirements of this paragraph.

(5) Reciprocating compressors and positive displacement pumps used in natural gas/gasoline processing operations are exempt from the requirements of this division except §115.356(3)(C) of this title.

(6) Components at a petroleum refinery or synthetic organic chemical, polymer, resin, or methyl-tert-butyl ether manufacturing process, that contact a process fluid that contains less than 10% VOC by weight and components at a natural gas/gasoline processing operation that contact a process fluid that contains less than 1.0% VOC by weight are exempt from the requirements of this division except §115.356(3)(C) of this title.

(7) Plant sites covered by a single account number with less than 250 components in VOC service are exempt from the requirements of this division except §115.356(3)(C) of this title.

(8) Components in ethylene, propane, or propylene service, not to exceed 5.0% of the total components, may be classified as non-repairable beyond the second repair attempt at 500 parts per million by volume (ppmv). These components will remain in the fugitive monitoring program and be repaired no later than 15 calendar days after the concentration of VOC detected via United States Environmental Protection Agency [~~Test~~] Method 21 in 40 Code of Federal Regulations (CFR) Part 60, Appendix A-7 [~~A~~] (October 17, 2000) exceeds 10,000 ppmv. For the purposes of this division, components that contact a process fluid with greater than 85% ethylene, propane, or propylene by weight are considered in ethylene, propane, or propylene service, respectively. If the owner or operator elects to use the alternative work practice in §115.358 of this title (relating to Alternative Work Practice), this exemption may not be claimed for any component that is monitored according to the alternative work practice unless the owner or operator demonstrates the leak concentration does not exceed 10,000 ppmv using Method 21 and the owner or operator continues to monitor the component using both the alternative work practice and Method 21 according to the frequency specified in §115.358 of this title.

(9) The following valves are exempt from the requirements of §115.352(4) of this title:

(A) pressure relief valves;

(B) open-ended valves or lines in an emergency shutdown system that are designed to open automatically in the event of an emissions event;

(C) open-ended valves or lines containing materials that would autocatalytically polymerize or would present an explosion, serious overpressure, or other safety hazard if capped or equipped with a double block and bleed system; and

(D) valves rated greater than 10,000 psig.

(10) Instrumentation systems, as defined in 40 CFR §63.161 (January 17, 1997), that meet 40 CFR §63.169 (June 20, 1996) are exempt from the requirements of this division except §115.356(3)(C) of this title.

(11) Sampling connection systems, as defined in 40 CFR §63.161 (January 17, 1997), that meet the requirements of 40 CFR §63.166(a) and (b) (June 20, 1996) are exempt from the requirements of this division except §115.356(3)(C) of this title.

(12) Components that are insulated, making them inaccessible to monitoring with a hydrocarbon gas analyzer, are exempt from the monitoring requirements of §115.354(1), (2), and (4) of this title.

(13) Components/systems that contact a process fluid containing VOC having a true vapor pressure equal to or less than 0.002 psia at 68 degrees Fahrenheit are exempt from the requirements of this division except §115.356(3)(C) of this title.

(14) In the Houston-Galveston-Brazoria [~~Houston/Galveston/Brazoria~~] area, the requirements of Subchapter H of this chapter (relating to Highly-Reactive Volatile Organic Compounds) may apply to components that qualify for one or more of the exemptions in paragraphs (1) - (11) of this section at any petroleum refinery; synthetic organic chemical, polymer, resin, or methyl-tert-butyl ether manufacturing process; or natural gas/gasoline processing operation in which a highly-reactive volatile organic compound, as defined in §115.10 of this title (relating to Definitions), is a raw material, intermediate, final product, or in a waste stream.

§115.358. Alternative Work Practice.

(a) Alternative work practice applicability. The owner or operator of a site subject to this division (relating to Fugitive Emission Control in Petroleum Refining, Natural Gas/Gasoline Processing, and Petrochemical Processes in Ozone Nonattainment Areas) or any other division of this chapter (relating to Control of Air Pollution from Volatile Organic Compounds), when specifically allowed by that division, may use the alternative work practice of this section as an optional alternative to hydrocarbon gas analyzer monitoring required under the applicable division. The alternative work practice described in this section may only be used for components with a leak definition specified by a division of this chapter of 500 parts per million by volume (ppmv) or greater.

(b) Definitions. For the purposes of this section, the following terms have the following meanings.

(1) Imaging--A means or process of making emissions visible that may otherwise be invisible to the naked eye.

(2) Optical gas imaging instrument--An instrument that makes emissions visible that may otherwise be invisible to the naked eye.

(3) Repair--The adjustment or alteration of a component in order to eliminate a leak.

(4) Leak--For the purposes of this section, a leak is:

(A) any emissions imaged by an optical gas imaging instrument, as defined in paragraph (2) of this subsection;

(B) indications of liquids dripping;

(C) indications by a sensor that a seal or barrier fluid system has failed; or

(D) screening results using Method 21 (40 Code of Federal Regulations (CFR) Part 60, Appendix A-7 (October 17, 2000)) that exceed the leak definition specified for the component by the applicable division of this chapter.

(c) Optical gas imaging instrument specifications.

(1) Any optical gas imaging instrument used for the purposes of this section must meet the requirements of 40 CFR §60.18(i)(1) (December 22, 2008).

(2) The owner or operator shall perform and the optical gas imaging instrument must meet all requirements of the daily instrument check as specified in 40 CFR §60.18(i)(2) (December 22, 2008). In addition, the daily instrument check must be performed by each personnel that will be performing imaging for that day.

(d) Leak survey procedure. The owner or operator shall operate the optical gas imaging instrument to image every component selected for this work practice in accordance with the instrument manufacturer's operating parameters. All emissions imaged by the optical gas imaging instrument are considered to be leaks and subject to repair in accordance with requirements of the applicable division of this chapter. All emissions visible to the naked eye during the leak survey are also considered to be leaks and subject to repair in accordance with the applicable division of this chapter. The operator of the optical gas imaging instrument shall not image a component during the leak survey at a distance greater than the distance demonstrated by that same instrument operator during the daily instrument check for the configuration of the optical gas imaging instrument used in the leak survey.

(e) Frequency. The owner or operator that elects to use the alternative work practice in this section shall perform the leak surveys according to the following.

(1) The frequency for performing leak surveys on each component must be determined by selecting one of the frequencies in the following table, in lieu of the monitoring frequency specified for the component in the applicable division of this chapter.
Figure: 30 TAC §115.358(e)(1)

(2) Alternative monitoring frequencies for good performance (i.e., skip periods) are not allowed for any component that the owner or operator chooses to use this alternative work practice. Alternative frequency for other purposes may be used when specifically allowed by a division of this chapter (e.g., difficult-to-monitor components).

(f) Annual Method 21 screening. Each component that an owner or operator elects to use this alternative work practice must be monitored once per calendar year using Method 21 (40 CFR Part 60, Appendix A-7 (October 17, 2000)) at the leak definition required in the applicable division. The owner or operator may choose the specific monitoring period for the annual Method 21 monitoring; however, subsequent Method 21 monitoring must be conducted every 12 months from the initial period.

(g) Notification. The owner or operator that elects to use the alternative work practice in this section shall provide written notification to the appropriate regional office at least 30 days prior to implementing use of the alternative work practice.

(1) The written notification must include:

(A) identification of each unit that the alternative work practice will be used for;

(B) identification of the specific categories of components that the alternative work practice will be used for (e.g., valves, flanges, etc.);

(C) the total number of components monitored according to the alternative work practice in each of the categories identified as required by paragraph (2) of this subsection; and

(D) the date that the owner or operator will begin using the alternative work practice.

(2) After the initial notification required under this subsection, the owner or operator is required to resubmit the notification to the appropriate regional office only if use of the alternative work practice is expanded to a process unit not included in the initial notification. Renotification must be submitted within 30 days after implementing use of the alternative work practice in the new process unit.

(h) Operator training. Any person that performs the alternative work practice of this section shall comply with the following minimum training requirements.

(1) The operator of the optical gas imaging instrument must receive a minimum of 24 hours of initial training on the specific make and model of optical gas imaging instrument before using the instrument for the purposes of this alternative work practice.

(2) Operators using optical gas imaging instruments for this alternative work practice shall comply with one of the following requirements for on-going training purposes.

(A) Operators shall attend an annual eight-hour refresher training class on the optical gas imaging instrument used for this alternative work practice.

(B) Operators shall maintain a minimum of 100 hours per calendar year of hands-on operational experience with the model of optical gas imaging instrument used for the alternative work practice. Operators electing this option shall maintain a written log of the operator's operational experience with the optical gas imaging instrument.

This 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) 239-0177

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SUBCHAPTER H. HIGHLY-REACTIVE VOLATILE ORGANIC COMPOUNDS

DIVISION 3. FUGITIVE EMISSIONS

30 TAC §§115.781, 115.782, 115.784, 115.786 - 115.788

STATUTORY AUTHORITY

The amended and new 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 amended and new 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 amended and new 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 amended and new sections are also proposed under 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 amended and new sections implement THSC, §§382.002, 382.011, 382.012, 382.016, 382.017, 382.021, and FCAA, 42 USC, §§7401 *et seq.*

§115.781. General Monitoring and Inspection Requirements.

(a) The owner or operator shall identify the components of each process unit in highly-reactive volatile organic compound (HRVOC) service that is subject to this division (relating to Fugitive Emissions). Such identification must allow for ready identification of the components, and distinction from any components that are not subject to this division. The components must be identified by one or more of the following methods:

(1) a plant site plan;

(2) color coding;

(3) a written or electronic database;

(4) designation of process unit boundaries;

(5) some form of weatherproof identification; or

(6) process flow diagrams that exhibit sufficient detail to identify major pieces of equipment, including major process flows to, from, and within a process unit. Major equipment includes, but is not limited to, columns, reactors, pumps, compressors, drums, tanks, and exchangers.

(b) Each component in the process unit must be monitored according to the requirements of Subchapter D, Division 3 of this chapter (relating to Fugitive Emission Control in Petroleum Refining, Natural Gas/Gasoline Processing, and Petrochemical Processes in Ozone Nonattainment Areas), except that the following additional requirements apply.

(1) The exemptions of §115.357(1) - (12) of this title (relating to Exemptions) do not apply.

(2) The leak-skip provisions of §115.354(7) and (8) of this title (relating to Monitoring and Inspection Requirements) do not apply.

(3) The emissions from blind flanges, caps, or plugs at the end of a pipe or line containing HRVOC; connectors; heat exchanger heads; sight glasses; meters; gauges; sampling connections; bolted manways; hatches; agitators; sump covers; junction box vents; covers and seals on volatile organic compound water separators; and process drains must [~~shall~~] be monitored each calendar quarter (with a hydrocarbon gas analyzer).

(4) All components for which a repair attempt was made during a shutdown shall be monitored (with a hydrocarbon gas analyzer) and inspected for leaks within 30 days after startup is completed following the shutdown.

(5) All process drains equipped with water seal controls, as defined in §115.140 of this title (relating to Industrial Wastewater Definitions), shall be inspected weekly to ensure that the water seal controls are effective in preventing ventilation, except that daily inspections are required for those seals that have failed three or more inspections in any 12-month period. Upon request by the executive director, United States Environmental Protection Agency, or any local program with jurisdiction, the owner or operator shall demonstrate (e.g., by visual inspection or smoke test) that the water seal controls are properly designed and restrict ventilation.

(6) All process drains not equipped with water seal controls shall be inspected monthly to ensure that all gaskets, caps, and/or plugs are in place and that there are no gaps, cracks, or other holes in the gaskets, caps, and/or plugs. In addition, all caps and plugs shall be inspected monthly to ensure that they are tightly fitting.

(7) An unsafe-to-monitor or difficult-to-monitor component for which quarterly monitoring is specified may instead be monitored as follows.

(A) An unsafe-to-monitor component is a component that the owner or operator determines is unsafe to monitor because monitoring personnel would be exposed to an immediate danger as a consequence of conducting the monitoring. Components that are unsafe to monitor shall be identified in a list made immediately available upon request. If an unsafe-to-monitor component is not considered safe to monitor within a calendar year, then it shall be monitored as soon as possible during safe-to-monitor times.

(B) A difficult-to-monitor component is a component that cannot be inspected without elevating the monitoring personnel more than two meters above a permanent support surface or that requires a permit for confined space entry as defined in 29 Code of Federal Regulations (CFR) §1910.146. A difficult-to-monitor component for which quarterly monitoring is specified may instead be monitored annually.

(8) All pressure relief valves in gaseous service that are not equipped with a rupture disk upstream of the relief valve with a pressure-sensing device between the rupture disk and the pressure relief valve shall be monitored for fugitive leaks each calendar quarter (with a hydrocarbon gas analyzer).

(9) A leak is defined as a screening concentration greater than 500 parts per million by volume above background as methane for

all components. If the owner or operator elects to use the alternative work practice specified in §115.358 of this title (relating to Alternative Work Practice), a leak is defined as specified in §115.358 of this title, including any leak detected using the alternative work practice on a component that is subject to the requirements of this division but not specifically selected for alternative work practice monitoring.

(10) Monitored screening concentrations must be recorded for each component in gaseous or light liquid service. Notations such as "pegged," "off scale," "leaking," "not leaking," or "below leak definition" may not be substituted for hydrocarbon gas analyzer results. For readings that are higher than the upper end of the scale (i.e., pegged) even when using the highest scale setting or a dilution probe, record a default pegged value of 100,000 parts per million by volume. This requirement does not apply to monitoring using an optical gas imaging instrument in accordance with §115.358 of this title.

(c) Pumps, compressors, and agitators must be:

(1) inspected visually each calendar week for liquid dripping from the seals; or

(2) equipped with an alarm that alerts the operator of a leak.

(d) If securing the bypass line valve in the closed position to comply with §115.783(1)(B) of this title (relating to Equipment Standards), the seal or closure mechanism must be visually inspected to ensure the valve is maintained in the closed position and the vent stream is not diverted through the bypass line:

(1) on a monthly basis; and

(2) after any maintenance activity that requires the seal to be broken.

(e) For any pressure relief device that has vented directly to the atmosphere (uncontrolled), the associated vent must be monitored (with a hydrocarbon gas analyzer) and inspected within 24 hours after actuation and the results recorded in accordance with §115.786 of this title (relating to Recordkeeping Requirements). If the associated vent is considered unsafe to monitor, then the vent must be monitored as soon as possible during safe-to-monitor times. If the associated vent is considered difficult to monitor, it must be monitored within 15 days after a release. This requirement does not supersede any monitoring requirements found in §115.725 of this title (relating to Monitoring and Testing Requirements).

(f) As an alternative to the requirements of subsection (b)(3) of this section for blind flanges, caps, or plugs at the end of a pipe or line containing HRVOC, sight glasses, meters, gauges, connectors, bolted manways, heat exchanger heads, hatches, and sump covers, the owner or operator may elect to monitor all of these components in a process unit by April 1, 2006, and then conduct subsequent monitoring at the following frequencies.[:]

(1) The owner or operator may monitor the components once per year (i.e., 12-month period), if the percent leaking blind flanges, caps, or plugs at the end of a pipe or line containing HRVOC, sight glasses, meters, gauges, connectors, bolted manways, heat exchanger heads, hatches, and sump covers in the process unit was 0.5% or greater, but less than 2.0%, during the last required annual or biennial monitoring period.[;]

(2) The owner or operator may monitor the components once every two years, if the percent leaking blind flanges, caps, or plugs at the end of a pipe or line containing HRVOC, sight glasses, meters, gauges, connectors, bolted manways, heat exchanger heads, hatches, and sump covers was less than 0.5% during the last required monitoring period. An owner or operator may comply with this paragraph by monitoring at least 40% of the components in the first year and the remainder of the components in the second year. The percent leaking connectors, bolted manways, heat exchanger heads, hatches, and sump covers will be calculated for the total of all monitoring performed during the two-year period.[;]

(3) If [~~if~~] the owner or operator of a process unit in a biennial leak detection and repair program calculates less than 0.5% leaking blind flanges, caps, or plugs at the end of a pipe or line containing HRVOC, sight glasses, meters, gauges, connectors, bolted manways, heat exchanger heads, hatches, and sump covers from the two-year monitoring period, the owner or operator may monitor the components one time every four years. An owner or operator may comply with the requirements of this paragraph by monitoring at least 20% of the components each year until all connectors, bolted manways, heat exchanger heads, hatches, and sump covers have been monitored within four years.[;]

(4) If [~~if~~] a process unit complying with the requirements of paragraph (3) of this subsection using a four-year monitoring interval program has greater than or equal to 0.5% but less than 1.0% leaking blind flanges, caps, or plugs at the end of a pipe or line containing HRVOC, sight glasses, meters, gauges, connectors, bolted manways, heat exchanger heads, hatches, and sump covers, the owner or operator shall increase the monitoring frequency to one time every two years. An owner or operator may comply with the requirements of this paragraph by monitoring at least 40% of the components in the first year and the remainder of the components in the second year. The owner or operator may again elect to use the provisions of paragraph (3) of this subsection when the percent leaking components decreases to less than 0.5%.[;]

(5) If [~~if~~] a process unit complying with requirements of paragraph (3) of this subsection using a four-year monitoring interval program has greater than or equal to 1.0% but less than 2.0% leaking blind flanges, caps, or plugs at the end of a pipe or line containing HRVOC, sight glasses, meters, gauges, connectors, bolted manways, heat exchanger heads, hatches, and sump covers, the owner or operator shall increase the monitoring frequency to one time per year. The owner or operator may again elect to use the provisions of paragraph (3) of this subsection when the percent leaking components decreases to less than 0.5%.[; ~~and~~]

(6) If [~~if~~] a process unit complying with requirements of paragraph (3) of this subsection using a four-year monitoring interval program has 2.0% or greater leaking blind flanges, caps, or plugs at the end of a pipe or line containing HRVOC, sight glasses, meters, gauges, connectors, bolted manways, heat exchanger heads, hatches, and sump covers, the owner or operator shall increase the monitoring frequency to quarterly. The owner or operator may again elect to use the provisions of paragraph (3) of this subsection when the percent leaking components decreases to less than 0.5%.

(g) Except as provided in paragraph (2) of this subsection, the owner or operator shall use dataloggers and/or electronic data collection devices during all monitoring required by this section. The owner or operator shall transfer electronic data from electronic datalogging devices to an electronic or hard copy database within seven days of monitoring.

(1) For all monitoring events in which an electronic data collection device is used, the collected monitoring data must include the identification of each component and each calibration run, the maximum screening concentration detected, the time of monitoring (i.e., the time that the organic vapor concentration is read or recorded for each component), a date stamp, an operator identification, an instrument identification, and calibration gas concentrations and certification dates.

(2) The owner or operator may use paper logs where necessary or more feasible (e.g., small rounds (less than 100 components), re-monitoring following component repair, or when dataloggers are broken or not available), and shall record, at a minimum, the information required in paragraph (1) of this subsection. The owner or operator shall transfer any manually recorded monitoring data to the electronic or hard copy database within seven days of monitoring.

(3) Each change to the database regarding the monitored concentration, date and time read, repair information, addition or deletion of components, or monitoring schedule must be detailed in a log or inserted as a notation in the database. All such changes must include the name of the person who made the change, the date of the change, and an explanation to support the change.

(h) For any components that the owner or operator elects to use the alternative work practice specified in §115.358 of this title, the following provisions apply.

(1) The frequency for monitoring of any components listed in this section must be the frequency determined according to §115.358 of this title, except as specified in paragraph (3) of this subsection.

(2) The alternative monitoring schedules allowed under subsection (f) of this section are not allowed.

(3) If the owner or operator elects to use the alternative work practice in §115.358 of this title to satisfy the hydrocarbon gas analyzer monitoring requirements of subsections (b)(4) or (e) of this section, the time limitations specified in subsections (b)(4) and (e) of this section on performing the monitoring continue to apply.

(4) If the component is within a class of equipment (e.g., valves, flanges, etc.) that the owner or operator has elected to monitor using the alternative work practice and the component meets all other conditions specified in §115.358 of this title for acceptable use of the alternative work practice, then the component may not be classified as difficult-to-monitor under subsection (b)(7)(B) of this section unless in order to image the component as required by §115.358 of this title the monitoring personnel would have to be elevated more than two meters above a permanent support surface or would require a permit for confined space entry as defined in 29 CFR §1910.146 (December 1, 1998). If the component does qualify as difficult-to-monitor using the alternative work practice in §115.358 of this title, the owner or operator may use either Method 21 (40 CFR Part 60, Appendix A-7 (October 17, 2000)) or the alternative work practice at the monitoring frequency specified in subsection (b)(7)(B) of this section.

(5) An owner or operator electing to use the alternative work practice in §115.358 of this title may still classify a component as unsafe-to-monitor as allowed under subsection (b)(7)(A) of this section if the component cannot be safely monitored using either a hydrocarbon gas analyzer or the alternative work practice.

(6) For any components subject to subsection (b)(3) of this section that are not subject to Method 21 monitoring under 40 CFR Parts 60, 61, 63, or 65, but the owner or operator is using the alternative work practice to satisfy a Method 21 monitoring requirement under this chapter, the owner or operator may choose to comply with the following in lieu of the annual Method 21 monitoring in §115.358(f) of this title.

(A) For any leak detected using the alternative work practice in this section, the owner or operator must perform a Method 21 test on the component to determine the leak concentration. The Method 21 test must be performed on the same day that the leak is detected using the alternative work practice.

(B) To qualify for this option, the percent leaking components of all the components selected for this option must be less than 2.0%.

(C) The owner or operator shall perform a Method 21 test on each component selected for this option according to the frequencies specified in subsection (f) of this section. If the Method 21 test required under subparagraph (A) of this paragraph for any leak detected is within the same calendar year as the normally scheduled Method 21 test required under this subparagraph, the owner or operator may use the Method 21 test performed for subparagraph (A) of this paragraph to satisfy the requirements of this subparagraph.

(D) If the owner or operator elects to follow the alternative schedules for annual Method 21 testing under this paragraph, the owner or operator shall provide notice of electing this option with the notification required under §115.358(g) of this title.

§115.782. Procedures and Schedule for Leak Repair and Follow-up.

(a) Tagging. Upon the detection or designation of a leaking component, a weatherproof and readily visible tag, bearing the component identification and the date the leak was detected, must be affixed to the leaking component. The tag must remain in place until the leaking component is repaired.

(b) General rule - time to repair.

(1) For leaks detected over 10,000 parts per million by volume (ppmv), a first attempt at repairing the leaking component must [~~shall~~] be made no later than one business day after the leak is detected, and the component must [~~shall~~] be repaired no later than seven calendar days after the leak is detected.

(2) For all other leaks, a first attempt at repairing the leaking component must [~~shall~~] be made no later than five calendar days after the leak is detected, and the component must [~~shall~~] be repaired no later than 15 calendar days after the leak is detected.

(3) For any leak detected from a component using the alternative work practice specified in §115.358 of this title (relating to Alternative Work Practice), a first attempt at repairing the leaking component must be made no later than one business day after the leak is detected, and the component shall be repaired no later than seven calendar days after the leak is detected. If the owner or operator measures leak concentration using Method 21 (40 Code of Federal Regulations Part 60, Appendix A-7 (October 17, 2000)) and demonstrates the leak concentration is 10,000 ppmv or less, then the time to repair is as specified in paragraph (2) of this subsection. The Method 21 test must be performed on the same day that the leak was detected using the alternative work practice screening.

(c) Delay of repair.

(1) For all components (except valves specified in paragraph (2) of this subsection), repair may be delayed beyond the period designated in subsection (b) of this section for any of the following reasons.[~~:~~]

(A) The [~~the~~] component is isolated from the process and does not remain in highly-reactive volatile organic compound (HRVOC) service.[~~;~~]

(B) If [~~if~~] the repair of a component within seven or 15 days (as specified in subsection (b) of this section) after the leak is detected would require a process unit shutdown that would create more emissions than the repair would eliminate, the repair may be delayed until the next scheduled process unit shutdown, provided that the owner or operator meets the conditions in both clause (i) and (ii) of this subparagraph, or meets the conditions of either clause (iii) or (iv) of this subparagraph.[~~:~~]

(i) The [the] owner or operator maintains documentation of the following calculations, and makes the documentation available upon request[, documentation] to authorized representatives of the United States Environmental Protection Agency (EPA), the executive director, and any local air pollution control agency having jurisdiction. [which includes a calculation of:]

(I) The owner or operator shall calculate the expected mass emissions resulting from the next scheduled process unit shutdown, clearing, and subsequent startup of the unit, including the basis for the calculation and all assumptions made.[;]

(II) The owner or operator shall calculate the mass emission rates from each leaking component in the process unit for which delay of repair is sought as determined by using the methods in the EPA correlation approach in Section 2.3.3 of the EPA guidance document *Protocol for Equipment Leak Emission Estimates* (EPA-453/R-95-017, November 1995) alone or in combination with the mass emission sampling approach in Chapter 4 of the guidance document (EPA-453/R-95-017, November 1995). To use the EPA correlation approach, the estimated hourly mass emission rate for each component shall be based on the component's current screening concentration using [Test] Method 21. The initial calculation must be performed within 30 days after the leak is detected. Where the monitoring instrument is not calibrated to read past the leak definition or 100,000 ppmv, the pegged emission rate values in Tables 2-13 and 2-14 in Section 2.3.3 of the EPA guidance document *Protocol for Equipment Leak Emission Estimates* must ["Protocol for Equipment Leak Emission Estimates" shall] be used as appropriate. If the mass emission sampling approach is used, it replaces the estimated emissions rate of the EPA correlation approach in the calculation. For any leak detected using the alternative work practice in §115.358 of this title that a corresponding Method 21 or mass emission sampling test was not performed on that specific leak, the owner or operator shall use the 100,000 ppmv pegged emission rate values in Tables 2-13 and 2-14 in Section 2.3.3 of the EPA guidance document *Protocol for Equipment Leak Emission Estimates,* as appropriate.[;]

(III) The owner or operator shall calculate the daily mass emissions from each leaking component in HRVOC service in the process unit for which delay of repair is sought calculated as 24 times the hourly mass emission rate determined as required by subclause (II) of this clause. [;; and]

(IV) The owner or operator shall calculate the total daily mass emissions in the process unit from the calculations made in subclause (III) of this clause for leaking components in HRVOC service in the unit for which delay of repair is sought.[; and]

(ii) The [the] total daily mass emissions from leaking components in HRVOC service in the process unit for which delay of repair is sought as determined in clause (i)(IV) of this subparagraph will be less than the daily mass emissions resulting from shutdown, clearing, and subsequent startup of the unit as determined in clause (i)(I) of this subparagraph or 500 pounds, whichever is greater.[; or]

(iii) As [as] an alternative to the requirements of clause (i) and (ii) of this subparagraph, delay of repair is allowed for each leaking component for which the owner or operator has chosen to undertake "extraordinary efforts" to repair the leak. For purposes of this subparagraph, "extraordinary efforts" is defined as nonroutine repair methods (e.g., sealant injection) or utilization of a closed-vent system to capture and control the leaks by at least 90%. [For leaks detected over 10,000 ppmv, extraordinary efforts shall be undertaken within 22 calendar days after the leak is found; however, the owner or operator may keep the leaking component on the shutdown list only after two unsuccessful attempts to repair a leaking component through extraordinary efforts, provided that the second extraordinary effort attempt is made within 37 calendar days after the leak is found. For all other leaks, extraordinary efforts shall be undertaken within 30 calendar days after the leak is found, and a second extraordinary effort attempt is not required; or]

(I) For leaks detected over 10,000 ppmv, extraordinary efforts must be undertaken within 22 calendar days after the leak is found. The owner or operator may keep the leaking component on the shutdown list only after two unsuccessful attempts to repair a leaking component through extraordinary efforts, provided that the second extraordinary effort attempt is made within 37 calendar days after the leak is found.

(II) For all other leaks, extraordinary efforts shall be undertaken within 30 calendar days after the leak is found, and a second extraordinary effort attempt is not required to keep the component on the shutdown list.

(III) For any leak detected from a component using the alternative work practice specified in §115.358 of this title, extraordinary efforts must be performed as specified in subclause (I) of this clause. If the owner or operator measures the leak concentration using Method 21 and demonstrates the leak concentration is 10,000 ppmv or less, then extraordinary efforts must be as specified in subclause (II) of this clause. The Method 21 test must be performed on the same day that the leak was detected using the alternative work practice screening.

(iv) The component is repaired or replaced [repair or replacement of the component occurs] at the next scheduled shutdown. The executive director[, at his discretion,] may require an early process unit shutdown, or other appropriate action, based on the number and severity of leaks awaiting a shutdown.[; or]

(C) The [the] components are pumps, compressors, or agitators, and:

(i) repair requires replacing the existing seal design with:

(I) a dual mechanical seal system that includes a barrier fluid system;

(II) a system that is designed with no externally actuated shaft penetrating the housing; or

(III) a closed-vent system and control device that meets the requirements of §115.783 of this title (relating to Equipment Standards); and

(ii) repair is completed as soon as practicable, but not later than six months after the leak was detected.

(2) For valves that are not pressure relief valves or automatic control valves, repair may only be delayed beyond the period designated in subsection (b) of this section if the conditions of either subparagraphs (A) or (B) of this paragraph are met.[:]

(A) The valves are repaired or replaced [repair or replacement of these valves occurs] at the next scheduled process unit shutdown. The owner or operator shall also do one of the following. [; and]

(i) The [the] owner or operator undertakes [has undertaken] "extraordinary efforts" to repair the leaking valve. For purposes of this subparagraph, "extraordinary efforts" is defined as nonroutine repair methods (e.g., sealant injection) or utilization of a closed-vent system to capture and control the leaks by at least 90%. [For leaks detected over 10,000 ppmv, extraordinary efforts shall be undertaken within 14 calendar days after the leak is found; however, the owner or

~~operator may keep the leaking valve on the shutdown list only after two unsuccessful attempts to repair a leaking valve through extraordinary efforts, provided that the second extraordinary effort attempt is made within 15 days of the first extraordinary effort attempt. For all other leaks, extraordinary efforts shall be undertaken within 30 calendar days after the leak is found, and a second extraordinary effort attempt is not required;~~ ~~or~~]

(I) For leaks detected over 10,000 ppmv, extraordinary efforts must be undertaken within 14 calendar days after the leak is found. The owner or operator may keep the leaking valve on the shutdown list only after two unsuccessful attempts to repair a leaking valve through extraordinary efforts, provided that the second extraordinary effort attempt is made within 15 days of the first extraordinary effort attempt.

(II) For all other leaks, extraordinary efforts must be undertaken within 30 calendar days after the leak is found, and a second extraordinary effort attempt is not required to keep the valve on the shutdown list.

(III) For any leak detected from a component using the alternative work practice specified in §115.358 of this title, extraordinary efforts must be performed as specified in subclause (I) of this clause. If the owner or operator measures the leak concentration using Method 21 and demonstrates the leak concentration is 10,000 ppmv or less, then extraordinary efforts must be as specified in subclause (II) of this clause. The Method 21 test must be performed on the same day as the alternative work practice screening.

(ii) The [~~the~~] owner or operator maintains, and makes available upon request, documentation to authorized representatives of EPA, the executive director, and any local air pollution control agency having jurisdiction that demonstrates that there is a safety, mechanical, or major environmental concern posed by repairing the leak by using "extraordinary efforts" and emissions from the leaking valves are included in the calculation of total daily mass emissions required by paragraph (1)(B)(i)(IV) of this subsection.[~~; or~~]

(B) The [~~the~~] valve is isolated from the process and does not remain in HRVOC service.

(d) Demonstration of repair. For the purposes of this section, a component is considered repaired:

(1) for any component that the owner or operator uses the alternative work practice specified in §115.358 of this title, when the component is demonstrated to no longer have a leak after adjustments or alterations to the component by either screening using an optical gas imaging instrument as specified in §115.358 of this title or by using Method 21 at the leak definition in §115.781(b)(9) of this title (relating to General Monitoring and Inspection Requirements); and

(2) for all other components, when the component is demonstrated to no longer have a leak after adjustments or alterations to the component by the normal monitoring method required under this division.

§115.784. Alternate Control Requirements.

(a) The executive director may approve alternate methods of demonstrating and documenting continuous compliance with the applicable control requirements or exemption criteria in this division (relating to Fugitive Emissions) 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.

(b) The owner or operator of a site subject to the requirements of this division may use the alternative work practice specified in §115.358 of this title (relating to Alternative Work Practice) as an optional alternative to hydrocarbon gas analyzer monitoring required under this division.

§115.786. Recordkeeping Requirements.

(a) If using a flow indicator to comply with §115.783(1)(A) of this title (relating to Equipment Standards), the owner or operator shall:

(1) maintain hourly records of whether the flow indicator was operating and whether a diversion was detected at any time during the hour; and

(2) record all periods when:

(A) the vent stream is diverted from the control stream; or

(B) the flow indicator is not operating.

(b) If securing the bypass line valve in the closed position to comply with §115.783(1)(B) of this title, the owner or operator shall:

(1) maintain a record of the dates that the monthly visual inspection of the seal or closure mechanism has been performed;

(2) record the date and time of all periods when:

(A) the seal mechanism is broken;

(B) the bypass line valve position has changed; or

(C) the key for a lock-and-key type lock has been checked out; and

(3) maintain a record of each time the bypass line valve was opened, including:

(A) the date and time the valve was opened;

(B) the date and time the valve was closed;

(C) the reason(s) the valve was opened;

(D) the estimated flow rate through the valve; and

(E) the resulting emissions, including the basis for the emissions estimate.

(c) Records of all non-repairable components subject to §115.782(c) of this title (relating to Procedures and Schedule for Leak Repair and Follow-up) must be maintained. Reports must be submitted by January 31st for the previous July 1 through December 31 and July 31st for the previous January 1 through June 30 of each year to the Houston regional office and any local air pollution control agency having jurisdiction. The report shall contain:

(1) the component identification code;

(2) the component type;

(3) the leak concentration measurement and date, if a hydrocarbon gas analyzer was used to determine the leak;

(4) if the owner or operator used the alternative work practice specified in §115.358 of this title (relating to Alternative Work Practice), indication that the leak was determined according to the alternative work practice and the date the leak was detected;

(5) [~~(4)~~] the date of the last scheduled process unit shutdown; and

(6) [~~(5)~~] the total number of non-repairable components awaiting repair or replacement.

(d) The owner or operator shall maintain records in accordance with §115.356 of this title (relating to [~~Monitoring and~~] Recordkeeping Requirements), including records identifying, by one or more of the methods specified in §115.781(a)(1) - (6) of this title (relating to

General Monitoring and Inspection Requirements), and justifying each exemption claimed exempt under §115.787 of this title (relating to Exemptions). The following additional requirements also apply:

(1) the calculation showing the estimated volatile organic compound (VOC) emission rates of the component as required by §115.782(c)(1)(B)(i)(II) of this title if extraordinary efforts are not going to be initiated; and

(2) records for each process unit with leaking components, updated within five business days after a leaking component is determined to require a process unit shutdown to repair and where extraordinary efforts to repair the component will not be pursued, including the following:

(A) the date, calculations, and estimated daily VOC emissions as required by §115.782(c)(1)(B)(i)(III) of this title;

(B) the date, calculations, and comparison of daily VOC emissions as required by §115.782(c)(1)(B)(i)(IV) and (ii) of this title; and

(C) the date of each process unit shutdown required due to VOC emissions of leaking components exceeding the expected VOC emissions from the shutdown.

(e) The owner or operator shall maintain a record of the results of all monitoring and inspections conducted in accordance with §115.781 of this title.

(f) If the owner or operator elects to use the alternative work practice in §115.358 of this title, the following records must be maintained in addition to the records required by subsections (a) - (e) of this section.

(1) The owner or operator shall maintain a list of each component that is monitored according to the alternative work practice of this section.

(2) The owner or operator shall maintain records of the detection sensitivity level selected from the table in §115.358(e)(1) of this title.

(3) The owner or operator shall maintain records of the analysis to determine the component in contact with the lowest mass fraction of chemicals that are detectable, as required by the daily instrument check procedure referenced in §115.358(c)(2) of this title.

(4) The owner or operator shall maintain records of the technical basis for the mass fraction of detectable chemicals used for the daily instrument check procedure referenced in §115.358(c)(2) of this title.

(5) The owner or operator shall maintain records of each daily instrument check required by §115.358(c)(2) of this title. These records include:

(A) the flow meter reading of the leak used in the daily instrument check and the distance from which the leak was imaged;

(B) a video record, with a date and time stamp, of the daily instrument check for each configuration and operator of the optical gas imaging instrument used during monitoring; and

(C) the name of each operator performing the daily instrument check.

(6) The owner or operator shall maintain records of the leak survey results as follows for all components that the owner or operator uses the alternative work practice in §115.358 of this title.

(A) A video record must be used to document the leak survey results and the results of the recheck to verify the leak has been repaired, if the alternative work practice is used to perform the recheck. The video record must meet the following requirements.

(i) The video record must include a time and date stamp for each monitoring event.

(ii) Each component must be identifiable in the video record.

(B) The records must include the names of each operator performing the leak survey for each monitoring event.

(7) The owner or operator shall maintain records of the annual Method 21 screening required by §115.358(f) of this title, including:

(A) the components screened;

(B) the concentration measured according to Method 21;

(C) the date and time of the Method 21 screening; and

(D) the calibrations required by Method 21.

(8) The owner or operator shall maintain records of the training required by §115.358(h) of this title.

(9) If the owner or operator elects to use the alternative frequencies for the annual Method 21 specified in §115.781(h)(6) of this title, the following additional records must be maintained:

(A) a list of each component that the owner or operator is using the alternative frequencies allowed under §115.781(h)(6) of this title; and

(B) the percent leaking components for the specific population of components included in the alternative frequency schedule.

(10) The owner or operator shall maintain records of the optical gas imaging instrument manufacturer's operating parameters.

(g) [~~(f)~~] The owner or operator shall maintain all records for at least five years and make them available for review upon request by authorized representatives of the executive director, United States Environmental Protection Agency, or local air pollution control agencies with jurisdiction.

§115.787. Exemptions.

(a) Components that contact a process fluid containing less than 5.0% highly-reactive volatile organic compounds by weight on an annual average basis are exempt from the requirements of this division (relating to Fugitive Emissions), except for §115.786(e) and (g) [~~(f)~~] of this title (relating to Recordkeeping Requirements).

(b) The following are exempt from the shaft sealing system requirements of §115.783(3) of this title (relating to Equipment Standards):

(1) submerged pumps or sealless pumps (e.g., diaphragm, canned, or magnetic-driven pumps); and

(2) pumps, compressors, and agitators installed before July 1, 2003.

(c) The following components are exempt from the requirements of this division:

(1) conservation vents or other devices on atmospheric storage tanks that are actuated either by a vacuum or a pressure of no more than 2.5 pounds per square inch gauge (psig);

(2) components in continuous vacuum service;

(3) valves that are not externally regulated (such as in-line check valves);

(4) any site as defined in §122.10 of this title (relating to General Definitions) with less than 250 components in volatile organic compound (VOC) service;

(5) components that are insulated, making them inaccessible to monitoring with a hydrocarbon gas analyzer;

(6) sampling connection systems, as defined in 40 Code of Federal Regulations (CFR) §63.161 (January 17, 1997), that meet the requirements of 40 CFR §63.166(a) and (b) (June 20, 1996); and

(7) instrumentation systems, as defined in 40 CFR §63.161 (January 17, 1997), that meet the requirements of 40 CFR §63.169 (June 20, 1996).

(d) All pumps, compressors, and agitators that are equipped with a shaft sealing system that prevents or detects emissions of VOC from the seal are exempt from the monitoring requirement of §115.781(b) and (c) of this title (relating to General Monitoring and Inspection Requirements). These seal systems may include, but are not limited to, dual seals with barrier fluid at higher pressure than process pressure, seals degassing to vent control systems kept in good working order, or seals equipped with an automatic seal failure detection and alarm system. Submerged pumps or sealless pumps (including, but not limited to, diaphragm, canned, or magnetic driven pumps) may be used to satisfy the requirements of this subsection.

(e) Each pressure relief valve equipped with an upstream rupture disk is exempt from the requirements of §115.781(b)(8) of this title, provided that the pressure relief valve complies with §115.725(c) of this title (relating to Monitoring and Testing Requirements). The rupture disk must be replaced as soon as practicable, but no later than 30 calendar days after a failure is detected.

(f) The following valves are exempt from the requirements of §115.783(5) of this title:

(1) pressure relief valves;

(2) open-ended valves or lines in an emergency shutdown system that are designed to open automatically in the event of an emissions event;

(3) open-ended valves or lines containing materials that would autocatalytically polymerize or would present an explosion, serious overpressure, or other safety hazard if capped or equipped with a double block and bleed system; and

(4) valves rated greater than 10,000 psig.

(g) Any site as defined in §122.10 of this title with less than 100 valves [~~components~~] in highly-reactive volatile organic compound service is exempt from §115.788 of this title (relating to Audit Provisions).

§115.788. Audit Provisions.

(a) At least once every calendar year, the owner or operator of a site as defined in §122.10 of this title (relating to General Definitions) that is subject to the highly-reactive volatile organic compound (HRVOC) fugitive monitoring requirements of this division (relating to Fugitive Emissions) shall retain the services of an independent third-party organization to conduct an audit of the process units subject to HRVOC monitoring in this division. The field survey conducted as part of the audit must be based on a random sampling of the affected valves at the site. The random sample must be such that each valve has an equal chance of being selected from the total number of valves being sampled. The valves to be considered in this random sampling are all of the valves at the site in HRVOC service that are not exempted from quarterly monitoring by §115.787 of this title (relating to Exemptions) and are not listed on either the difficult-to-monitor or the unsafe-to-monitor lists. [~~The independent third-party organization shall:~~]

(1) The independent third-party organization shall verify that all affected valves are properly tagged in accordance with §115.782(a) of this title (relating to Procedures and Schedule for Leak Repair and Follow-up).

(2) The independent third-party organization shall perform a field survey to determine the representative percentage of leaking valves determined from the random sampling of the affected units at the site as follows.

(A) The field survey must begin after the owner or operator's contracted or usual monitoring service has completed monitoring the valves for that monitoring period. The field survey must be completed by the end of the next monitoring period.

(B) The following table must be used to determine the number of valves required to be monitored in the field survey. The total population valve count is all of the valves in HRVOC service that are not exempted from quarterly monitoring by §115.787 of this title and are not listed on either the difficult-to-monitor or the unsafe-to-monitor lists based on the average of the previous four quarters of monitoring. The company claimed leaker rate is the number of leaking valves found in the total population valve count based on the previous four quarters of monitoring divided by the total population valve count.
Figure: 30 TAC §115.788(a)(2)(B) (No change.)

(C) The following alternatives may be used in lieu of subparagraph (B) of this paragraph to determine the number of valves required to be monitored in the field survey. The required sample size must be calculated using a hypergeometric distribution that characterizes sampling from a given finite population of valves without replacement and reported leaker rate. Commercially available statistical software programs may be used. The sample size must be determined according to the following requirements.[~~:~~]

(i) The [~~the~~] total population valve count is all of the valves in HRVOC service that are not exempted from quarterly monitoring by §115.787 of this title and are not listed on either the difficult-to-monitor or the unsafe-to-monitor lists based on the average of the previous four quarters of monitoring. The company claimed leaker rate is the number of leaking valves found in the total population valve count based on the previous four quarters of monitoring divided by the total population valve count.[~~;~~]

(ii) Type I error rate must be less than or equal to 0.05. A Type I error occurs when the company claimed leaker rate accurately reflects the true proportion of leakers, yet the test falsely indicates that the true percentage of leakers is greater than reported (false positive).[~~; and~~]

(iii) Type II error rate must be less than or equal to 0.20, when the minimum difference between the company's claimed leaker rate and the true population leaker rate is at least 2%. A Type II error occurs when the true leaker rate is in fact greater than the reported rate, but the test fails to so indicate (false negative).

(D) The independent third-party organization shall perform the field survey in accordance with [~~Test~~] Method 21 (40 Code of Federal Regulations Part 60, Appendix A-7 (October 17, 2000)). The independent third-party organization may not use the alternative work practice in §115.358 of this title (relating to Alternative Work Practice) for the field survey if the majority of valves in HRVOC service at the site are monitored according to Method 21. [~~A);~~]

(3) The independent third-party organization shall conduct a review of all data generated by monitoring technicians in the previous quarter. This review must include:

(A) identification of data patterns indicative of failure to properly implement [~~Test~~] Method 21 including, but not limited to, a review of the number of valves monitored per technician and the time between monitoring events to validate that the sampling procedures accurately reflect the requirements of [~~Test~~] Method 21 including identification of specific instances in which a monitoring technician recorded data faster than was physically possible due to the hydrocarbon gas analyzer response time and/or the time required for the technician to move to the next component; and

(B) a review of records to verify that the calibration requirements of [~~Test~~] Method 21 have been properly implemented.[~~;~~]

(b) For purposes of this section, an independent third-party organization is an organization in which the owner or operator (including any subsidiary, parent company, sister company, or joint venture) of the petroleum refinery; synthetic organic chemical, polymer, resin, or methyl tert-butyl ether manufacturing process; or natural gas/gasoline processing operation has no ownership or other financial interest. If the owner or operator's routine monitoring is done by a contractor rather than by in-house monitoring, then the independent third-party organization must be a different contractor from that ordinarily used for those services.

(c) The owner or operator shall submit a verbal notification to the Houston regional office and any local air pollution control agency having jurisdiction that provides the date that the independent third-party organization is scheduled to begin the audit. The notification must be submitted at least 30 days prior to the start date of the audit. The notification must also identify whether the audit will be conducted using Method 21 or the alternative work practice in §115.358 of this title.

(d) The owner or operator shall furnish the Houston regional office and any local air pollution control agency having jurisdiction a copy of the results of the audit authored by the independent third-party organization within 30 days after completion of the audit requirements listed in subsection (a) of this section. The report must include:

(1) the number of valves that were not tagged, but should have been tagged in accordance with §115.782(a) of this title;

(2) the number of valves monitored during the field survey, the number of leaking valves found during the field survey, the percentage of leaking valves identified by the independent third-party organization during the field survey, and a detailed description of the sampling scheme used to ensure that a random sample of valves was selected so that each valve had an equal chance of being selected from the total number of valves being sampled;

(3) the total number of valves in HRVOC service that are not exempted from quarterly monitoring by §115.787 of this title and are not listed on either the difficult-to-monitor or the unsafe-to-monitor lists monitored based on the average of the previous four quarters of monitoring, the total number of leaking valves found at the site by the owner or operator's contracted or usual monitoring service based on the average of the previous four quarters of monitoring, and the percentage of leaking valves based on the average of the previous four quarters of monitoring;

(4) the methodology used to select the field survey sample size, and if[~~. If~~] the alternative provided in subsection (a)(2)(C) of this section was used to determine the number of valves to be sampled in the field survey, documentation must include: [~~the actual Type I and Type II error rates associated with the sample size used and a detailed description of the methodology used to calculate the sample size; and~~]

(A) the actual Type I and Type II error rates associated with the sample size used; and

(B) a detailed description of the methodology used to calculate the sample size; and

(5) a summary of the independent third-party organization's review of all data generated by monitoring technicians in the previous quarter by the owner or operator's contracted or usual monitoring service for each of the categories specified in subsection (a)(3)(A) and (B) of this section.

(e) If the results of the independent third-party audit indicate deficiencies in the implementation of [~~Test~~] Method 21 or in the implementation of the alternative work practice in §115.358 of this title, the owner or operator shall submit a corrective action plan with the audit report to the Houston regional office and [~~or~~] any local air pollution control agency having jurisdiction.

(f) Authorized representatives of the executive director, United States Environmental Protection Agency, or any local air pollution control agency with jurisdiction may conduct an audit of the owner or operator's leak detection and repair program.

(g) In lieu of complying with subsections (a) - (d) of this section, an owner or operator may request approval from the executive director of an alternative method that demonstrates equivalency with the independent third-party audit, provided that the request:

(1) includes a detailed explanation of how the equivalency will be demonstrated, including the appropriate recordkeeping and reporting requirements that will be implemented that are sufficient to demonstrate compliance with the alternative method; and

(2) demonstrates that it is a replicable procedure and details how the equivalency will be demonstrated.

(h) If the owner or operator of a site subject to the third-party audit requirements of this section elects to use the alternative work practice allowed under §115.358 of this title for valves in HRVOC service, the following additional provisions will apply.

(1) The field survey must be conducted as specified in subsection (a)(2) of this section, except that the independent third-party organization shall perform the field survey according to the alternative work practice specified in §115.358 of this title.

(2) In lieu of the data review specified under subsection (a)(3) of this section, the independent third-party organization shall conduct a review of all data and video generated by the monitoring personnel in the previous monitoring interval as specified in §115.358 of this title. For example, if the frequency for performing the alternative work practice is monthly, the review includes data from the monitoring event in the prior calendar month.

(A) The review must include a review of records to verify:

(i) the optical gas imaging instrument meets the requirements referenced in §115.358(c)(1) of this title;

(ii) the daily instrument check was performed as required by §115.358(c)(2) of this title; and

(iii) monitoring personnel performing the alternative work practice have satisfied the training requirements specified in §115.358(h) of this title.

(B) The review must also include identification of any:

(i) instances that components were imaged at a distance greater than demonstrated during the daily instrument check;

(ii) instances that the optical gas imaging instrument was not operated in accordance with the instrument manufacturer's operating parameters; and

(iii) leaking components in the video records that were not identified as leaking by the routine monitoring personnel.

(C) In lieu of the categories specified in subsection (a)(3)(A) and (B) of this section, the report contents specified in subsection (d)(5) of this section must include a summary of the independent third-party organization's review based on the categories specified in subparagraphs (A) and (B) of this paragraph.

(3) If the owner or operator is performing a combination of Method 21 hydrocarbon gas analyzer monitoring according to §115.781 of this title (relating to General Monitoring and Inspection Requirements) and the alternative work practice according to §115.358 of this title on different valves in HRVOC service, the field survey and data review must be performed based on how the majority of valves in HRVOC service were monitored in the evaluation period of the third party audit (e.g., if greater than 50% of valves in HRVOC service were monitored according to the alternative work practice, then the field survey and data review must be conducted according to this subsection). The population of valves used for the field survey in subsection (a)(2) of this section must only include those valves monitored according to the method (i.e., Method 21 or alternative work practice) that will be used in the field survey.

(i) [~~(h)~~] Upon review of the audit results, the executive director may specify additional corrective actions beyond any potential corrective actions submitted in the documentation required under subsection (e) 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 December 11, 2009.

TRD-200905757
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: January 24, 2010
For further information, please call: (512) 239-0177

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TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 1. GENERAL LAND OFFICE

CHAPTER 9. EXPLORATION AND LEASING OF STATE OIL AND GAS

SUBCHAPTER D. PAYING ROYALTY TO THE STATE

31 TAC §9.51

INTRODUCTION AND BACKGROUND

The General Land Office (GLO) proposes amendments to §9.51, concerning royalty and reporting obligations to the state, in order to streamline the royalty payment collection efforts of the GLO and to allow for the fluctuation of royalty payment and/or penalty interest under certain circumstances.

The GLO proposes to amend §9.51(b)(3)(E) relating to the reduction of penalty and/or interest. The proposed amendment to subsection (b)(3)(E) provides the GLO with greater flexibility in addressing concerns that it's policy with respect to penalty and interest does not reflect current market conditions. It also provides an incentive for individuals and companies to resolve audit issues in a much more timely fashion.

FISCAL IMPACTS

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

PUBLIC BENEFIT/COST ANALYSIS

Mr. Laine has also determined that for each year of the first five years the proposed amendments will be in effect, the public benefit will be improved operation of the GLO and better conservation of state resources. The GLO does not anticipate incurring any additional costs as a result of administering the proposed rule amendments.

SMALL BUSINESS ANALYSIS

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

EMPLOYMENT IMPACT

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

REQUEST FOR COMMENTS BY THE PUBLIC

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

STATUTORY AUTHORITY

Texas Natural Resources Code, §31.051 and §52.131.

No other statute, article, or code is affected by this proposal.

§9.51. Royalty and Reporting Obligations to the State.

(a) (No change.)

(b) Monetary royalties and reports.

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

(3) Penalties and interest.

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

(E) Reduction of penalty and/or interest. For royalties due on or after February 26, 2010, the interest rate assessed on delinquent royalties shall be determined as of the date of the first business day of the year the royalty becomes delinquent and will be reduced to prime plus one percent.

(i) As used herein "Prime" shall mean the prime interest rate, as published daily in the Wall Street Journal that is not a Saturday, Sunday, or legal holiday. For royalties due on a Saturday, "Prime" shall refer to the prime interest rate published on the next business day that is not a legal holiday.

(ii) The interest rate shall never exceed the percentage rate as stated in the Texas Natural Resource Code at §52.131(g).

(iii) Interest rates assessed hereunder shall be reset on the first business day of each calendar year; if the underlying royalties have not been paid they may be revised upward should the prime interest rate on the first business day be higher.

~~[(E) Reduction of penalty and/or interest. The SLB may reduce penalties and/or interest assessed under Texas Natural Resources Code, §52.131, and/or any other penalties or interest relating to delinquent or unpaid royalties that have been assessed by the commissioner in the following circumstances:]~~

~~*[(i)* when a lessee brings a deficiency to the GLO's attention voluntarily; and/or]~~

~~*[(ii)* when a lessee and the GLO have reached an agreement regarding the reduction as part of a resolution of an outstanding audit issue.]~~

(4) - (5) (No change.)

(c) (No change.)

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

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

TRD-200905640
Larry Laine
Deputy Land Commissioner and Chief Clerk
General Land Office
Earliest possible date of adoption: January 24, 2010
For further information, please call: (512) 475-1859

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CHAPTER 13. LAND RESOURCES
SUBCHAPTER B. RIGHTS-OF-WAY OVER PUBLIC LANDS

31 TAC §13.17

The General Land Office (GLO) proposes amendments to §13.17, relating to Fees for Right-of-Way Easements, to change the applicable rates and fees for power, communications, data and other right-of-way easements over or across public lands and to change the number of and boundaries of the regions that define the geographic limits to which the rates and fees apply. Modifications are also made to allow the commissioner the flexibility to deal with the merits of each easement, as provided for by statutory changes made during the 80th Legislature by Senate Bill 654.

BACKGROUND AND SECTION-BY-SECTION ANALYSIS OF PROPOSED AMENDMENTS

The proposed amendments to the text of §13.17(e) clarifies that Figure: 31 TAC §13.17(e) (figure) applies only to power line right-of-way easements over and across public lands. The proposed amendment also substitutes the figure with a new figure that provides revised fee and rate schedules for power line right-of-way easements. The GLO has proposed an increase in processing fees to $350 per event of application, renewal, assignment, or amendment to better reflect the cost of processing by staff. This amount mirrors the fees for the processing of pipeline right-of-way easements, which were amended in 2008.

Instead of the width of the right-of-way, the rates are proposed to be based on the capacity and location of the power line, consistent with industry standards. The new rates are based on calculating the value of the 1984 rates adjusted forward to 2009 based on actual inflation (Consumer Price Index) during the 25 year period. The GLO has defined three regions for implementing the applicable rate schedules. These regions are the gulf, coastal counties that include bays and estuaries, and the remainder of the state (all uplands). Because right-of-way easement activities cause the fewest impacts to the gulf region, rates for power line right-of-way easements in this region are the lowest. Rates for power line right-of-way easements in the coastal region are highest due to the greatest impact to natural resources occurring in that location.

Because the proposed revised rates will be based on the location of the power line, the proposed figure includes a regions map for use in determining the applicable rate. This map is identical to the map that was included with the 2008 amendments to the pipeline right-of-way easement rates and fees. Due to their higher land value, rates for power line right-of-way easements over or across properties acquired by the Permanent School Fund and properties within a municipality or its extraterritorial jurisdiction (ETJ) are proposed to be negotiated based on the appraised value of the property, consistent with industry standards.

Base rates for power line right-of-way easements in the three regions are proposed to increase (but not decrease) September 1 of each year according to the Consumer Price Index for All Urban Consumers. The minimum total consideration for a power line right-of-way easement will be $1,000 per line per 10-year contract term.

The proposed figure also proposes to add a fee for damages to each new easement, based on geographical region. This addition mirrors the damages aspect of pipeline right-of-way easement rates, which the GLO added in 2008 to address damages caused by easement activities. Damages assessments are a component of typical utility easement rates industry-wide and are consistent with §51.296(b) of the Texas Natural Resources Code.

The proposed amendments also add a new subsection (f) to §13.17 which provides that fees, rates, and terms for communications, data, and other right-of-way easements will be negotiated because the base rates for power line right-of-way easements are based on the capacity of the line, which cannot be implemented with communications, data, and other right-of-way easements.

The text from the current §13.17(f) is relettered as subsection (g). The text has been amended to clarify the types of easements described by that subsection.

FISCAL AND EMPLOYMENT IMPACTS

Rene Truan, Deputy Commissioner for the GLO's Professional Services Program Area, has determined that for each year of the first five years the amended section as proposed is in effect there will be no additional cost to state government as a result of enforcing or administering the amended section. Administration of the proposed amendments will cause an increase in revenue to the Permanent School Fund, and an increase in state revenue as both rates and fees are increased by the changes.

Mr. Truan has determined that for each year of the first five years the amended section as proposed is in effect there will be no fiscal implications for local governments as a result of enforcing or administering the amended section.

Mr. Truan has also determined that for each year of the first five years the amended section as proposed is in effect there will be increased economic costs to businesses that secure new power, communications, data, and other right-of-way easements or renew expiring contracts. Because rates for these easements have not changed since February 1984, current rates are way below industry standards and an increase is necessary in order for the Permanent School Fund to receive fair compensation for the use of its land. As mentioned, the new base rates are based on calculating the value of the 1984 rates adjusted forward to 2009 based on actual inflation (Consumer Price Index) during the 25 year period. This increase is consistent with the 2008 increase in pipeline right-of-way easement rates. The proposed fees for contract events such as applications, amendments, assignments, and renewals is proposed to capture the administrative costs associated with such events. Also as described above, a new, one-time damages fee is proposed for all new easements in order to compensate for damages to natural resources on public lands.

The proposed rate and fee increases would result in the GLO's costs fitting squarely within the spectrum of rates and fees charged by comparable land owners. The proposed regions map is the same one used in determining the applicable rates for pipeline right-of-way easements, and reflects the relative sensitivity of the various regions.

The GLO has determined that the proposed rulemaking will have no adverse local employment impact that requires an impact statement pursuant to Texas Government Code §2001.022.

PUBLIC BENEFIT

Mr. Truan has determined that the public will benefit from the proposed amendments because of the additional revenue deposited to the Permanent School Fund, which ultimately benefits K-12 school children of Texas.

TAKINGS IMPACT ASSESSMENT

The GLO 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 GLO has determined that the proposed rulemaking does not affect private real property in a manner that requires real property owners to be compensated as provided by the Fifth and Fourteenth Amendments to the United States Constitution or Article I, Sections 17 and 19, of the Texas Constitution. Furthermore, the GLO has determined that the proposed rulemaking would not affect any private real property in a manner that restricts or limits the owner's right to the property that would otherwise exist in the absence of the rule amendments. The GLO has determined that the proposed rulemaking will not result in a taking of private property and that there are no adverse impacts on private real property interests inasmuch as the property subject to the proposed amendments is owned by the state.

ENVIRONMENTAL REGULATORY ANALYSIS

The GLO 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 exceed express requirements of state law and does not meet the definition of a "major environmental rule" as defined in the statute. "Major environmental rule" means a rule of which the specific intent is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect the economy, a sector of the economy, productivity, competition, jobs, the environment, or public health and safety of the state or a sector of the state. The proposed amendments 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.

CONSISTENCY WITH COASTAL MANAGEMENT PROGRAM (CMP)

The proposed rulemaking is subject to the CMP, 31 TAC §505.11(a)(1) and §505.11(c), relating to the Actions and Rules Subject to the CMP. The GLO has reviewed these proposed actions for consistency with the CMP's goals and policies in accordance with the regulations of the Coastal Coordination Council (Council). The applicable goals and policies are found at 31 TAC §501.12 (relating to Goals) and §501.16 (relating to Policies for Construction of Electric Generating and Transmission Facilities); §501.23 (relating to Policies for Development in Critical Areas); and §501.24 (relating to Policies for Construction of Waterfront Facilities and Other Structures on Submerged Lands). Because all requests for the use of coastal public land must continue to meet the same criteria for GLO approval, the GLO has determined that the proposed actions are consistent with applicable CMP goals and policies. The proposed amendments will be distributed to Council members in order to provide them an opportunity to provide comment on the consistency of the proposed new rules during the comment period.

PUBLIC COMMENT REQUEST

To comment on the proposed rulemaking or its consistency with the CMP goals and policies, please send a written comment to Walter Talley, Texas Register, Liaison, Texas General Land Office, P.O. Box 12873, Austin, Texas 78711, facsimile number (512) 463-6311 or email to walter.talley@glo.state.tx.us. Written comments must be received no later than 5:00 p.m., 30 days from the date of publication of this proposal.

STATUTORY AUTHORITY

The amendments are proposed under the Texas Natural Resources Code §§51.291 - 51.307, relating to the commissioner's ability to grant easements or other interests in property for rights-of-way or access across, through and under state public land; and Texas Natural Resources Code §51.014(a), providing that the commissioner may adopt procedural and substantive rules which it considers necessary to administer, implement and enforce Chapter 51, Texas Natural Resources Code.

Texas Natural Resources Code §§51.291 - 51.307 are affected by the proposed amendments.

§13.17. Fees for Right-of-Way Easement.

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

(e) The following table lists the fees, rates, and terms for power [~~and telephone~~] line right-of-way easements over and across [~~rights-of-way over~~] public lands as established by the commissioner.
Figure: 31 TAC §13.17(e)

(f) Fees, rates and terms for communications, data, and other right-of-way easements will be negotiated.

(g) [~~(f)~~] Renewal fees, rates and terms for all power, communications data, and other right-of-way easements over and across [~~and telephone line rights-of-way over~~] public lands are the fees, rates, and terms [~~rates~~] in effect at the time of renewal.

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

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

TRD-200905781
Trace Finley
Deputy Commissioner, Policy and Governmental Affairs
General Land Office
Earliest possible date of adoption: January 24, 2010
For further information, please call: (512) 475-1859

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PART 2. TEXAS PARKS AND WILDLIFE DEPARTMENT

CHAPTER 65. WILDLIFE

SUBCHAPTER K. RAPTOR PROCLAMATION

The Texas Parks and Wildlife Department (the department) proposes the repeal of §§65.261 - 65.267 and 65.269 - 65.277 and new §§65.261 - 65.277, concerning the Raptor Proclamation.

The practice of falconry in the United States is regulated at both the state and federal levels. The federal authority to regulate falconry is derived from the Migratory Bird Treaty Act. (See 16 U.S.C. §703 et seq.) Under the Migratory Bird Treaty Act, and the doctrine of federal preemption, each state is authorized to adopt falconry rules that are more restrictive than this federal statute and the associated federal falconry regulations, but not less restrictive. (16 U.S.C. §708).

Until 2009, under the federal falconry regulations, an applicant for a state falconry permit was required to apply for a federal falconry permit concurrently with an application for a state permit. (Add cite to CFR). The United States Secretary of the Interior, through the U.S. Fish and Wildlife Service ("FWS" or "the Service"), has recently adopted significant revisions to the federal falconry regulations. (See 50 CFR §29.21) Part of these revisions allows states that are certified by FWS has having state regulations that meet the federal falconry standards to issue state falconry permits without requiring the applicant to concurrently apply for a federal falconry permit. Texas falconers have expressed a strong desire to be administratively regulated by the department alone.

The proposed new rules are intended to provide a conveniently abridged, user-friendly version of the more voluminous federal falconry regulations, many of which do not apply to Texas. In most cases, the proposed new rules recapitulate federal requirements, but there are specific instances in which the proposed rules differ, as noted.

Proposed new §65.261, concerning Applicability, would state that the proposed rules apply to all raptors indigenous to the state of Texas and specifically provides that federal rules will control in all instances of conflict. The proposed new rule is necessary to define the resources to which the rules apply and to clearly the articulate any differences between state and federal authorities on matters concerning raptors and falconry.

Proposed new §65.262, concerning Definitions, would set forth the meanings for words and terms used in the subchapter. The proposed new section is necessary in order to provide unambiguous meanings so that compliance and enforcement are not problematic.

Proposed new §65.262(1) would define the term "abatement permit." The U.S. Fish and Wildlife Service issues a special purpose permit for the use of raptors to abate nuisance wildlife. Rather than employ the formal title of the permit each time it is referred to, the rules would simply to refer to it as an abatement permit. The proposed new definition is necessary to minimize the use of awkward or unwieldy terms.

Proposed new §65.262(2) would define the term "captive bred." Throughout the federal falconry regulations and the proposed new rules the term "captive bred" is used repeatedly. The proposed new definition would be "raptors, including eggs hatched in captivity, from parents that mated or otherwise reproduced in captivity." The definition is necessary to clearly and unambiguously establish what is meant by the term for purposes of enforcement and program administration.

Proposed new §65.262(3) would define the term "educational display." The use of raptors to provide educational programs is regulated by federal falconry regulations (50 CFR §21.29(f)(8)). The proposed new definition provides a description of what constitutes educational display, specifically, "activities conducted for the purposes of encouraging understanding of falconry, the management and conservation of raptors, or furthering awareness and understanding of the biology and ecological roles of protected wildlife." This definition is necessary to provide a general guideline for the types of activities that are encompassed by the term in order to facilitate compliance and enforcement.

Proposed new §65.262(4) would define the term "eyass." An eyass is a young raptor that has not yet left the nest. Although the term is well understood in the falconry community, it is necessary to define it for purposes of enforcement.

Proposed new §65.262(5) would define the term "falconer." For the sake of convenience, the department defines a falconer as any person who possesses a falconry permit (at any applicable level).

Proposed new §65.262(6) would define the term "FWS," meaning the United States Fish and Wildlife Service, which is convenient shorthand.

Proposed new §65.262(7) would define the term "hacking." Hacking (i.e., to "hack" a raptor) is a method of conditioning a raptor for use in falconry. Although the term is well understood in the falconry community, it is necessary to define it for purposes of enforcement.

Proposed new §65.262(8) would define the term "holding." A specific definition of "holding" is necessary to distinguish temporary possession of raptors (for instance, during trapping activities) from the possession of raptors under a permit.

Proposed new §65.262(9) would define the term "imping." Imping is the use of feathers to replace broken or damaged feathers on a raptor possessed under a falconry permit. Although the term is well understood in the falconry community, it is necessary to define it for purposes of enforcement.

Proposed new §65.262(10) would define the term "imprint." Imprinting is the process of raising an animal in isolation from other raptors. Although the term is well understood in the falconry community, it is necessary to define it for purposes of enforcement.

Proposed new §65.262(11) would define the term "passage bird." A passage bird is a raptor that is old enough to have left the nest but not more than one year of age. Although the term is well understood in the falconry community, it is necessary to define it for purposes of enforcement.

Proposed new §65.262(12) would define the term "physician's statement." Federal falconry rules allow master falconers to trap raptors on behalf of falconers prevented from engaging in trapping activities by a physical disability. The proposed new provision is necessary to create a definitive standard for determining that a physical disability exists. The department has determined that the easiest and most effective method of making this determination is to require a physician's statement that a person is incapable of participating in trapping activities because of a disability.

Proposed new §65.262(13) would define the term "raptor." The federal falconry regulations (50 CFR §21.29(a)(1)(i)) stipulates the species of raptors that may be taken and possessed for falconry purposes. The proposed new definition restates that definition.

Proposed new §65.262(14) would define the term "release to the wild." Because the practice of falconry requires raptors to be flown free of any restraints, the proposed new rules must provide a distinction between a raptor being flown for falconry purposes and a raptor that has been liberated to return to living in the wild on its own.

Proposed new §65.262(15) would define the term "sponsor." The federal falconry regulations (50 CFR §21.29(c)(3)(i)(C)) require apprentice falconers to obtain a sponsor who agrees to train the apprentice in the art and practice of falconry. The proposed new definition restates the federal definition.

Proposed new §65.262(16) would define the term "take." Because the practice of falconry involves the trapping of wild raptors and the use of them in hunting wildlife, the act of acquiring a raptor or using a raptor to capture wildlife falls under the definition of take as described in Parks and Wildlife Code, §1.101. The proposed new definition is necessary for compliance and enforcement purposes.

Proposed new §65.262(17) would define the term "transfer." The federal falconry regulations (50 CFR §21.29(e) and (f)(5)) allow falconers to transfer raptors to other persons permitted to receive them, provided there is no monetary or material consideration in return. The proposed new definition is necessary to create a standard for purposes of program administration, compliance, and enforcement.

Proposed new §65.262(18) and (19) would define the terms "Type 1 band" and "Type 2 band." Under the federal falconry regulations (50 CFR §21.29(c)(7)) certain raptors possessed for use in falconry must be banded. The proposed new definitions differentiate which bands are to be attached to falconry raptors, depending on the species and whether the raptor was wild-caught or captive bred.

Proposed new §65.262(20) would define the term "weathering area." A weathering area is an outdoor facility used for housing raptors. Although the term is well understood in the falconry community, it is necessary to define it for purposes of enforcement.

Proposed new §65.262(21) would define the term "wild raptor." Federal law in numerous instances makes a distinction between raptors that are obtained from the wild and raptors that are captive bred. In particular, the federal falconry regulations (50 CFR §21.29(f)) stipulates that a raptor captured in the wild is a wild raptor for the duration of its life. The proposed new definition would provide an unambiguous standard for making that distinction, and is necessary for purposes of compliance and enforcement.

Proposed new §65.263, concerning General Provisions, would set forth a number of provisions generally applicable to the take, possession, and use of raptors for falconry purposes.

Proposed new §65.263(a) would restate statutory requirements contained in Parks and Wildlife Code, Chapter 49, which prohibits any person from taking or possessing raptors unless the person possesses valid permits to do so, and Chapter 42, which prohibits any person from taking or attempting to take any animal or bird without possessing a valid hunting license.

Proposed new §65.263(b) would restate statutory requirements contained in Parks and Wildlife Code, Chapter 49 that prohibit nonresidents from possessing any permit issued under the authority of Chapter 49 other than a nonresident trapping permit.

Proposed new §65.263(c) would require permittees to provide all required permits, licenses, and documentation upon the request of a department employee acting within the scope of their official duties, and to possess all required paperwork when in possession of raptors away from the facility where the raptors are kept. The proposed new provisions are necessary to ensure that the department is able to quickly and easily verify that a person in possession of raptors is legally authorized to do so and in compliance with the recordkeeping requirements of the subchapter.

Proposed new §65.263(d) would set forth the requirements for the use of falconry raptors for educational display purposes. The proposed new provisions are required by the federal falconry regulations (50 CFR §21.29(f)(8)).

Proposed new §65.263(e) would allow a permitted falconer to capture a captive-bred raptor or a raptor wearing falconry equipment, and would require the raptor to be returned if it belonged to another falconer. The proposed new provision is required by the federal falconry regulations (50 CFR §21.29(e)(3)(E)(v)).

Proposed new §65.263(f) would require apprentice falconers to secure a new sponsor within 30 days of terminating the apprentice-sponsor relationship. The proposed new provision is necessary because the federal falconry regulations (50 CFR §21.29(c)(3)) require an apprentice falconer to be supervised by a falconer licensed at a higher level. The department must have a means of determining compliance with the federal requirement.

Proposed new §65.263(g) would authorize raptors possessed under a valid permit to be transported to other states, subject to applicable state and federal laws. The proposed new provision is consistent with the federal falconry regulations (50 CFR §21.29(c)(9)) and the department reasons that there is no reason to restrict the transport of falconry raptors to other states for lawful purposes if allowed by that state's laws.

Proposed new §65.264, concerning Permit Application Requirements, sets forth the age, experience, and testing requirements for the various classes of permits issued under the subchapter. With the exceptions of proposed new subsections (g) and (h), the proposed provisions are required by the federal falconry regulations and restate the requirements contained at 50 CFR §21.29(c)(3). Proposed new subsection (g) would require falconers who move to Texas from another state and desire to continue to practice falconry to pass a facility inspection prior to issuance of a Texas falconry permit. The proposed provision is necessary to ensure that falconers who relocate to Texas understand and comply with Texas facility requirements. Proposed new subsection (h) would allow for the department's denial of permit issuance or renewal in the event that an applicant has been convicted of a violation of statutory provisions regarding the possession of live wildlife resources or other violations of the Parks and Wildlife Code that are Class A or B misdemeanors or felonies. The proposed provisions are necessary because the department believes that a person who has demonstrated a disregard for wildlife laws should not be allowed the privilege of possessing live wildlife resources.

Proposed new §65.265, regarding Period of Validity, would establish the period of validity of up to five years and would prescribe an expiration date of June 30. The federal falconry rules allow states to establish any period of validity for falconry permits. The department has determined that a period of validity of up to five years allows for the reduction of administrative costs; by prescribing variable periods of validity based on the level of experience and compliance history, the department is able to provide oversight without requiring frequent renewal applications from permittees who have demonstrated a good compliance history. The fixed expiration date of June 30 is necessary because the department desires to establish a regular date for issuing or renewing permits.

Proposed new §65.266, concerning Review of Agency Decision to Deny or Revoke Permit, would provide a mechanism for persons who have been denied permit issuance or renewal to have the opportunity have such decisions reviewed by department managers. The proposed new section is intended to help ensure that decisions affecting permit privileges are correct.

Proposed new §65.267, concerning Permit Privileges and Restrictions, would establish the possession limits, sponsorship requirements, and permit privileges for each class of permit issued under the subchapter. The proposed provisions are required by the federal falconry regulations and restate the requirements contained at 50 CFR §21.29(c)(3).

Proposed new §65.268, concerning Equipment and Facility Standards; Related Provisions, would prescribe the falconry equipment that permittees are required to have, the required infrastructure for indoor, outdoor, and home facilities where falconry raptors are kept, provisions for temporary care of falconry raptors under special circumstances, and standards for housing and care of falconry raptors away from permitted facilities. The proposed provisions are required by federal law and restate the federal falconry regulations contained at 50 CFR §21.29(d).

Proposed new §65.269, concerning Marking, Banding, and Telemetry, would prescribe requirements for identifying falconry raptors and equipping captive-bred raptors with radio tracking devices. The proposed provisions are required by the federal law and restate the requirements contained at 50 CFR §21.29(c)(7)(ii).

Proposed new §65.270, concerning Notification, Reporting, and Recordkeeping Requirements, would set forth the timeframes for reporting various specific events and circumstances to the department or the FWS. With the exception of proposed new subsection (b), which requires certain notifications to be made solely by electronic means, the proposed provisions are required by the federal law and restate falconry regulations contained in 50 CFR §21.29. Under the federal falconry regulations, the department is required to maintain an electronic recordkeeping system that is accessible by the FWS. The department has the option of allowing permittees to submit written or telephonic reports which are then entered on the electronic system by department personnel; however, the department proposes to require permittees to enter required data directly onto the electronic system as a way to reduce the costs of administering the program. The department believes that the wide availability and prevalence of personal computers makes it possible for permittees to comply with the proposed provision without hardship.

Proposed new §65.271, concerning Trapping, would establish a trapping season during which falconers would be permitted to trap raptors from the wild, set forth the types and quantities of raptors that may trapped, the ages at which different species of raptors may be trapped, special provisions to protect endangered aplomado falcons in specific counties, special provisions for the trapping of Arctic peregrine falcons, and special provisions for the take of golden eagles, and provisions for the trapping of falconry raptors on behalf of falconers who are prevented from trapping because of physical disability.

Proposed new §65.271(a) - (c), (e) - (h), (j), (l), and (m) are required by the federal law and restate the requirements contained at 50 CFR §21.29(e).

Proposed new §65.271(d) would require juvenile raptors displaced during trapping activities to be replaced in the nest or near the nest so that they are not vulnerable to terrestrial predation. The proposed provision is necessary to ensure that the process of acquiring a raptor from the wild does not result in collateral negative impacts to the resource.

Proposed new §65.271(i) establishes a year-round season for the take of raptors from the wild. Each state is authorized by the FWS to determine the times at which wild raptors may be trapped by falconers. The department has determined that there is no biological reason that year-round trapping should not be allowed, since trapping activities are restricted to young birds that are not reproductively mature. Although federal rules allow American kestrels and great-horned owls to be trapped at any age, the department has determined that restricting the take of those species to passage birds is necessary to reduce or prevent the possibility of mortalities of young birds if the parents are trapped during nesting.

Proposed new §65.271(k) would provide for a department-administered program to distribute permits for the trapping of Arctic peregrine falcons. The FWS, based on biological data, authorizes a specific number of Arctic peregrine falcons to be trapped in any given year. The proposed new provision would stipulate that the method of distribution of permits be by a fair and im-

partial method, since the demand for permits is greater than the supply. The proposed new provision is necessary to provide for an equitable distribution of trapping opportunity.

Proposed new §65.272, concerning Transfer, Sale, and Donation, would set forth the conditions under which falconry raptors may be sold, exchanged, purchased, and transferred. The proposed provisions are required by the federal falconry regulations and restate the requirements contained at 50 CFR §21.29(f)(4) - (6).

Proposed new §65.273, concerning Release to the Wild, would establish the procedures and requirements for returning wild-caught raptors used for falconry purposes to the wild. The proposed provisions are required by the federal falconry regulations and restate the requirements contained at 50 CFR §21.29(e)(9).

Proposed new §65.274, concerning Miscellaneous Provisions, would address various situations and circumstances that cannot be categorically assigned to other sections of the subchapter, including the hacking and imping of raptors, the possession of feathers, the rehabilitation of injured raptors, and the disposition of raptors that have died in captivity. The proposed provisions are required by federal law and restate the requirements contained at 50 CFR §21.29(f).

Proposed new §65.275, concerning Exceptions, provides that the department's rules concerning control of depredating wildlife (31 TAC Chapter 65, Subchapter I) do not apply to the possession or use of raptors under a federal abatement permit. The use of raptors under a federal abatement permit is controlled by federal regulations and the department has determined that since those rules provide essentially the same oversight there is no reason to require falconers to comply with two sets of regulations.

Proposed new §65.276, concerning Open Seasons and Bag Limits; Hunting, would set forth the time periods during which it is lawful to hunt wildlife resources by means of falconry, prescribe the quantities of wildlife resources that may be taken and possessed, and provide for special circumstances. The take of wildlife resources by means of falconry is biologically insignificant; therefore, the department has determined that a year-round season is justified and that the bag and possession limits established for the take of game animals and game birds in 31 TAC Chapter 65, Subchapter A (the Statewide Hunting and Fishing Proclamation) and 31 TAC Chapter 65, Subchapter O (regulations governing the take of nongame wildlife) are appropriate. The seasons and bag limits for the take of migratory game birds by means of falconry is governed by the federal falconry regulations and are listed annually in the department's regulations at 31 TAC Chapter 65, Subchapter N (the Migratory Game Bird Proclamation).

Proposed new §65.276(b) would address instances in which a falconry raptor kills prey outside of an open season or in excess of a bag limit. The department recognizes that the nature of falconry, because a trained raptor is not under the absolute control of the falconer, necessarily introduces the possibility of accidental take of non-target wildlife. Therefore, the proposed new provision would prohibit the possession of wildlife taken under such conditions, but would allow a falconer to permit a raptor to feed on a carcass under such circumstances. The proposed new provision is necessary to address hunting circumstances that are not controllable by a falconer.

Proposed new §65.276(c) requires falconers to report the take of species listed as threatened or endangered by the federal government. The proposed provision is required by the federal falconry regulations and recapitulates the requirements contained at 50 CFR §21.29(f)(19)(ii).

Proposed new §65.277, concerning Violations and Penalties, would prescribe the penalties for a violation of Parks and Wildlife Code, Chapter 49, the subchapter, or a condition of a permit issued under the subchapter. The proposed new section restates the penalties established by Parks and Wildlife Code, Chapter 49.

Mr. John Davis, acting Director of the Wildlife Diversity Program, has determined that for each of the first five years the rules as proposed are in effect, there will be no fiscal implications to state or local government as a result of enforcing or administering the rules.

Mr. Davis also has determined that for each of the first five years the rules as proposed are in effect, the public benefit anticipated as a result of enforcing or administering the rules as proposed will be the regulation of falconry activities in Texas consistent with federal law and the provision of opportunity for citizens to trap, possess, and hunt with raptors.

Under the provisions of Government Code, Chapter 2006, a state agency must prepare an economic impact statement and a regulatory flexibility analysis for a rule that may have an adverse economic effect on small businesses and micro-businesses. The department has determined that there will be no direct economic effect on small or micro-businesses or persons required to comply as a result of the proposed rules, since the rules do not constitute state regulation of small or microbusinesses. Although the rules do contain provisions for the regulation of commercial activities conducted under the terms of federal abatement permits, those provisions are restatements of federal rules and cannot be altered by the department other than to prohibit the use of raptors for abatement purposes. The proposed rules continue to allow the use of raptors for abatement purposes. Therefore, any effect on small or microbusinesses would be the result of the federal rules, rather than the proposed rules and any such impact would be positive. The rule would not compel or mandate any action on the part of any small businesses or microbusinesses. In particular, the proposed rules would not add new reporting or recordkeeping requirements; require any new professional expertise, capital costs, or costs for modification of existing processes or procedures; lead to loss of sales or profits; change market competition; or increase taxes or fees. Accordingly, the department has not prepared a regulatory flexibility analysis under Government Code, Chapter 2006.

The department has not drafted a local employment impact statement under the Administrative Procedure Act, §2001.022, as the agency has determined that the rules as proposed will not impact local economies.

The department has determined that Government Code, §2001.0225 (Regulatory Analysis of Major Environmental Rules), does not apply to the proposed rules.

The department has determined that there will not be a taking of private real property, as defined by Government Code, Chapter 2007, as a result of the proposed rules.

Comments on the proposed rule may be submitted to Mr. Robert Macdonald, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744; (512) 389-4775, e-mail: robert.macdonald@tpwd.state.tx.us.

31 TAC §§65.261 - 65.267, 65.269 - 65.277

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

The repeals are proposed under Parks and Wildlife Code, Chapter 49, which authorizes the commission to prescribe rules for the taking, capture, possession, propagation, transportation, export, import, and sale of raptors, time and area from which raptors may be taken or captured, and species that may be taken or captured; provide standards for possessing and housing raptors held under a permit; prescribe annual reporting requirements and procedures; prescribe eligibility requirements and fees for and issue any falconry, raptor propagation, or nonresident trapping permit; and require and regulate the identification of raptors held by permit holders; §61.054, which requires the commission to specify the means or method that may be used to hunt, take, or possess game animals, game birds, or aquatic animal life; and Chapter 67, which authorizes the commission to establish any limits on the taking, possession, propagation, transportation, importation, exportation, sale, or offering for sale of nongame fish or wildlife that the department considers necessary to manage the species.

The proposed repeals affect Parks and Wildlife Code, Chapters 49, 61, and 67.

§65.261. Applicability.

§65.262. Definitions.

§65.263. General Provisions.

§65.264. Applications and Permits.

§65.265. Permit Classes: Qualifications and Restrictions.

§65.266. General Facility Standards.

§65.267. Reports.

§65.269. Trapping Seasons and Collecting Area.

§65.270. Marking.

§65.271. Transfers and Sale.

§65.272. Change of Address.

§65.273. Temporary Relocation Out of State.

§65.274. Permanent Relocation to Texas.

§65.275. Special Provisions.

§65.276. Open Seasons and Bag Limits.

§65.277. Violations and Penalties.

This 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 December 14, 2009.

TRD-200905816
Ann Bright
General Counsel
Texas Parks and Wildlife Department
Earliest possible date of adoption: January 24, 2010
For further information, please call: (512) 389-4775

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31 TAC §§65.261 - 65.277

The new sections are proposed under Parks and Wildlife Code, Chapter 49, which authorizes the commission to prescribe rules for the taking, capture, possession, propagation, transportation, export, import, and sale of raptors, time and area from which raptors may be taken or captured, and species that may be taken or captured; provide standards for possessing and housing raptors held under a permit; prescribe annual reporting requirements and procedures; prescribe eligibility requirements and fees for and issue any falconry, raptor propagation, or nonresident trapping permit; and require and regulate the identification of raptors held by permit holders; §61.054, which requires the commission to specify the means or method that may be used to hunt, take, or possess game animals, game birds, or aquatic animal life; and Chapter 67, which authorizes the commission to establish any limits on the taking, possession, propagation, transportation, importation, exportation, sale, or offering for sale of nongame fish or wildlife that the department considers necessary to manage the species.

The new sections affect Parks and Wildlife Code, Chapters 49, 61, and 67.

§65.261. Applicability.

(a) This subchapter applies to all species of raptors indigenous to the state of Texas.

(b) To the extent that a provision of this subchapter conflicts with any provision of 50 CFR Part 21 governing the possession and use of raptors, the federal regulation shall prevail.

§65.262. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise. All other words and terms shall have the meanings assigned by Parks and Wildlife Code.

(1) Abatement permit--A special purpose permit issued by the FWS that allows the use of raptors to control nuisance wildlife.

(2) Captive bred--Raptors, including eggs hatched in captivity, from parents that mated or otherwise reproduced in captivity.

(3) Educational display--Activities conducted for the purposes of encouraging understanding of falconry, the management and conservation of raptors, or furthering awareness and understanding among the general public of the biology and ecological roles of protected wildlife.

(4) Eyass--A young raptor that is still in the nest.

(5) Falconer--A person legally allowed to take and fly raptors under a permit issued under the authority of Parks and Wildlife Code, Chapter 49, the laws of another state, or by the federal government.

(A) An apprentice falconer is a person who holds an apprentice falconry permit.

(B) A general falconer is a person who holds a general falconry permit.

(C) A master falconer is a person who holds a master falconry permit.

(6) FWS--The United States Fish and Wildlife Service.

(7) Hack--Temporary release of a raptor to the wild. Hacking is a method used by falconers to condition raptors for falconry.

(8) Holding--Retaining in captivity, but does not include the temporary possession of a raptor that is accidentally trapped and must be released.

(9) Imping--Using a feather to replace a broken feather of a raptor.

(10) Imprint--A raptor that is hand-raised in isolation from the sight of other raptors from two weeks of age until it is fully feathered.

(11) Passage bird--A raptor less than one year of age that has left the nest.

(12) Physician's statement--A written statement from a physician attesting that a long-term or permanent medical condition prevents a person from participating in trapping activities.

(13) Raptor--A migratory bird of the Order Falconiformes or the Order Strigiformes.

(14) Release to the wild--Permanent release of a raptor to an area where it is capable of leaving at will.

(15) Sponsor--A general or master falconer who agrees to supervise the training of an apprentice falconer.

(16) Take--To trap or capture, or attempt to trap or capture, a wild raptor.

(17) Transfer--The change of possession of a raptor from one permitted person to another permitted person by mutual agreement and without the exchange or offer to exchange money or anything of value as a condition of the change in possession.

(18) Type 1 band--A FWS plastic leg band, issued by the department, which must be attached to gyrfalcons, peregrine falcons, goshawks, and Harris' hawks.

(19) Type 2 band--A FWS metal leg band, issued by the department, which must be attached to captive-bred raptors. This includes FWS replacement bands made of plastic.

(20) Weathering area--Outdoor facilities providing a raptor protection from the environment.

(21) Wild raptor--A raptor whose conception was not the result of the breeding of raptors in captivity.

§65.263. General Provisions.

(a) No person shall take or possess a raptor in this state unless that person possesses valid state and federal permits (if required) to do so, including a Texas resident or nonresident hunting license, as applicable.

(b) A person who is not a resident of this state may not hold any permit issued under this subchapter other than a nonresident trapping permit.

(c) A person permitted to possess a live raptor under this subchapter shall:

(1) provide all permits, licenses, and documentation required to be maintained by this subchapter and the Parks and Wildlife Code upon the request of a department employee acting within the scope of official duties; and

(2) have in immediate possession all required permits, licenses, and documentation when in possession of a raptor away from the permitted facility where the raptor is kept.

(d) A raptor possessed under a falconry permit may be used for educational display purposes. For the purposes of this section, "direct supervision" means the personal presence of a master or general falconer at all times that an apprentice falconer is engaged in the educational display of a raptor.

(1) A raptor in any given 12-month period shall not be used more frequently or for a greater amount of time for educational display purposes than for falconry purposes.

(2) Educational display of a raptor shall be performed only by a general or master falconer, or an apprentice falconer under the direct supervision of a general or master falconer.

(3) A permittee may impose a fee or charge to present an educational display, but may not charge more than is necessary to recoup the direct expenses incurred in making the presentation.

(4) Educational display presentations shall include accurate information about falconry, wildlife conservation, and the biology, ecological roles, and conservation needs of raptors and other migratory birds.

(5) The photographing, filming, or videotaping of raptors held under a falconry permit is lawful for educational display purposes; however, a permittee:

(A) may not receive cash or anything of value in exchange for allowing a raptor to be photographed, filmed, or videotaped; and

(B) may not use or allow the use of a raptor held under a falconry permit for purpose of entertainment media or advertisements; promotion or endorsement of any products, merchandise, goods, services, meetings, or fairs; or as a representation of any business, company, corporation, or other organization.

(e) A permitted falconer at any time may capture a captive-bred raptor or any raptor wearing falconry equipment. If the raptor belongs to another falconer, it must be returned.

(f) In the event that an apprentice falconer's permittee-sponsor relationship is terminated, the apprentice falconer shall secure a new sponsor within 30 days of the date that the sponsor notifies the department of sponsorship termination.

(g) Raptors possessed under a valid permit may be transported to other states, subject to applicable federal, state, and local laws.

§65.264. Permit Application Requirements.

(a) All permit applications shall be made using forms supplied by the department. An application shall contain a signed and dated statement showing that the applicant agrees that the permittee's falconry facilities, equipment, and raptors may be inspected without advance notice by the department. If the applicant is not the owner of the property where raptors are housed under this subchapter, the application shall contain a signed and dated statement showing that the owner of the property agrees that the falconry facilities, equipment, and raptors may be inspected without advance notice by the department.

(b) Permits may be issued for any period of time not exceeding five years from date of issuance and shall expire on June 30.

(c) Educational or school programs may not be used to satisfy the experience requirements of paragraphs (1) - (4) of this subsection.

(1) An applicant for an apprentice falconry permit must be at least 12 years of age.

(A) If the applicant is under the age of 18, a parent or legal guardian must sign the application. By signing an application, a parent or legal guardian agrees to be legally responsible for the actions of the applicant with respect to the requirements of this subchapter. Nothing in this subparagraph shall be construed to relieve any person under the age of 18 of any legal responsibility for failure to abide by the provisions of this subchapter.

(B) An application for an apprentice permit must be accompanied by:

(i) a letter from a general falconer with at least two years' experience at that level, or a master falconer, stating that the person agrees to be the applicant's sponsor; and

(ii) an original, signed certification that the applicant is familiar with the federal falconry regulations in Title 50 of the Code of Federal Regulations and is aware that submission of false information is an offense under 18 U.S.C. 1001.

(C) The department will not issue a permit at the apprentice level until the applicant's facilities have passed an inspection conducted by a department representative or designee. All inspections shall be in the presence of the permittee or the property owner (if the facility is located on property that is not owned by the permittee).

(2) An applicant for a general falconry permit must be at least 16 years of age.

(A) If the applicant is under the age of 18, a parent or legal guardian must sign the application. By signing an application, a parent or legal guardian agrees to be legally responsible for the actions of the applicant with respect to the requirements of this subchapter.

(B) An application for a general permit must be accompanied by a signed attestation from the applicant's sponsor, who must be a general or master falconer, that the applicant has maintained (to include capture from the wild), trained, flown (which may include releasing to the wild) and hunted with raptors in the applicant's possession for at least four months in each of at least two years during which the person has been permitted to practice falconry.

(3) An applicant for a master falconry permit must have been permitted to practice falconry at the general level for a minimum of five years.

(4) An applicant for a raptor propagator permit must:

(A) be a resident of Texas;

(B) be 18 years of age or older;

(C) have at least five years of experience in the practice of falconry; and

(D) possess a valid general or master permit.

(5) An applicant for a nonresident trapping permit must possess a license, issued by their state of residence, equivalent to a Texas falconry permit.

(d) The department will not issue an apprentice permit if the applicant has not taken a department-administered examination and scored at least 80.

(e) The requirements of subsections (b) - (d) of this section do not apply to applications for a nonresident trapping permit.

(f) A person who has allowed a falconry permit to expire is entitled to permit issuance at the level the person held at the time of permit expiration, provided not more than five years has elapsed from the date of expiration. If more than five years has elapsed since expiration, the person must take a department-administered falconry examination and record a score of at least 80.

(g) The department will not issue a permit under this subchapter to a person who has relocated to Texas while holding the valid equivalent of a permit issued under this subchapter issued by another state, territory, or tribe until the applicant's facilities have passed an inspection conducted by a department representative or designee. All inspections shall be in the presence of the permittee or the property owner (if the facility is located on property that is not owned by the permittee).

(h) The department may refuse permit issuance or renewal to any person who within five years of applying for a permit issued under the authority of this subchapter has been finally convicted of or received deferred adjudication for:

(1) a violation of Parks and Wildlife Code, Chapter 43, Subchapters C, E, L, or R or Chapter 49;

(2) a violation of Parks and Wildlife Code that is a Class B misdemeanor, a Class A misdemeanor, or felony; or

(3) a violation of Parks and Wildlife Code, §63.002.

§65.265. Period of Validity.

Permits will be issued with a period of validity not to exceed five years from date of issuance and shall expire on June 30 of the 5th year after issuance.

§65.266. Review of Agency Decision to Deny or Revoke Permit.

An applicant or permittee for a permit under this subchapter may request a review of a decision of the department to deny issuance or delay processing of a permit.

(1) An applicant or permittee seeking review of a decision of the department with respect to denial of permit issuance under this subchapter shall first contact the department within ten business days of being notified by the department of permit denial.

(2) The department shall conduct the review and notify the applicant or permittee of the results within ten business days of receiving a request for review.

(3) The request for review shall be presented to a review panel. The review panel shall consist of the following:

(A) the deputy executive director for natural resources, or his or her designee;

(B) the director of the Wildlife Division; and

(C) the director of the Wildlife Diversity program within the Wildlife Division.

(4) The decision of the review panel is final.

(5) The department shall report on an annual basis to the Falconry and Raptor Council the number and disposition of all reviews under this section.

§65.267. Permit Privileges and Restrictions.

(a) Apprentice falconers.

(1) An apprentice falconer may possess any member of the Order Strigiformes or Falconiformes except as provided in paragraph (3) of this subsection.

(2) An apprentice falconer may obtain a raptor by trapping, by purchase, or by transfer from another permittee.

(3) An apprentice falconer may not:

(A) possess more than one raptor at any given time;

(B) hack a raptor possessed under a permit;

(C) possess any of the following:

(i) American swallow-tailed kite (Elanoides forficatus);

(ii) bald eagle (Haliaeetus leucocephalus);

(iii) white-tailed eagle (Haliaeetus albicilla);

(iv) Steller's sea-eagle (Haliaeetus pelagicus);

(v) northern harrier (Circus cyaneus);

(vi) Swainson's hawk (Buteo swainsoni);

(vii) ferruginous hawk (Buteo regalis);

(viii) golden eagle (Aquila chrysaetos);

(ix) peregrine falcon (Falco peregrinus);

(x) prairie falcon (Falco mexicanus);

(xi) flammulated owl (Otus flammeolus);

(xii) burrowing owl (Athene cunicularia); or

(xiii) short-eared owl (Asio flammeus); or

(D) take or possess:

(i) an eyass;

(ii) an imprinted raptor;

(iii) a hybrid that has not been sterilized; or

(iv) a raptor taken from the wild as a nestling.

(4) An apprentice falconer must secure a new sponsor within 30 calendar days in the event of sponsorship termination.

(5) An apprentice falconer may conduct abatement activities under the supervision of a master falconer who holds an abatement permitonly as a subpermittee of a master falconer who holds an abatement permit.

(b) General falconers.

(1) A general falconer may possess any member of the Order Strigiformes or Falconiformes except as provided in paragraph (2) of this subsection.

(2) A general falconer may not:

(A) possess more than three raptors at any given time; or

(B) possess any of the following: golden eagle, a bald eagle, a white-tailed eagle, or a Steller's sea-eagle.

(3) A general class falconer may possess hybrid and captive-bred raptors.

(4) A general falconer may take no more than one raptor that is listed as a federal threatened species from the wild each year, provided that take is specifically authorized by both the department and the federal government.

(5) A general falconer may conduct abatement activities under the supervision of a master falconer who holds an abatement permit.

(c) Master falconers.

(1) A master class permittee may possess any member of the Order Strigiformes or Falconiformes except as provided in paragraph (3) of this subsection.

(2) A master class permittee may not possess more than five wild-caught raptors at any time. Captive-bred raptors may be possessed in any number; however, all captive-bred raptors must be trained and used for hunting.

(3) A master falconer may possess up to three golden eagles, white-tailed eagles, or Steller's sea eagles, in the aggregate. To possess a raptor under this subsection, a master falconer shall submit to the department a written request to possess individuals of the listed species. The written request required by this subsection must contain description of the applicant's experience in handling large raptors, including information about the species handled and the type and duration of the activity in which the applicant has engaged. The written request required by this subsection must be accompanied by at least two letters of reference from people with experience handling and/or flying large raptors such as eagles, ferruginous hawks (Buteo regalis), goshawks (Accipiter gentilis), or great horned owls (Bubo virginianus). Each letter of reference must contain a concise history of the author's experience with large raptors, and must attest to the applicant's ability to care for eagles and fly them in falconry.

(4) A master falconer may take up to two golden eagles within a calendar year from a livestock depredation area declared by the United States Department of Agriculture or the governor.

(5) A master falconer may take no more than one raptor that is listed as a federal threatened species from the wild each year, provided that take is specifically authorized by both the department and the federal government.

(6) A master falconer may conduct abatement activities with a bird or birds possessed under the person's falconry permit, provided the permittee has obtained a federal permit for that purpose. No person other than the master falconer to whom an abatement permit has been issued may use a raptor possessed under a falconry permit to conduct abatement activities. A master falconer may receive payment, and may pay a general or apprentice falconer for providing abatement services under a federal permit for that purpose.

(d) Raptor propagator permittees.

(1) A person who holds a raptor propagator permit may use raptors possessed by the person under a falconry permit for captive breeding, however, if the raptor is used as a captive breeding bird for more than eight months in any 12-month period, the raptor must be:

(A) permanently transferred as a propagation bird; and

(B) be permanently banded with a Type 2 band.

(2) A raptor propagator may not possess or breed species of raptors listed by the federal government as endangered unless the propagator can document proof of seven years' experience caring for and handling raptors.

(e) Nonresident trapping permittees.

(1) The department will not issue a nonresident trapping permit to any person who is a resident of a state that does not allow Texas residents to trap raptors in that state.

(2) A nonresident trapper shall not trap more than one raptor per year in this state.

(f) Federal abatement permittees.

(1) The possession limits established in this section for each class of permittee do not apply to raptors possessed under a federal abatement permit.

(2) The requirements of §65.268(2) of this title (relating to Equipment and Facility Standards; Related Provisions) apply to raptors possessed under a federal abatement permit.

(3) Only a raptor held under an abatement permit may be used for abatement purposes, unless the raptor is possessed as a falconry bird by the abatement permit holder.

(4) Raptors may not be used for abatement purposes unless they are possessed by the permit holder.

§65.268. Equipment and Facility Standards; Related Provisions.

All facilities and equipment are subject to inspection by the department; however, no inspection shall be conducted unless the permittee is personally present.

(1) Equipment. A permittee shall possess:

(A) jesses or the materials and equipment to make them;

(B) leash and swivel;

(C) bath container; and

(D) appropriate scales or balances for weighing a raptor.

(2) Facilities.

(A) General.

(i) Permit holders shall provide facilities that are appropriately sized, constructed, and maintained so as to provide a safe environment for raptors held under a permit issued under the authority of this subchapter. All facilities shall provide each raptor with protection from sun, wind, inclement weather, predators, and undue disturbance.

(ii) Clean water shall be available at all times except when medical circumstances require the temporary denial of water.

(iii) Veterinary care shall be available to all raptors.

(B) Permittees shall maintain facilities that meet the following standards.

(i) Indoor facility standards.

(I) If more than one raptor is being kept in a facility, the raptors shall be tethered or separated by partitions, except for raptors that are compatible with each other.

(II) Each raptor shall be kept in an area large enough to allow the raptor to fully extend its wings.

(III) A perch designed or intended for use by raptors shall be provided for each raptor kept in the facility.

(IV) There shall be at least one window, protected on the inside by vertical bars spaced narrower than the width of the raptor's body if the bird is not to be tethered, and a secure door.

(V) The floor of the facility shall be kept clean.

(ii) Outdoor facility (weathering area) standards.

(I) Weathering areas shall be fenced and covered with netting or roofed to protect the raptors from disturbance or attack.

(II) A weathering area must be provided with a minimum of 32 square feet and each raptor must have an area large enough to fly, if it is untethered, or, if tethered, to fully extend its wings or bate (attempt to fly while tethered) without damaging its feathers or contacting other raptors.

(III) The floor of the facility shall be well drained.

(iii) Raptors may be housed in a personal residence without modifications to windows or other openings in the residence; provided:

(I) a suitable perch is provided for each raptor; and

(II) each raptor is tethered when not being moved into or out of the location in which they are kept.

(C) Only one facility is required if it meets the requirements for both indoor and outdoor facilities.

(3) Alternative or Temporary Facilities. The provisions of this paragraph are intended to allow for the temporary relocation of falconry raptors due to special circumstances or conditions that prevent the provision of adequate housing and/or care by the falconer to whom the raptors are registered. Nothing in this paragraph shall be construed as to allow the de facto permanent possession of any raptor and the department shall determine on a case-by-case basis if the provisions of this paragraph are being used for that purpose.

(A) A permittee may house a raptor in a temporary facility for no more than 120 consecutive calendar days, provided the raptor is provided with a perch and is protected from predators, domestic animals, extreme temperatures, wind, and injurious disturbance.

(B) A person with a valid falconry permit may care for a raptor or raptors held under another person's falconry permit for up to 120 consecutive calendar days, provided the person possesses:

(i) a signed and dated statement authorizing the temporary possession. The statement must specify the time period for which the person will keep each raptor and the activities the person is allowed to engage in with each raptor (to include flying and hunting, provided the permittee in temporary possession is authorized to do so under the terms of their falconry permit);

(ii) a copy of a valid FWS form 3-186A for each bird in temporary possession. A raptor held under the provisions of this subparagraph does not count against the possession limits established under the provisions of §65.267 of this title (relating Permit Privileges and Restrictions) for the person holding the raptor;

(iii) the department may authorize temporary possession in excess of 120 days when warranted by extenuating circumstances such as illness, military service, natural disasters, or a family emergency. A person seeking an extension under this subparagraph shall submit a written request to the department, accompanied by a signed affidavit stating the nature of the extenuating circumstance; and

(iv) upon the 30th day, consecutively or in the aggregate, that a raptor is placed in temporary possession under the provisions of this paragraph, the falconer who placed the raptor in temporary possession shall notify the department. Such notification shall be made within ten days from the date that the 30-day period has elapsed.

(C) A person who is not a permitted falconer may provide care for a permittee's raptor or raptors for no more than 45 consecutive days, provided:

(i) the raptor or raptors remain at the permittee's facility;

(ii) the raptor or raptors are not flown for any reason; and

(iii) the department may authorize temporary possession in excess of 45 days when warranted by extenuating circumstances such as illness, military service, natural disasters, or a family emergency. A person seeking an extension under this subparagraph

shall submit a written request to the department, accompanied by a signed affidavit stating the nature of the extenuating circumstance.

(4) Transportation and Possession Away from a Permitted Facility. At all times that a raptor possessed under this subchapter is not in a permitted facility, the permittee responsible for the raptor shall provide:

(A) a perch designed or intended for use by raptors; and

(B) protection from extreme temperatures, wind, and injurious disturbance.

§65.269. Marking, Banding, and Telemetry.

(a) Markers and bands.

(1) No person may possess an unmarked goshawk, Harris's hawk, peregrine falcon, or gyrfalcon under a permit issued pursuant to this subchapter unless the person has notified the department within ten days of acquisition. Upon notification, the department shall issue a Type 1 leg band, which must be attached to the raptor immediately upon receipt.

(2) A person who takes a goshawk, Harris's hawk, peregrine falcon, or gyrfalcon from the wild or acquires one from a rehabilitator must band the raptor with a Type 1 leg band. Within ten days from the date of take, the person shall report the take of the bird by entering the required information (including the band number) in the electronic database at http://permits.fws.gov/186A. Upon request, the department will supply a band in advance of capture.

(3) A person who possesses a raptor bred in captivity must band the bird with a Type 2 leg band. If the band required by this subsection is removed or lost, it must be reported within ten days of removal or loss by contacting the department. The department shall issue a replacement band upon notification. The person shall band the bird with the replacement band immediately upon receipt of the band and immediately upon rebanding shall submit all required information electronically at http://permits.fws.gov/186A.

(4) If a band is removed or lost from a raptor that is not captive-bred, the person in whose name the raptor is possessed must report the removal or loss within five days and request a replacement band from the department. The person shall band the bird with the replacement band immediately upon receipt and shall submit the required information electronically immediately upon rebanding at http://permits.fws.gov/186A.

(5) The department may exempt a permittee from the banding requirements of this section for a raptor upon submission of documentation proving that banding has caused health or injury problems for the raptor. In such cases, the department will provide the exemption in writing, and the permittee must:

(A) maintain the exemption notice at the permitted facility where the raptor is kept; and

(B) possess the exemption notice on their person when in possession of the raptor away from the permitted facility where the raptor is kept.

(6) A wild-caught raptor may not be banded with a Type 2 band.

(7) It is unlawful for any person to alter, counterfeit, or deface a marker, except that a permit holder may remove the rear tab on markers and smooth an imperfect surface, provided the integrity of the marker and numbering are not affected.

(b) Telemetry. No person authorized to fly a hybrid raptor may free-fly the raptor unless at least two radio transmitters are attached to the raptor.

§65.270. Notification, Reporting, and Recordkeeping Requirements.

(a) A general or master falconer acting as a sponsor for an apprentice falconer shall notify the department in writing within ten days of terminating a sponsor-apprentice relationship.

(b) A permittee shall maintain a copy of all notifications required under this section for a period of five years. Notification under this subsection shall be made via the electronic database at http://permits.fws.gov/186A. Except as specifically provided by paragraph (6) of this subsection, notification shall be within ten days of any event condition listed in this subsection. A permittee is required to provide notification:

(1) upon acquisition of a raptor;

(2) upon take of a raptor from the wild;

(3) when a raptor is transferred by the permittee to another permittee;

(4) when a raptor is rebanded;

(5) when a raptor in the permittee's possession is stolen (a permittee must report a suspected stolen raptor to the appropriate local police jurisdiction);

(6) at any time that a raptor in the possession of the permittee:

(A) has been lost in the wild; and

(B) 30 consecutive days have elapsed and the raptor has not been recovered by the permittee; and

(7) when a raptor in the possession of a permittee dies.

(c) A falconer who captures a bird that belongs to another falconer must report the capture to the department within five days of capture. The department will determine the disposition of the raptor in the event that the owner of the raptor cannot be determined or located.

(d) A person who holds a permit issued under this subchapter shall:

(1) upon a change of address within Texas, notify the department within 30 days of the change of address; and

(2) within 30 days of relocation outside of Texas, notify both the department and the entity where the permittee has relocated that is legally responsible for the regulation of the possession of raptors for falconry purposes.

(e) A person who holds a permit issued under this subchapter shall notify the department within five business days of moving a facility regulated under this subchapter.

(f) A person who relocates to Texas and holds the valid equivalent of a permit issued under this subchapter issued by another state, territory, or tribe may retain raptors the person lawfully possesses; however, the person shall submit an application for the appropriate Texas permit within 30 days of relocation to this state. The department will not issue a permit until the applicant's facilities have passed an inspection conducted by a department representative or designee. All inspections shall be in the presence of the permittee or the property owner (if the facility is located on property that is not owned by the permittee).

§65.271. Trapping.

(a) No person may take more than two raptors from the wild between July 1 of one year and June 30 of the immediately following year.

(b) No person may remove an egg from a raptor nest in the wild.

(c) Only a general or master falconer may take an eyass. No person shall take more than two eyasses within a calendar year. No person may remove an eyass from a nest if it is the only eyass in the nest.

(d) If a young raptor that is incapable of independent flight is displace from the nest or nest area as a result of trapping activities, the falconer responsible for the displacement shall place the raptor back in the nest or in an area near the nest where the raptor is not vulnerable to terrestrial predators.

(e) A permittee may obtain a raptor from the wild with the assistance of another person.

(1) If the permittee captures a raptor from the wild or is present when a raptor is captured from the wild on behalf of the permittee, the permittee shall file the report required by §65.270 of this title (relating to Notification, Reporting, and Recordkeeping Requirements).

(2) If the permittee is not present when a raptor is captured from the wild on behalf of the permittee:

(A) the person who captures the raptor from the wild must:

(i) be a general or master falconer; and

(ii) must file the report required by §65.270 of this title and then transfer the bird to the permittee as provided by §65.272 of this title (relating to Transfer, Sale, and Donation); and

(B) the provisions of subsection (a) of this section apply to the person who trapped the raptor, but not to the person on whose behalf the raptor was trapped.

(3) A general or master falconer may capture a raptor from the wild on behalf of a permittee, provided the person who captures the raptor possesses a physician's statement. The person on whose behalf the bird was trapped is required to file the report required by §65.270 of this title and the requirements of subsection (a) of this section apply to that person.

(f) Trapped birds that are not intended to be or cannot be kept for falconry purposes shall be released to the wild immediately upon discovery, unless the bird is injured in the process of trapping. A raptor injured as a result of trapping activity must be:

(1) transported to a permitted wildlife rehabilitator, veterinarian, or government wildlife agency employee, in which case the person who trapped the bird is liable for all costs that may be imposed for caring for and/or rehabilitating and releasing the raptor; or

(2) reported as a wild-caught raptor and made part of the permittee's legal possession limit under the permittee's falconry permit.

(g) Nonresidents in possession of a valid Nonresident Trapping Permit may take raptors from the wild according to the terms of the permit.

(h) An apprentice falconer may not trap:

(1) an eyass; or

(2) a raptor older than one year of age.

(i) Raptors may be taken year round. A marked raptor may be retrapped at any time.

(j) In Aransas, Brewster, Brooks, Calhoun, Cameron, Culberson, Duval, Ector, El Paso, Hidalgo, Hudspeth, Jackson, Jeff Davis, Kenedy, Kinney, Kleberg, Matagorda, Maverick, Midland, Nueces, Pecos, Presidio, Reeves, Refugio, San Patricio, Starr, Terrell, Val Verde, Victoria, Webb, Willacy, or Zapata counties:

(1) an apprentice falconer must be accompanied by a master or general falconer during all trapping activities; and

(2) all persons must immediately cease trapping activities, including the retrieval of all traps, upon observing a northern aplomado falcon (Falco femoralis) in the vicinity of the trapping effort.

(k) The department may issue permits authorizing the trapping of Arctic peregrine falcons (Falco peregrinus tundrius). Permits shall be issued by a fair and impartial method to permitted falconers only.

(l) A master falconer may take a golden eagle (adult or nestling) under the provisions of this subchapter in a livestock depredation area declared by the federal government or the governor. No person shall take an adult golden eagle from a depredation area unless the department has determined that the eagle is preying on livestock and the notification requirements of §65.270 of this title have been met.

(m) No eggs may be taken from raptor nests.

(n) No raptor may be taken when over one year old or in adult plumage.

(o) Any raptor other than an endangered species taken under a federal depredation (including a special purpose depredation) permit may be used for falconry by a general or master falconer. Endangered species taken under a depredation permit shall not be released to the wild without prior written department approval of the release site.

§65.272. Transfer, Sale, and Donation.

(a) No person shall purchase, sell, trade for anything of value, barter or offer to purchase, sell, trade for anything of value, or barter a wild raptor.

(b) Except as provided for in §65.271(e)(3) of this title (relating to Trapping), a raptor trapped from the wild shall count against the annual trapping limit of the person who trapped the bird, even if the raptor is transferred to another permittee.

(c) No person may transfer more than one wild-caught raptor to an out-of-state resident in any 12-month period.

(d) A falconer may buy raptors from any legal source and may buy, sell, purchase, barter, and offer to buy sell, purchase, or barter captive-bred raptors to another falconer in this state and to persons outside the state who are authorized under federal and state law to purchase raptors. A captive-bred raptor that is bought, sold, or bartered must be banded with a Type 2 band.

(e) A falconer may transfer a raptor to another falconer, provided the possession limits established by this chapter are not exceeded.

(f) A falconer may transfer a wild-caught raptor to:

(1) the holder of a raptor propagation permit, provided:

(A) the raptor is a sharp-shinned hawk, Cooper's hawk, merlin, or American kestrel and has been used in falconry for a minimum of one year; or

(B) the raptor is any species of raptor other than the species listed in subparagraph (A) of this paragraph and has been used in falconry for a minimum of two years;

(2) a person other than a raptor propagator who is permitted to possess raptors, provided a licensed veterinarian or permitted wildlife rehabilitator has certified that the raptor is no longer capable of being used for falconry. A permittee who transfers a raptor under the provisions of this paragraph shall furnish the certification and a copy of the permittee's federal form 3-186A to the federal permits office responsible for administering the permit type held by the person to whom the raptor is transferred.

(g) A permitted rehabilitator may transfer a raptor to a general or master falconer for use in falconry, provided the transfer is reported under the provisions of §65.270 of this title (relating to Notification, Reporting, and Recordkeeping Requirements). A raptor acquired from a rehabilitator counts against the possession limits established under the provisions of §65.267 of this title (relating Permit Privileges and Restrictions) for the person holding the raptor.

(h) A surviving spouse, executor, administrator, or other legal representative of a deceased falconry permittee may transfer any bird held by the permittee to another authorized permittee within 90 days of the death of the falconry permittee. After 90 days, disposition of a bird held under the permit is at the discretion of the department.

§65.273. Release to the Wild.

(a) No person may release a raptor to the wild if:

(1) the raptor is a hybrid; or

(2) the raptor is a species or subspecies that is not indigenous to Texas.

(b) No person may permanently release a captive-bred indigenous raptor to the wild unless authorized to do so by the department in writing. If the department authorizes such release, the permittee shall:

(1) hack the bird to the wild at an appropriate time of year and an appropriate location;

(2) remove any falconry band and/or telemetry devices from the bird; and

(3) report release of the bird as provided in §65.270 of this title (relating to Notification, Reporting, and Recordkeeping Requirements).

(c) An indigenous raptor that was acquired by trapping from the wild may be released to the wild only at a time of year and at a location that is consistent with and facilitates the raptor's ability to survive in the wild. All bands and telemetry must be removed and the permittee is required to provide notification as set forth in §65.270 of this title.

§65.274. Miscellaneous Provisions.

(a) Hacking. A hacked raptor counts against the possession limits established by this subchapter.

(b) Imping.

(1) For imping purposes, a falconer may possess the flight feathers of those species of raptors the falconer is authorized to possess and may obtain such feathers from or give such feathers to another falconer, a licensed wildlife rehabilitator, or a licensed raptor propagator; however, no person may buy, sell, or barter raptor feathers. Feathers from any raptor other than a golden eagle may be donated to any person or institution authorized by state or federal law to accept or possess them.

(2) A person who possesses a golden eagle must collect all primary and secondary flight feathers and retrices (tail feathers) that are molted or otherwise shed. Feathers that are not retained for imping purposes must be mailed to the National Eagle Repository, Rocky Mountain Arsenal, Building 128, Commerce City, Colorado 80022.

(3) If a permit issued under this subchapter is revoked by the department or expires without renewal, the person whose permit is revoked or expired must destroy all feathers in possession or donate them to a person or institution authorized to obtain and possess them. Golden eagle feathers may not be destroyed and must be mailed to the National Eagle Repository.

(4) Feathers that are molted and feathers from raptors that die in captivity may be retained and exchanged by permit holders only for imping purposes.

(c) Raptor rehabilitation. A falconer may assist a permitted migratory bird rehabilitator in conditioning raptors for release to the wild and may keep such a raptor in a falconry facility. Such birds do not count against the falconer's possession limit under §65.267 of this title (relating to Permit Privileges and Restrictions); however, the facility standards set forth in §65.268 of this title (relating to Equipment and Facility Standards; Related Provisions) apply to rehabilitation birds temporarily housed in a falconry facility, provided the falconer:

(1) is listed as a subpermitee on the rehabilitator's permit; and

(2) possesses a letter or form, signed by the rehabilitator, certifying that the raptor is being temporarily possessed for rehabilitation purposes. The form shall include the rehabilitator's name, physical address, telephone number, and permit number.

(3) Within 180 days, a raptor possessed by a permittee under the provisions of this subsection shall be:

(A) released to the wild;

(B) transferred to the permittee as a raptor under the permittee's falconry permit; or

(C) returned to the rehabilitator from whom the raptor was obtained, unless the permittee has been specifically authorized in writing by the department to retain the raptor for longer than 180 days.

(4) A raptor that cannot be permanently released to the wild shall be returned to the rehabilitator from whom the raptor was obtained.

(d) Disposition of raptor mortalities. If a raptor possessed under a permit issued under this subchapter dies, the raptor shall be disposed of as provided in this subsection. A raptor may be necropsied to determine the cause of death, but must be buried or destroyed within ten days of necropsy, except as provided by paragraph (2) of this subsection.

(1) The body and/or feathers of a dead raptor may be donated to any person or institution authorized to obtain or possess the raptor or its feathers.

(2) The body and/or feathers of a dead raptor may be preserved, mounted and retained by the permittee, and may be used in educational programs. If the bird was banded, the band must remain on the raptor.

(3) If the body or feathers of a dead raptor are not donated as provided by §65.272 of this title (relating to Transfer, Sale, and Donation) the flight feathers or taxidermic body mount of the raptor may be possessed for as long as a valid falconry permit is maintained by the falconer who possessed the raptor; however, the falconer must maintain the paperwork documenting the acquisition of the bird.

(4) The body of a golden eagle (including all feathers not retained for imping purposes, talons, and other parts) that dies while possessed under a falconry permit shall be sent to the National Eagle Repository.

§65.275. Exceptions.

The provisions of Subchapter I of this chapter (relating to Depredation Permits) do not apply to raptors possessed or used under a federal abatement permit.

§65.276. Open Seasons and Bag Limits; Hunting.

(a) There shall be an open season during which game animals and game birds except for migratory birds may be taken by means of falconry.

(1) Open season: September 1 - August 31.

(2) Daily bag and possession limits:

(A) game animals: as specified for individual counties in Subchapter A of this chapter (relating to Statewide Hunting and Fishing Proclamation);

(B) game birds other than migratory birds: one per day, either sex, per raptor, and the possession limit is two, either sex, per raptor; and

(C) migratory game birds: as provided by Subchapter N of this chapter (relating to Migratory Game Bird Proclamation).

(b) A falconer who flies a raptor that subsequently and without the intent of the falconer kills an animal or bird outside of the open season for the animal or bird, or an animal or bird that cannot be possessed without violating a possession limit, may allow the raptor to feed upon the dead animal or bird, but may not take possession of the animal or bird.

(c) The take of any animal or bird that is listed by the federal government as threatened or endangered must be reported to the U.S. Fish and Wildlife Service Ecological Services Field Office for the location in which the take occurred.

§65.277. Violations and Penalties.

A violation of this subchapter, 50 CFR §29.21, or a provision of a permit issued under this subchapter is an offense punishable by the penalties prescribed by Parks and Wildlife Code, §49.017.

This 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 December 14, 2009.

TRD-200905817
Ann Bright
General Counsel
Texas Parks and Wildlife Department
Earliest possible date of adoption: January 24, 2010
For further information, please call: (512) 389-4775

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CHAPTER 69. RESOURCE PROTECTION SUBCHAPTER D. MEMORANDUM OF UNDERSTANDING

31 TAC §69.71

The Texas Parks and Wildlife Department proposes an amendment to §69.71, concerning Memorandum of Understanding between the Texas Parks and Wildlife Department and the Texas Department of Transportation.

The proposed rule would adopt by reference a proposed Memorandum of Understanding (MOU) between the Texas Parks and Wildlife Department (TPWD) and the Texas Department of Transportation (TxDOT) concerning transportation projects and highway improvement projects ("TxDOT construction projects" or "projects").

Transportation Code, §201.607, requires TxDOT to adopt an MOU with each state agency that has responsibility for the protection of the natural environment, which includes TPWD. Among other things, this MOU must address "the responsibilities of each agency entering into the memorandum relating to the review of the potential environmental . . . effect of a highway project." Transportation Code, §201.607, also requires TxDOT to adopt the memoranda and all revisions by rule and to examine and revise the memoranda every five years. In addition, §201.607 requires each agency that is a party to the MOU to adopt revisions to the MOU by rule.

Under Parks and Wildlife Code, §12.0011, TPWD is the state agency with primary responsibility for protecting the state's fish and wildlife resources. This section also requires TPWD to provide "recommendations that will protect fish and wildlife resources to local, state, and federal agencies that approve, permit, license, or construct developmental projects" and to provide "information on fish and wildlife resources to any local, state, and federal agencies or private organizations that make decisions affecting those resources."

The proposed MOU is intended to implement the statutory obligations of both TxDOT and TPWD regarding review of projects covered by the MOU for impacts to natural resources.

The current MOU between TPWD and TxDOT (43 TAC §2.22) provides for TPWD review of TxDOT projects that have the potential to affect natural resources within the jurisdiction of TPWD. However, the current MOU between TPWD and TxDOT is outdated and in need of revision. In accordance with Transportation Code, §201.607, TPWD and TxDOT have examined the current MOU and have developed a proposed new MOU. The proposed new MOU was published by TxDOT in the October 9, 2009, issue of the *Texas Register* (34 TexReg 7050). A section-by-section summary of the proposed MOU is included in the preamble to the TxDOT proposal as published in the October 9, 2009, issue of the *Texas Register* (34 TexReg 7050). The following is intended to provide additional explanation and background regarding the proposed MOU.

The proposed new MOU continues the required review process with some modifications. In addition to changes necessary to update the agencies' organizational structures and provide additional details, the primary differences between the current MOU and the proposed new MOU concern identification of the projects to be reviewed and compensation for impacts to natural resources.

TPWD and TxDOT recognize that some TxDOT projects are of a size and nature that the individual review of those projects by TPWD may not be time and cost effective, and that those projects may be appropriately mitigated for in the aggregate. Therefore, §2.106 of the proposed MOU lists the types of projects that must be reviewed by TPWD. It is the agencies' intent that this provision will reduce the number of projects that are required to be reviewed by TPWD, thus reducing the time and costs associated with those projects.

With regard to mitigation, under the proposed MOU, TxDOT and TPWD agree that mitigation for impacts to natural resources

should be through avoidance, minimization and compensation, in that order of preference. Therefore, in seeking TPWD review of projects, TxDOT will describe its actions to mitigate impacts on natural resources and TPWD will provide advice and assistance in designing TxDOT construction plans or agreements to mitigate impacts to natural resources. TxDOT will then describe the mitigation proposal in the project's environmental document upon mutual agreement with TPWD. Mitigation will be included if mutually agreed to by TxDOT and TPWD.

The MOU also provides for payments to be made to TPWD by TxDOT to compensate for impacts to unregulated fish and wildlife resources. The term "unregulated resources" is defined in §2.104 of the proposed MOU as state fish and wildlife resources that are not "regulated resources." "Regulated resources" are defined in the proposed MOU as "state fish and wildlife 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, §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 under the Endangered Species Act (16 U.S.C. §1531 et seq.) concerning impacts to federal threatened or endangered species." Examples of unregulated resources include bottomland hardwood forests, isolated wetlands (that are not federally regulated), and prairies.

Under Transportation Code, §222.001(2), money required to be used for public roadways by the Texas Constitution or federal law and that is deposited in the state treasury to the credit of the state highway fund, including money deposited to the credit of the state highway fund under Title 23, United States Code, relating to highways, may be used to mitigate adverse environmental effects that result directly from construction or maintenance of a state highway.

Environmental resources that are not "unregulated" are compensated for through federal processes. As a result, there would be no change in requirements for assessment and mitigation of impacts to federally regulated resources such as wetlands and endangered species habitat.

Under the proposed MOU, on a quarterly basis, TxDOT will provide estimated compensation for future projects. The compensation amount will be based on the volume of project lettings and on agreed upon rates specific to the categories of the projects. The proposed MOU provides for an interim compensation method to be implemented under which payments are based on the dollar amount of contracts entered into by TxDOT. The amount paid will be a percentage of the contract amount, with the percentage factor to be agreed upon between TxDOT and TPWD. At the end of each fiscal year, TxDOT will calculate actual impacts to resources, based on acreage and habitat type, and calculate compensation based on agreed-upon rates. These rates are set forth in Figure 43 TAC §2.109(c)(4)(A) of the proposed MOU and are structured to encourage the avoidance of high value resources, such as riparian areas. After calculating the actual impacts, TxDOT 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. Upon completion of the calculation, if the actual impacts are greater than or less than the payments made by TxDOT, then TPWD will refund and/or TxDOT will make additional payments, as necessary, to ensure that the final amount paid by TxDOT equals the actual impacts.

As noted above, under the proposed MOU, TxDOT will first seek to avoid and minimize impacts to both regulated and unregulated resources. Avoidance and minimization will reduce the amounts paid by TxDOT for mitigation for unregulated resources. Under proposed §2.110 of the MOU, TxDOT and TPWD will work together to implement a final methodology which calculates mitigation payments based on acreage.

The funds paid to TPWD under the proposed rule are intended to achieve significant conservation benefits by aggregating compensatory mitigation into larger regional projects, rather than smaller project-by-project mitigation. TPWD will apply mitigation funds to achieve the greatest benefits on an eco-regional basis. Therefore, although mitigation, such as acquisition or protection of state fish and wildlife resources, will not be handled on a project-by-project basis, the intent is that such mitigation will occur in the same ecoregion as the area impacted by the project.

TxDOT and TPWD intend to assemble an interagency team to review habitat characterizations to be sure they are useful for categorizing project impacts to state fish and wildlife resources. The agencies agree that the MOU will reduce the net regulatory burden and delay for many projects as well as reduce the net loss of wildlife habitat associated with highway project implementation in Texas.

Therefore, the intended benefits of the proposed MOU include the reduction of costs associated with project-by-project environmental review for smaller projects and enhanced protection of the state's fish and wildlife resources.

Mr. Ted Hollingsworth, Director, Land Conservation, has determined that for each of the first five years that the rule as proposed is in effect, there will be fiscal implications to TPWD as a result of enforcement or administration of the rule. Under the terms of the proposed MOU, TxDoT will make payments to TPWD for unregulated impacts to natural resources resulting from certain TxDoT projects. The compensation paid to TPWD will be based on the habitat types affected by each TxDOT project. Based on historical construction project data, it is estimated that the compensation paid by TxDOT will be $3 million to $6 million for each year the MOU is in effect. There will be no fiscal implications for other units of state or local government.

Mr. Hollingsworth also has determined that for each of the first five years the rule as proposed is in effect, the public benefit anticipated as a result of enforcing or administering the rule by TPWD as proposed will be will be the ability of TPWD to provide additional protection of natural resources and habitat.

Under the provisions of Government Code, Chapter 2006, a state agency must prepare an economic impact statement and a regulatory flexibility analysis for a rule that may have an adverse economic effect on small businesses and micro-businesses. TPWD has determined that there will be no direct economic effect on small or micro-businesses or persons required to comply as a result of the proposed rule. The rule would not compel or mandate any action on the part of small businesses or micro-businesses. In particular, the proposed rule would not add new reporting or recordkeeping requirements; require any new professional expertise, capital costs, or costs for modification of existing processes or procedures; lead to loss of sales or profits; change market competition; or increase taxes or fees. Accordingly, TPWD has not prepared a regulatory flexibility analysis under Government Code, Chapter 2006.

TPWD has not drafted a local employment impact statement under the Administrative Procedures Act, §2001.022, as the

agency has determined that the rule as proposed will not impact local economies.

TPWD has determined that Government Code, §2001.0225 (Regulatory Analysis of Major Environmental Rules), does not apply to the proposed rule.

TPWD has determined that there will not be a taking of private real property, as defined by Government Code, Chapter 2007, as a result of the proposed rule.

Comments on the proposed rule may be submitted to Ann Bright, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744; (512) 389-8558 (e-mail: ann.bright@tpwd.state.tx.us).

The rule is proposed under the authority of Transportation Code, §201.607, which requires TPWD to adopt by rule a memorandum of understanding with the Texas Department of Transportation and each state agency that is responsible for the protection of the natural environment or for the preservation of historical or archeological resources.

The proposed rule affects Transportation Code, Chapter 201.

§69.71. Memorandum of Understanding between the Texas Parks and Wildlife Department and the Texas Department of Transportation. The Texas Parks and Wildlife Commission adopts by reference the provisions of 43 TAC §§2.109 - 2.112 [~~§2.22~~] (relating to 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 December 11, 2009.

TRD-200905790
Ann Bright
General Counsel
Texas Parks and Wildlife Department
Earliest possible date of adoption: January 24, 2010
For further information, please call: (512) 389-4775

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PART 10. TEXAS WATER DEVELOPMENT BOARD

CHAPTER 371. DRINKING WATER STATE REVOLVING FUND

SUBCHAPTER B. PROGRAM REQUIREMENTS

31 TAC §371.22

The Texas Water Development Board (Board) proposes amendments to 31 Texas Administrative Code (TAC) Chapter 371, Subchapter B, §371.22(a) and (c) regarding Administrative Cost Recovery.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULE AMENDMENTS.

The American Recovery and Reinvestment Act of 2009 ("ARRA") provides a significant federal effort to jumpstart the economy and create or save millions of jobs by addressing long-neglected infrastructure projects. It is in the State's interest to assist in this effort and ensure that all projects receiving ARRA funding are "under contract or construction" prior to February 17, 2010. Any project not "under contract or construction" will have its ARRA funding revoked and funds reallocated to other states.

On September 17, 2009, the Board approved for adoption proposed amendments to: (a) 31 Texas Administrative Code Chapter 371 regarding the Drinking Water State Revolving Fund (DWSRF); and (b) 31 Texas Administrative Code Chapter 375 regarding the Clean Water State Revolving Fund (CWSRF), to authorize special funding for provisional and partially funded projects impacted by the ARRA program. These adopted amendments allow the Executive Administrator to designate a project as "provisional" or "partially funded" ensuring that all funds administered under the ARRA DWSRF and CWSRF intended use plans ("IUP") will be under contract or supporting construction by the February 17, 2010 deadline. The September 17th Board rule adoption authorized 0.0% loan financing from the base CWSRF and DWSRF programs for those designated "provisional" and "partially funded" projects that failed to qualify for ARRA funding. However, these projects will be required to remit a loan origination fee which has been waived for ARRA-funded projects by prior action of the Board. The proposed rulemaking removes the loan origination fee for: (a) provisional and partially funded projects that benefit disadvantaged communities; and (b) partially funded projects which have been removed from special capitalization grant funding to fund other projects in order to meet special funding requirements in a special capitalization grant, such as the ARRA green reserve of 20% in the ARRA special capitalization CWSRF grant.

SECTION BY SECTION DISCUSSION OF THE PROPOSED AMENDMENTS. Section 371.22(a) assesses charges for the purpose of recovering administrative costs for all projects receiving DWSRF loan assistance that receive binding commitments. However, currently §371.22(a) does not allow administrative costs to be recouped from those projects or portions of projects which receive subsidies in the form of forgiveness of loan principal pursuant to §371.24, relating to the Disadvantaged Community Program through Loan Subsidies. The proposed amendment would add disadvantaged communities which are designated as "provisional" or "partially funded" projects to §371.22(a) as identified under §371.207(c) and (d), as well as provisional projects which have been removed from special capitalization grant funding to fund other projects in order to meet specified funding requirements in a special capitalization grant, such as the ARRA green reserve, identified under §371.207(c) and would disallow loan origination fees for these projects.

Section 371.22(c) imposes a 2.25% loan origination charge on the DWSRF loan amount, excluding the amount of the origination charge. The loan origination charge is a one-time, non-refundable charge that is due at the time of loan closing or may be financed as part of the DWSRF loan. The proposed amendment would specifically waive the 2.25% loan origination charge for DWSRF loans for disadvantaged communities which are designated as "provisional" or "partially funded" projects as identified under §371.207(c) and (d) as well as provisional projects which have been removed from special capitalization grant funding to fund other projects in order to meet special funding requirements in a special capitalization grant such as the ARRA green reserve, identified under §371.207(c).

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENTS.

Ms. Melanie Callahan, Chief Financial Officer, has determined that there will be no fiscal implications for local governments as a result of the proposed rulemaking. Ms. Callahan has determined there will be some fiscal impact to the DWSRF, but the proposed rulemaking should not materially affect the Board's ability to provide financing for DWSRF projects.

PUBLIC BENEFITS AND COSTS.

Ms. Amanda Lavin, Deputy Executive Administrator for Project Finance, also has determined that for each year of the first five years the proposed rulemaking is in effect, the public will benefit from the rulemaking because it enhances the ability of the Board to fully commit the American Recovery and Reinvestment Act of 2009 federal grant monies under the Drinking Water State Revolving Fund and will impose no new requirements on the public or persons required to comply with the rules.

LOCAL EMPLOYMENT IMPACT STATEMENT.

The Board has 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 because it will impose no new requirements on local economies.

The Board has determined that there will be no adverse economic effect on small businesses or micro-businesses as a result of enforcing this rulemaking. The Board has also determined that there is no anticipated economic cost to persons who are required to comply with the rulemaking as proposed. Therefore, no regulatory flexibility analysis is necessary.

REGULATORY IMPACT ANALYSIS.

The Board has determined that the proposed rulemaking is not subject to Government Code §2001.0225 because it is not a major environmental rule under that section.

TAKINGS IMPACT ASSESSMENT.

The Board has determined that the promulgation and enforcement of these proposed rule amendments will constitute neither a statutory nor a constitutional taking of private real property. The proposed rule amendments do not adversely affect a landowner's rights in private real property, in whole or in part, temporarily or permanently, because these proposed rule amendments do not burden or restrict or limit the owner's right to property. Therefore, the proposed amendments do not constitute a taking under Texas Government Code, Chapter 2007.

SUBMITTAL OF COMMENTS.

Comments on the proposed rulemaking will be accepted for 30 days following publication and may be submitted to Legal Services, Texas Water Development Board, P.O. Box 13231, Austin, Texas 78711-3231, *rulescomments@twdb.state.tx.us,* or by fax at (512) 463-5580.

STATUTORY AUTHORITY.

This rulemaking is proposed under the authority of Water Code §6.101, which authorizes the Board to adopt rules necessary to carry out the powers and duties of the Board.

Cross reference to statute: Texas Water Code Chapters 15, 16, and 17.

§371.22. Administrative Cost Recovery.

(a) General. The board will assess charges for the purpose of recovering administrative costs of all projects receiving DWSRF loan assistance, except those projects or portions of projects which receive subsidies in the form of forgiveness of loan principal pursuant to §371.24 of this title (relating to Disadvantaged Community Program through Loan Subsidies); those disadvantaged communities which are designated as provisional or partially funded projects under §371.207(c) and (d) of this title; and those projects which are placed below the funding line as provisional projects in a special capitalization grant intended use plan in order to fund other projects necessary to meet specified funding requirements in a special capitalization grant under §371.207(c) of this title and which receive binding commitments after the effective date of this section.

(b) (No change.)

(c) Loan Origination Charge. A loan origination charge will be assessed of 2.25% of the DWSRF loan amount, excluding the amount of the origination charge,except for those loan amounts for disadvantaged communities which are designated as provisional or partially funded projects under §371.207(c) and (d) of this title; and those projects which are placed below the funding line as provisional projects in a special capitalization grant intended use plan in order to fund other projects necessary to meet specified funding requirements in a special capitalization grant under §371.207(c) of this title. The loan origination charge is a one-time non-refundable charge that is due and payable at the time of loan closing. The loan origination charge may be financed as a part of the DWSRF loan.

(d) - (g) (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 December 8, 2009.

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Kenneth L. Petersen
General Counsel
Texas Water Development Board
Earliest possible date of adoption: January 24, 2010
For further information, please call: (512) 463-8061

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CHAPTER 375. CLEAN WATER STATE REVOLVING FUND
SUBCHAPTER A. GENERAL PROVISIONS
DIVISION 2. PROGRAM REQUIREMENTS

31 TAC §375.18

The Texas Water Development Board (Board) proposes amendments to 31 Texas Administrative Code (TAC) Chapter 375, Subchapter A, §375.18(a) and (c) regarding Administrative Cost Recovery.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULE AMENDMENTS.

The American Recovery and Reinvestment Act of 2009 ("ARRA") provides a significant federal effort to jumpstart the economy and create or save millions of jobs by addressing long-neglected infrastructure projects. It is in the State's interest

to assist in this effort and ensure that all projects receiving ARRA funding are "under contract or construction" prior to February 17, 2010. Any project not "under contract or construction" will have its ARRA funding revoked and funds reallocated to other states.

On September 17, 2009, the Board approved for adoption proposed amendments to: (a) 31 Texas Administrative Code Chapter 371 regarding the Drinking Water State Revolving Fund (DWSRF); and (b) 31 Texas Administrative Code Chapter 375 regarding the Clean Water State Revolving Fund (CWSRF), to authorize special funding for provisional and partially funded projects impacted by the ARRA program. These adopted amendments allow the Executive Administrator to designate a project as "provisional" or "partially funded" ensuring that all funds administered under the ARRA DWSRF and CWSRF intended use plans ("IUP") will be under contract or supporting construction by the February 17, 2010 deadline. The September 17th Board rule adoption authorized 0.0% loan financing from the base CWSRF and DWSRF programs for those designated "provisional" and "partially funded" projects that failed to qualify for ARRA funding. However, these projects will be required to remit a loan origination fee which has been waived for ARRA-funded projects by prior action of the Board. The proposed rulemaking removes the loan origination fee for: (a) provisional and partially funded projects that benefit disadvantaged communities; and (b) partially funded projects which have been removed from special capitalization grant funding to fund other projects in order to meet specified funding requirements in a special capitalization grant such as the ARRA green reserve of 20% in the ARRA special capitalization CWSRF grant.

SECTION BY SECTION DISCUSSION OF THE PROPOSED AMENDMENTS.

Section §375.18(a) assesses charges for the purpose of recovering administrative costs for all projects receiving CWSRF loan assistance that receive binding commitments. Unlike the DWSRF program, the CWSRF program does not provide for any exceptions to this charge. The proposed amendment would provide for an exception and would disallow charges from being assessed for disadvantaged communities which are designated as "provisional" or "partially funded" as identified under §375.407(c) and (d) as well as partially funded projects which have been removed from special capitalization grant funding to fund other projects in order to meet special funding requirements in a special capitalization grant, such as the ARRA green reserve, as identified under §375.407(c).

Section §375.18(c) imposes a loan origination charge on the CWSRF loan amount, excluding the amount of the origination charge. The Board routinely imposes a 1.85% loan origination charge on projects seeking CWSRF financial assistance. The loan origination charge is a one-time, non-refundable charge that is due at the time of loan closing or may be financed as part of the CWSRF loan. The proposed amendment would specifically waive the loan origination charge for CWSRF loans for disadvantaged communities which are designated as "provisional" or "partially funded" projects as identified under §375.407(c) and (d) as well as partially funded projects which have been removed from special capitalization grant funding to fund other projects in order to meet specified funding requirements, such as the ARRA green reserve.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENTS.

Ms. Melanie Callahan, Chief Financial Officer, has determined that there will be no fiscal implications for local governments as a result of the proposed rulemaking. Ms. Callahan has determined there will be some fiscal impact to the CWSRF, but the proposed rulemaking should not materially affect the Board's ability to provide financing for CWSRF projects.

PUBLIC BENEFITS AND COSTS.

Ms. Amanda Lavin, Deputy Executive Administrator for Project Finance, also has determined that for each year of the first five years the proposed rulemaking is in effect, the public will benefit from the rulemaking because it enhances the ability of the Board to fully commit the American Recovery and Reinvestment Act of 2009 federal grant monies under the Clean Water State Revolving Fund and will impose no new requirements on the public or persons required to comply with the rules.

LOCAL EMPLOYMENT IMPACT STATEMENT.

The Board has 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 because it will impose no new requirements on local economies.

The Board has determined that there will be no adverse economic effect on small businesses or micro-businesses as a result of enforcing this rulemaking. The Board has also determined that there is no anticipated economic cost to persons who are required to comply with the rulemaking as proposed. Therefore, no regulatory flexibility analysis is necessary.

REGULATORY IMPACT ANALYSIS.

The Board has determined that the proposed rulemaking is not subject to Government Code §2001.0225 because it is not a major environmental rule under that section.

TAKINGS IMPACT ASSESSMENT.

The Board has determined that the promulgation and enforcement of these proposed rule amendments will constitute neither a statutory nor a constitutional taking of private real property. The proposed rule amendments do not adversely affect a landowner's rights in private real property, in whole or in part, temporarily or permanently, because these proposed rule amendments do not burden or restrict or limit the owner's right to property. Therefore, the proposed amendments do not constitute a taking under Texas Government Code, Chapter 2007.

SUBMITTAL OF COMMENTS.

Comments on the proposed rulemaking will be accepted for 30 days following publication and may be submitted to Legal Services, Texas Water Development Board, P.O. Box 13231, Austin, Texas 78711-3231, *rulescomments@twdb.state.tx.us,* or by fax at (512) 463-5580.

STATUTORY AUTHORITY.

This rulemaking is proposed under the authority of Water Code §6.101, which authorizes the Board to adopt rules necessary to carry out the powers and duties of the Board.

Cross reference to statute: Texas Water Code Chapters 15, 16, and 17.

§375.18. Administrative Cost Recovery.

(a) General. The board will assess charges for the purpose of recovering administrative costs of all recipients of CWSRF financial

assistance who receive commitments after the effective date of this section, except those disadvantaged communities which are designated as provisional or partially funded projects under §375.407(c) and (d) of this title and those projects which are placed below the funding line as provisional projects in a special capitalization grant intended use plan in order to fund other projects necessary to meet specified funding requirements in a special capitalization grant under §375.407(c) of this title.

(b) (No change.)

(c) Loan origination charge. A loan origination charge will be assessed of the CWSRF loan amount, excluding the amount of the origination charge, except for those loan amounts for disadvantaged communities which are designated as provisional or partially funded projects under §375.407(c) and (d) of this title and those projects which are placed below the funding line as provisional projects in a special capitalization grant intended use plan in order to fund other projects necessary to meet specified funding requirements in a special capitalization grant under §375.407(c) of this title. The loan origination charge is a one-time charge that is due at the time of loan closing. The loan origination charge may be financed as a part of the CWSRF loan.

(d) - (g) (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 December 8, 2009.

TRD-200905669
Kenneth L. Petersen
General Counsel
Texas Water Development Board
Earliest possible date of adoption: January 24, 2010
For further information, please call: (512) 463-8061

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TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 3. TAX ADMINISTRATION
SUBCHAPTER K. HOTEL OCCUPANCY TAX

34 TAC §3.163

The Comptroller of Public Accounts proposes an amendment to §3.163, concerning refund of hotel occupancy tax. Subsections (b) and (d) are amended to correct punctuation. Subsection (c) is being amended to change reference from sections of the State of Texas Travel Allowance Guide to Government Code, Chapter 403, Subchapter E. Subsection (f) is being amended to update contact information for the comptroller's office and delete reference to the telephone numbers for a Telecommunication Device for the Deaf (TDD).

John Heleman, Chief Revenue Estimator, has determined that for the first five-year period the rule will be in effect, there will be no significant revenue impact on the state or units of local government.

Mr. Heleman 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 by updating the contact information and the reference for state agencies applying for a refund of state hotel taxes paid. This rule is proposed under Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed rule.

Comments on the proposal may be submitted to Bryant K. Lomax, Manager, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711-3528.

This amendment is proposed 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 the Tax Code, Title 2.

The amendment implements Tax Code, §§156.103, 156.154, 351.006 and 352.007.

§3.163. Refund of Hotel Occupancy Tax.

(a) State agency. A state agency is an agency, institution, board, or commission of the State of Texas other than an institution of higher education as defined in Education Code, §61.003.

(b) Refunds. A state agency may request a refund for each fiscal year quarter for the state hotel tax paid directly to a hotel or the amount of state hotel tax for which the agency reimbursed a state employee on a state travel voucher. A state agency that uses the Uniform Statewide Accounting System (USAS) will receive its state hotel tax refund by way of USAS. A state agency must directly contact the applicable city or county to apply for a refund of municipal or county hotel tax for which the agency reimbursed a state employee.

(c) Time limitation. A state agency may apply for a refund of state hotel tax no later than two years after the end of the fiscal year in which the travel occurred as provided by Government Code, Chapter 403, Subchapter E [~~State of Texas Travel Allowance Guide, §1.17 and §8.06~~]. A state agency may apply for a refund of municipal or county hotel occupancy tax for each calendar quarter according to the local city or county ordinance. In the absence of a local ordinance, the same time limitation that applies to the refund of state hotel tax will apply to municipal and county taxes.

(d) Documentation required.

(1) Documentation must be maintained to substantiate the claim, including a copy of the hotel folio, billing statement, invoice, or other document, that contains the following information:

(A) name of the hotel; [~~,~~]

(B) location address of hotel; [~~,~~]

(C) name of city where hotel is located; [~~,~~]

(D) name of county where hotel is located; [~~,~~]

(E) date(s) of lodging; [~~,~~]

(F) amount of state, municipal, and county hotel tax paid separately stated; [~~,~~]

(G) method of payment (travel voucher reimbursement, state credit card, state purchase order, direct billing, other); [~~,~~] and

(H) name of employee, if tax reimbursed on travel voucher.

(2) A municipality or county may, by local ordinance, require additional documentation or require documentation be submitted with a claim for refund of local tax.

(e) Separate refund claim required. A separate refund claim form must be filed with each municipality or county.

(f) Form. Each claim for refund for state hotel occupancy tax must be filed on a form furnished by the comptroller. The municipal and county hotel occupancy tax refund claim form, herein adopted by reference, must be substantially in the form set out as follows. Copies of the certificate are available for inspection at the office of the Texas Register or may be obtained from the Comptroller of Public Accounts, P.O. Box 13528, Austin, Texas 78711-3528. Copies may also be requested by calling 512-463-4600 or our toll-free number 1-800-252-1385. [~~In Austin, call 463-4600. From a Telecommunication Device for the Deaf (TDD) only, call 1-800-248-4099 toll free. In Austin the local TDD number is 463-4621~~]

This 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 December 14, 2009.

TRD-200905834
Ashley Harden
General Counsel
Comptroller of Public Accounts
Earliest possible date of adoption: January 24, 2010
For further information, please call: (512) 475-0387

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PART 4. EMPLOYEES RETIREMENT SYSTEM OF TEXAS

CHAPTER 71. CREDITABLE SERVICE

34 TAC §71.14

The Employees Retirement System of Texas (ERS) proposes amendments to 34 Texas Administrative Code §71.14, concerning Payments to Establish or Reestablish Service Credit.

As a result of recent legislation in the 81st Legislative Session, House Bill 2559, amendments to §71.14 are necessary regarding members who have contributed to both the Law Enforcement and Custodial Officer Supplemental Retirement (LECOS) fund and the ERS defined benefit plan. This section of the ERS rules is amended to update the rules for the various changes related to that legislation.

Section 71.14, concerning Payments to Establish or Reestablish Service Credit, is being amended to reflect the new requirement for employee contributions to the LECOS fund. The amended rule is required in order to provide for members to purchase this particular service credit and receive retirement benefits as a result of such purchase.

Paula A. Jones, General Counsel and Chief Compliance Officer, Employees Retirement System of Texas, has determined that for the first five year period the rule is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Ms. Jones also 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 would be simplified administration for the ERS defined benefit plans, to improve the accuracy of calculations and computations related to retirement benefits, and to make the rule conform to the recent legislation. There are no known anticipated costs to persons who are required to comply with the rule as proposed other than having to purchase the service in a similar manner as any other service purchase and, to her knowledge, small businesses should not be affected.

Comments on the proposed amendments may be submitted to Paula A. Jones, General Counsel and Chief Compliance Officer, Employees Retirement System of Texas, P.O. Box 13207, Austin, Texas 78711-3207, or you may email Ms. Jones at paula.jones@ers.state.tx.us. The deadline for receiving comments is Monday, January 25, 2010, at 10:00 a.m.

The amendments are proposed under the Texas Government Code §815.102 and §815.105 which provide authorization for the ERS Board of Trustees to adopt rules for the retirement system and for the program of supplemental benefits for law enforcement and custodial officers and to adopt mortality, service and other tables necessary for the retirement system.

No other statutes are affected by the proposed amendments.

§71.14. Payments to [~~To~~] Establish or Reestablish Service Credit.

(a) A member or contributing member may purchase eligible service creditable in the retirement system in accordance with the Government Code, Chapter 813. The retirement system shall grant the applicable amount of service credit after each payment made under this section is equal to the amount required to establish one or more months of creditable service.

(b) Service credit that may be established or reestablished includes military service credit, service credit previously cancelled, and service credit not previously established.

(c) A contributing member of the Employees Retirement System of Texas (ERS) may file with the member's state employer, a contract to establish or reestablish service credit through a monthly payroll deduction installment plan. The state agency shall provide the ERS a signed copy of the contract not later than the date the service purchase contribution is reported to the ERS. Members with payroll deductions that will result in less than the amount required to establish one month of creditable service by fiscal year end will be provided written notice at the time the contract is received by the ERS, that a balloon payment will be due at fiscal year end; otherwise additional penalty interest will accrue on the service cost.

(d) The contributing member shall designate the amount to be deducted from the member's salary and deposited each month with the ERS. The total amount deducted in any one fiscal year must equal or exceed the cost to establish one month of service credit. Excess payments of $5.00 or greater will be applied to the next fiscal year service purchase contract, if eligible. In the event the member does not negotiate a new contract within 60 days of a new fiscal year or there is no remaining service for purchase, any overpayment of $5.00 or greater will be refunded to the member. Any remaining credit of less than $5.00 will be deposited as penalty interest toward the last purchase period established and will not be subject to refund.

(e) A member who ceases to hold a position or who withdraws authority for payroll deduction while making payments through payroll deduction may contract with the ERS for an alternative method of continuing the payment in accordance with procedures developed by the ERS.

(f) The ERS shall develop procedures and forms to be used in connection with this section.

(g) A member who has contributed to both the Law Enforcement and Custodial Officer Supplemental Retirement (LECOS) fund and the ERS defined benefit plan will be allowed to purchase previously refunded Commissioned Peace Officer and Custodial Officer (CPO/CO) service and/or employee class service within the defined benefit plan. If a member purchases employee class service only and decides later to retire as a CPO/CO, the member must purchase the unpaid portion of service credit attributable to CPO/CO service, which will include any additional contribution to the LECOS fund plus interest, in order to receive creditable service and retire as a CPO/CO. If the member does not purchase the unpaid portion of the service credit attributable to CPO/CO service, then the service shall only be creditable for the employee class of membership.

This 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 December 14, 2009.

TRD-200905823
Paula A. Jones
General Counsel and Chief Compliance Officer
Employees Retirement System of Texas
Earliest possible date of adoption: January 24, 2010
For further information, please call: (512) 867-7416

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CHAPTER 74. QUALIFIED DOMESTIC RELATIONS ORDERS

34 TAC §74.7, §74.9

The Employees Retirement System of Texas (ERS) proposes amendments to 34 Texas Administrative Code §74.7 and §74.9, concerning Qualified Domestic Relations Orders.

These sections of the ERS rules are amended to update them for various changes that will keep the rules current with other legislation, tax reporting requirements and to effectively manage appeals of determinations or the status of domestic relations orders.

Section 74.7 and §74.9, concerning Requirements and Determination of a domestic relations order, are being amended so that members, retirees and alternate payees must continue to provide a social security number or other tax identification number for proper payment and tax reporting, but eliminating the requirement that the information must be contained within the domestic relations order itself. These rules are also being amended to clarify when the executive director's or designee's decision is a final decision of the agency and to add a provision for filing a motion for reconsideration of the original determination, which is consistent with the current requirements for an administrative appeal under the Administrative Procedure Act and other law applicable to ERS.

Paula A. Jones, General Counsel and Chief Compliance Officer, Employees Retirement System of Texas, has determined that for the first five year period the rules are in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rules. There are no known anticipated costs to persons who are required to comply with the rules as proposed and, to her knowledge, small businesses should not be affected.

Ms. Jones also 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 would be a more efficient and simplified administration for qualified domestic relations orders, and a removal of the requirement to list social security numbers in a domestic relations order which is ordinarily a publicly filed document.

Comments on the proposed amendments may be submitted to Paula A. Jones, General Counsel and Chief Compliance Officer, Employees Retirement System of Texas, P.O. Box 13207, Austin, Texas 78711-3207, or you may email Ms. Jones at paula.jones@ers.state.tx.us. The deadline for receiving comments is Monday, January 25, 2010, at 10:00 a.m.

The amendments are proposed under Texas Government Code §§815.102, 835.002 and 840.002, which provide authorization for the ERS Board of Trustees to adopt rules necessary for the administration of the retirement system.

No other statutes are affected by the proposed amendments.

§74.7. Requirements.

A domestic relations order is a qualified domestic relations order only if such order:

(1) clearly specifies the name, [~~social security number,~~] and last known mailing address, if any, of the member or retiree and of each alternate payee covered by the order. Although the social security number of the member or retiree and each alternate payee is not required to be specified in the domestic relations order, the social security number or other valid tax identification number acceptable to the system must be provided by the member or retiree and each alternate payee to the system before the domestic relations order is determined by the system to be a qualified domestic relations order;

(2) clearly specifies the amount or percentage of the member's or retiree's benefits to be paid by the system to each such alternate payee or the manner in which such amount or percentage is to be determined;

(3) clearly specifies the number of payments or the period to which such order applies;

(4) clearly specifies that such order applies to the system;

(5) does not require the system to provide any type or form of benefit or any option not otherwise provided under the program;

(6) does not require the system to provide increased benefits determined on the basis of actuarial value;

(7) does not require the payment of benefits to an alternate payee which are required to be paid to another alternate payee under another order previously determined to be a qualified domestic relations order;

(8) does not require the payment of benefits to an alternate payee before the retirement of a member, the distribution of a withdrawal of contributions to a member, or other distribution to a member or retiree required by law;

(9) provides for a proportional reduction of the amount awarded to an alternate payee in the event of the retirement of the member before normal retirement age;

(10) does not purport to require the designation of a particular person as the recipient of benefits in the event of a member's or annuitant's death;

(11) does not purport to require the selection of a particular benefit payment;

(12) provides clearly for each possible benefit distribution under program provisions;

(13) does not require any action on the part of the system contrary to its program provisions other than the direct payment of the benefit awarded to an alternate payee;

(14) does not make the award of an interest contingent on any condition other than those conditions resulting in the liability of the system for payments under its program provisions;

(15) does not purport to award any future benefit increases that are provided or required by the legislature; and

(16) provides for a proportional reduction of the amount awarded to an alternate payee in the event that benefits available to the retiree or member are reduced by law.

§74.9. Determination.

Action on a domestic relations order shall be taken in accordance with the provisions of this section.

(1) The executive director or executive director's [~~his~~] designee has the exclusive authority to determine whether a domestic relations order is a qualified domestic relations order. Upon receipt of a certified copy of a domestic relations order, the executive director or executive director's designee shall determine whether such order is a qualified domestic relations order and shall notify the member or retiree and each alternate payee of the determination.

(A) If the order is determined to be a qualified domestic relations order, benefits shall be paid in accordance with the order.

(B) If the order is determined not to be a qualified domestic relations order, the member or retiree or any alternate payee named in the order may [~~appeal the determination of the executive director to a court of competent jurisdiction, and may~~] petition the court which issued the order to amend the order so that it will be qualified.

(2) A determination by the executive director or executive director's designee that an order is or is not a qualified domestic relations order is a final decision by the system. No appeal to the board of trustees is authorized. However, a member, retiree or alternate payee adversely affected by a determination of the executive director or executive director's designee must file a motion for reconsideration with the executive director no later than 20 days after the date the party is given notice of such determination if the party wishes to contest the determination. [~~Appeals to the board of trustees of the determination of the executive director are not required.~~]

(3) During any period in which the issue of whether a domestic relations order is a qualified domestic relations order is being determined, the system shall, if possible, separately account for the amounts, in this section referred to as the segregated amounts, which would have been payable to the alternate payee or alternate payees during such period if the order had been determined to be a qualified domestic relations order.

(4) If a domestic relations order is determined to be a qualified domestic relations order, then the system shall pay the segregated amounts without interest to the alternate payee or alternate payees entitled thereto and shall thereafter pay benefits pursuant to the order.

(5) If a domestic relations order is determined not to be a qualified domestic relations order or if within 18 months of the date a domestic relations order is received by the system the issue as to whether such order is a qualified domestic relations order is not resolved, then the system shall pay the segregated amounts without interest and shall thereafter pay benefits to the person or persons who would have been entitled to such amounts if there had been no order.

(6) All determinations made regarding a domestic relations order shall be prospective only, and the system shall not be required to retroactively segregate, approve a division of benefits, or pay benefits pursuant to a domestic relations order prior to the system's receipt of a domestic relations order that is determined to be qualified. Any determination that an order is a qualified domestic relations order which is made after the close of the 18 month period shall be applied prospectively only.

This 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 December 14, 2009.

TRD-200905826
Paula A. Jones
General Counsel and Chief Compliance Officer
Employees Retirement System of Texas
Earliest possible date of adoption: January 24, 2010
For further information, please call: (512) 867-7416

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CHAPTER 85. FLEXIBLE BENEFITS

34 TAC §85.7, §85.17

The Employees Retirement System of Texas (ERS) proposes amendments to 34 Texas Administrative Code (TAC) Chapter 85, §85.7 and §85.17, concerning Flexible Benefits.

The proposed amendments are necessary to comply with the Children's Health Insurance Program Reauthorization Act of 2009 and to clarify the appeal process available when a participant is aggrieved by a decision of the Executive Director or her designee in connection with the Flexible Benefits Program.

Section 85.7, concerning Enrollment, is modified to comply with the Children's Health Insurance Program Reauthorization Act of 2009.

Section 85.17, concerning Grievance Procedure, is modified by adding language reflecting that the Executive Director's designee may make determinations in connection with matters in dispute involving participants in the Flexible Benefits Program. The amendments also clarify that the appeal process set forth in 34 TAC Chapter 67 will be used to conduct any appeal of a decision by the Executive Director or her designee. These changes are necessary for the efficiency and consistency of program administration.

Paula A. Jones, General Counsel and Chief Compliance Officer, Employees Retirement System of Texas, has determined that for the first five-year period the rules are in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rules. There are no known anticipated economic costs to persons who are required to comply with the rules as proposed, except for any costs associated with

continued participation in the TexFlex program. To Ms. Jones' knowledge, small businesses should not be affected.

Ms. Jones also 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 would be simplified and consistent administration for the Texas Employees Flexible Benefit Program in accordance with the law.

Comments on the proposed amendments may be submitted to Paula A. Jones, General Counsel and Chief Compliance Officer, Employees Retirement System of Texas, P.O. Box 13207, Austin, Texas 78711-3207, or you may email Ms. Jones at paula.jones@ers.state.tx.us. The deadline for receiving comments is Monday, January 25, 2010, at 10:00 a.m.

The amendments are proposed under the Texas Insurance Code, §1551.052 which provides authorization for the ERS Board of Trustees to adopt rules necessary to carry out its statutory duties and responsibilities.

No other statutes are affected by the proposed amendments.

§85.7. Enrollment.

(a) Election of benefits.

(1) An eligible employee may elect to participate in the health care and/or dependent care reimbursement accounts within the flexible benefits plan by making an election and executing an election form or enrolling electronically.

(2) An employee who becomes eligible after the beginning of a plan year has 30 days from the date of eligibility to elect or decline benefits by executing an election form.

(3) By enrolling in the plan, the employee agrees to a reduction in compensation or agrees to after-tax payments equal to the participant's share of the cost and any fees for each reimbursement account selected.

(4) An election to participate in a reimbursement plan must be for a specified dollar amount plus any administrative fee.

(5) An annual enrollment period will be designated by the Employees Retirement System of Texas and shall be prior to the beginning of a new plan year. The annual enrollment period shall provide an opportunity to change and to elect or decline benefit options.

(6) An active employee who is enrolled in reimbursement accounts immediately prior to the annual enrollment period will be automatically re-enrolled with the same elections and contribution amounts for the new plan year unless the active employee takes action during the annual enrollment period to change contribution amounts or to decline participation.

(b) Effects of failure to elect.

(1) If the Employees Retirement System of Texas does not receive an election form from an eligible employee to participate in the reimbursement accounts by the due date, it shall be deemed an express election and informed consent by the eligible employee to:

(A) receive cash compensation as a benefit by reason of failure to purchase optional benefits in lieu of cash compensation; or

(B) in the case of automatic re-enrollment during the annual enrollment period, to continue participation in the reimbursement accounts with the same contributions for the new plan year.

(2) To the extent an eligible employee does not elect the maximum permissible participation amounts hereunder, he shall be deemed to have elected cash compensation.

(c) Benefit election irrevocable except for qualifying life event.

(1) An election to participate shall be irrevocable for the plan year unless a qualifying life event occurs, and the change in election is consistent with the qualifying life event. The plan administrator may require documentation in support of the qualifying life event.

(2) A qualifying life event occurs when an employee experiences one of the following changes:

(A) change in marital status;

(B) change in dependent status;

(C) change in employment status;

(D) change of address that results in loss of benefits eligibility;

(E) change in Medicare or Medicaid status, or Children's Health Insurance Program (CHIP) status;

(F) significant cost of benefit or coverage change imposed by a third party provider other than a provider through the Texas Employees Group Benefits Program; or

(G) change in coverage ordered by a court.

(3) An election form requesting a change in election must be submitted on, or within 30 days after, the date of the qualifying life event, provided, however, a change in election due to CHIP status under paragraph (2) of this subsection must be submitted on, or within 60 days after, the change in CHIP status.

(4) A change in election as provided in this subsection becomes effective on the first day of the month following the date of the qualifying life event.

(d) Payment of flexible benefit dollars.

(1) Flexible benefit dollars from an active duty employee shall be recovered through payroll withholding at least monthly during the plan year and remitted to the Employees Retirement System of Texas for the purpose of purchasing benefits. For the health care reimbursement account only, and except as otherwise provided in §85.3(b)(3)(D) of this title (relating to Eligibility and Participation), flexible benefit dollars from employees on leave without pay status or who have insufficient funds for any month shall be recovered through direct after-tax payment from the employee or upon the return of the employee to active duty status from payroll withholding, for the total amount due.

(2) An employee's flexible benefit dollars with respect to any month during the plan year shall be equal to the authorization on the employee's election form plus any administrative fees.

(3) Flexible benefit dollars received by the Employees Retirement System of Texas shall be credited to the participant's dependent care reimbursement account and/or health care reimbursement account, as appropriate.

(e) Forfeiture of account balances.

(1) The amount credited to a participant's reimbursement account for each benefit election for any plan year will be used to reimburse or pay qualified expenses incurred during the eligible employee's period of coverage in such plan year and the grace period, if the claim is electronically adjudicated or if the participant files a correctly completed claim for reimbursement on or before December 31 following the close of the plan year.

(2) Any balances remaining after payment of all timely and correctly filed claims postmarked no later than December 31 following the close of the plan year and the grace period, shall be forfeited by the participant and be available to pay administrative expenses of the flexible benefits program.

(f) Reimbursement report to participant. The plan administrator or its designee shall provide to the participant periodic reports on each reimbursement account, showing the account transactions (disbursements and balances) during the plan year and the grace period. These reports may be provided periodically through electronic means.

§85.17. Grievance Procedure.

(a) Any person participating in the flexible benefits program, who is denied reimbursement of eligible expenses, may request the plan administrator or its designee to reconsider the claim. Any additional documentation in support of the claim may be submitted with the request for reconsideration. If the claim is again denied, the claim, accompanied by all related documents and copies of correspondence with the plan administrator or its designee, may be appealed by the person to the executive director of the Employees Retirement System of Texas. An appeal must be filed by the person in writing within 90 days from the date the plan administrator or its designee formally denies the claim and mails notice of this denial and right of appeal to the person.

(b) Any participant [~~person~~] with a grievance regarding eligibility or other matters involving the Program [~~program~~] may submit a written request to the executive director or the executive director's designee to make a determination on the matter in dispute.

(c) When the executive director or the executive director's designee reviews any matter arising under this section, information available to ERS will be considered. When the executive director or the executive director's designee completes the review and makes a decision, all parties involved will be notified in writing of the decision [~~executive director's determination~~].

(d) Any participant aggrieved by the executive director's or the executive director's designee's decision may appeal the decision to the Board's designee provided the decision grants a right of appeal.

(1) Appeals of the Board's designee's decision will be conducted under the provisions of Chapter 67 of this title (relating to Hearings and Disputed Claims) and Chapter 1551, Insurance Code.

(2) A notice of appeal to the Board's designee must be in writing and filed with ERS within 30 days from the date the executive director's or the executive director's designee's decision is served on the participant in accordance with §67.7 of this title (relating to Filing and Service of Documents and Pleadings).

[~~(d) Appeals to the executive director will be processed under the provisions of Chapter 67 of this title (relating to Hearings and Disputed Claims) and the Administrative Procedure Act, Chapter 2001, Government Code.~~]

[~~(e) As used in this section, the term "person" includes any duly authorized representative of such person.~~]

[~~(f) In computing time under this section, the day after any mailing by the plan administrator or its designee or the executive director shall be counted as the first day of the time period. A document is considered to be filed with the executive director when it is received by the executive director or when it is postmarked, whichever is earlier.~~]

This 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 December 14, 2009.

TRD-200905827
Paula A. Jones
General Counsel and Chief Compliance Officer
Employees Retirement System of Texas
Earliest possible date of adoption: January 24, 2010
For further information, please call: (512) 867-7421

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 1. TEXAS DEPARTMENT OF PUBLIC SAFETY

CHAPTER 4. COMMERCIAL VEHICLE REGULATIONS AND ENFORCEMENT PROCEDURES

SUBCHAPTER A. REGULATIONS GOVERNING HAZARDOUS MATERIALS

37 TAC §4.1

The Texas Department of Public Safety (the department) proposes an amendment to §4.1 concerning Regulations Governing Hazardous Materials.

The proposed amendment updates §4.1 to reflect January 1, 2010 in subsection (a). This amendment is necessary to ensure that the Federal Motor Carrier Safety Regulations, incorporated by reference in this section, reflect all amendments and interpretations issued through that particular date for the subchapter.

Cheryl MacBride, Assistant Director, 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.

In addition, Ms. MacBride has 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 to ensure the public greater compliance by motor carriers with the statutes and regulations pertaining to the safe operation of commercial vehicles in this state.

Ms. MacBride has also determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the section 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.

The department has determined that this proposal is not a "major environmental rule" as defined by Texas Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. This 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 Texas Government Code does not apply to this rule. Accordingly, the department is not required to complete a takings impact assessment regarding this rule.

The Texas Department of Public Safety, in accordance with the Administrative Procedure and Texas Register Act, Texas Government Code, Chapters 2001, et seq., and Texas Transportation Code, Chapter 644, will hold a public hearing on January 7, 2010, at 9:00 a.m., at the Texas Department of Public Safety, Texas Highway Patrol Division, Building G Annex, 5805 North Lamar, Austin, Texas. The purpose of this hearing is to receive comments from all interested persons regarding adoption of the proposed amendments to 37 TAC §4.1, regarding Hazardous Material and Transportation Safety, proposed for adoption under the authority of Texas Transportation Code, Chapter 644, which provides that the director shall, after notice and a public hearing, adopt rules regulating the safe operation of commercial motor vehicles.

Persons interested in attending this hearing are encouraged to submit advance written notice of their intent to attend the hearing and to submit a written copy of their comments. Correspondence should be addressed to Major David Palmer, Texas Highway Patrol Division, Texas Department of Public Safety, P.O. Box 4087, Austin, Texas 78773-0500.

Persons with special needs or disabilities who plan to attend this hearing and who may need auxiliary aids or services are requested to contact Major David Palmer at (512) 424-2775 at least three working days prior to the hearing so that appropriate arrangements can be made.

Other comments on this proposal may be submitted to Major David Palmer, Texas Highway Patrol Division, Texas Department of Public Safety, P.O. Box 4087, Austin, Texas 78773-0500, (512) 424-2775.

The amendments are proposed pursuant to Texas Transportation Code, §644.051, which authorizes the director to adopt rules regulating the safe transportation of hazardous materials and the safe operation of commercial motor vehicles; and authorizes the director to adopt all or part of the federal safety regulations, by reference.

Texas Transportation Code, §644.051 is affected by this proposal.

§4.1. Transportation of Hazardous Materials.

(a) The director of the Texas Department of Public Safety incorporates, by reference, the Federal Hazardous Materials Regulations, Title 49, Code of Federal Regulations, Parts 107 (Subpart G), 171 - 173, 177, 178, and 180, including all interpretations thereto, for commercial vehicles operated in intrastate, interstate, or foreign commerce, as amended through January 1, 2010 [~~October 1, 2008~~]. All other references in this section to the Code of Federal Regulations also refer to amendments and interpretations issued through January 1, 2010 [~~October 1, 2008~~].

(b) (No change.)

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

Filed with the Office of the Secretary of State on December 14, 2009.

TRD-200905833
Stuart Platt
General Counsel
Texas Department of Public Safety
Earliest possible date of adoption: January 24, 2010
For further information, please call: (512) 424-5848

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SUBCHAPTER B. REGULATIONS GOVERNING TRANSPORTATION SAFETY

37 TAC §§4.11, 4.12, 4.16, 4.17, 4.19, 4.21

The Texas Department of Public Safety (the department) proposes amendments to §§4.11, 4.12, 4.16, 4.17, 4.19, and 4.21 concerning Regulations Governing Transportation Safety.

The first proposed amendment to §4.11 updates the rule so that it reflects January 1, 2010 in subsection (a). This amendment is necessary to ensure that the Federal Motor Carrier Safety Regulations, incorporated by reference in this section, reflect all amendments and interpretations issued through that particular date for the subchapter. The second amendment to §4.11 ensures the applicability of the drug and alcohol testing requirements of Title 49, Code of Federal Regulations, Part 382 to all drivers/motor carriers subject to the commercial driver's license requirements of Texas Transportation Code, Chapter 522, regardless of whether they meet all of the requirements of Part 383. This change is necessary because the 81st Texas Legislature enacted Texas Transportation Code, Chapter 522 as the standard for requiring commercial driver's licenses in this state and therefore did not adopt Title 49, Code of Federal Regulations, Part 383. The final amendment to §4.11 is necessary to ensure that any person prohibited from performing safety-sensitive functions due to prohibited conduct, is prohibited from operating any vehicle regulated under this chapter.

The amendment to §4.12 is necessary to clarify the non-applicability of the United States Department of Transportation number requirements of Texas Transportation Code, Chapter 643 for vehicles/motor carriers operating exclusively in intrastate commerce that are excluded from the requirements of Texas Transportation Code, Chapter 643.

The proposed amendment for §4.16 modifies the method used to calculate administrative penalties in certain cases. This amendment is necessary to provide that when a carrier fails to provide credible information regarding the size of its operations, or when a carrier has been penalized repeatedly for the same violation, the maximum penalties may be assessed against the motor carrier. The final amendment to this section is required as a result of legislation passed by the 81st Texas Legislature that transferred the responsibility of the administration of Texas Transportation Code, Chapter 643 from the Texas Department of Transportation to the Texas Department of Motor Vehicles.

The proposed amendment for §4.17 is necessary to provide more flexibility in evaluating informal appeals "informally," by no longer requiring the designee of the director to be a "hearing officer."

The first proposed amendment for §4.19 is necessary to allow a more streamlined procedure for transmitting requests for action

if the executive director designates another to accept such requests from the department. The final amendment is to this section is required as a result of legislation passed by the 81st Texas Legislature that transferred the responsibility of the administration of Texas Transportation Code, Chapter 643 from the Texas Department of Transportation to the Texas Department of Motor Vehicles.

The proposed amendment for §4.21 is necessary to implement some of the regulations required by SB 481, relating to the regulation of certain contract carriers of railroad employees, passed by the 81st Legislature, effective September 1, 2009.

Cheryl MacBride, Assistant Director, Finance, has determined that for each year of the first five-year period the rules are in effect there will be no fiscal implications for state or local government, or local economies.

In addition, Ms. MacBride has determined that for each year of the first five-year period the rules are in effect the public benefit anticipated as a result of enforcing the rules will be to ensure to the public greater compliance by motor carriers with all of the statutes and regulations pertaining to the safe operation of commercial vehicles in this state.

Ms. MacBride has also determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the section 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.

The department has determined that this proposal is not a "major environmental rule" as defined by Texas Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. This 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 Texas Government Code does not apply to these rules. Accordingly, the department is not required to complete a takings impact assessment regarding these rules.

The Texas Department of Public Safety, in accordance with the Administrative Procedures and Texas Register Act, Texas Government Code, §2001, et seq., and Texas Transportation Code, Chapter 644, will hold a public hearing on January 7, 2010, at 9:00 a.m., at the Texas Department of Public Safety, Texas Highway Patrol Division, Building G Annex, 5805 North Lamar, Austin, Texas. The purpose of this hearing is to receive comments from all interested persons regarding adoption of the proposed amendments to Administrative Rules §§4.11, 4.12, 4.16, 4.17, 4.19, and 4.21 regarding Hazardous Material and Transportation Safety, proposed for adoption under the authority of Texas Transportation Code, Chapter 644, which provides that the director shall, after notice and a public hearing, adopt rules regulating the safe operation of commercial motor vehicles.

Persons interested in attending this hearing are encouraged to submit advance written notice of their intent to attend the hearing and to submit a written copy of their comments. Correspondence should be addressed to Major David Palmer, Texas Highway Patrol Division, Texas Department of Public Safety, P.O. Box 4087, Austin, Texas 78773-0500.

Persons with special needs or disabilities who plan to attend this hearing and who may need auxiliary aids or services are requested to contact Major David Palmer at (512) 424-2775 at least three working days prior to the hearing so that appropriate arrangements can be made.

Other comments on this proposal may be submitted to Major David Palmer, Texas Highway Patrol Division, Texas Department of Public Safety, P.O. Box 4087, Austin, Texas 78773-0500, (512) 424-2775.

The amendments are proposed pursuant to Texas Transportation Code, §644.051, which authorizes the director to adopt rules regulating the safe transportation of hazardous materials and the safe operation of commercial motor vehicles; and authorizes the director to adopt all or part of the federal safety regulations, by reference. Texas Transportation Code, §644.051 is affected by this proposal.

§4.11. General Applicability and Definitions.

(a) General. The director of the Texas Department of Public Safety incorporates, by reference, the Federal Motor Carrier Safety Regulations, Title 49, Code of Federal Regulations, Parts 40, 380, 382, 385, 386, 387, 390 - 393, and 395 - 397 including all interpretations thereto, as amended through January 1, 2010 [~~October 1, 2008~~]. All other references in this subchapter to the Code of Federal Regulations also refer to amendments and interpretations issued through January 1, 2010 [~~October 1, 2008~~]. The rules adopted herein are to ensure that:

(1) a commercial motor vehicle is safely maintained, equipped, loaded, and operated;

(2) the responsibilities imposed on a commercial motor vehicle's operator do not impair the operator's ability to operate the vehicle safely;

(3) the physical condition of a commercial motor vehicle's operator enables the operator to operate the vehicle safely;

(4) commercial motor vehicle operators are qualified, by reason of training and experience, to operate the vehicle safely; and,

(5) the minimum levels of financial responsibility for motor carriers of property or passengers operating commercial motor vehicles in interstate, foreign, or intrastate commerce is maintained as required.

(b) Terms. Certain terms, when used in the federal regulations as adopted in subsection (a) of this section, will be defined as follows:

(1) the definition of motor carrier will be the same as that given in Texas Transportation Code, §643.001(6) when vehicles operated by the motor carrier meet the applicability requirements of subsection (c) of this section;

(2) hazardous material shipper means a consignor, consignee, or beneficial owner of a shipment of hazardous materials;

(3) interstate or foreign commerce will include all movements by motor vehicle, both interstate and intrastate, over the streets and highways of this state;

(4) department means the Texas Department of Public Safety;

(5) director means the director of the Texas Department of Public Safety or the designee of the director;

(6) FMCSA field administrator, as used in the federal motor carrier safety regulations, means the director of the Texas Department of Public Safety for vehicles operating in intrastate commerce;

(7) farm vehicle means any vehicle or combination of vehicles controlled and/or operated by a farmer or rancher being used to transport agriculture commodities, farm machinery, and farm supplies to or from a farm or ranch;

(8) commercial motor vehicle has the meaning assigned by Texas Transportation Code, §548.001(1) if operated intrastate; commercial motor vehicle has the meaning assigned by Title 49, Code of Federal Regulations, Part 390.5 if operated interstate;

(9) foreign commercial motor vehicle has the meaning assigned by Texas Transportation Code, §648.001;

(10) agricultural commodity is defined as an agricultural, horticultural, viticultural, silvicultural, or vegetable product, bees and honey, planting seed, cottonseed, rice, livestock or a livestock product, or poultry or a poultry product that is produced in this state, either in its natural form or as processed by the producer, including wood chips. The term does not include a product which has been stored in a facility not owned by its producer;

(11) planting and harvesting seasons are defined as January 1 to December 31;

(12) producer is defined as a person engaged in the business of producing or causing to be produced for commercial purposes an agricultural commodity. The term includes the owner of a farm on which the commodity is produced and the owner's tenant or sharecropper; and

(13) off-road motorized construction equipment includes but is not limited to motor scrapers, backhoes, motor graders, compactors, excavators, tractors, trenchers, bulldozers, and other similar equipment routinely found at construction sites and that is occasionally moved to or from construction sites by operating the equipment short distances on public highways. Off-road motorized construction equipment is not designed to operate in traffic and such appearance on a public highway is only incidental to its primary functions. Off-road motorized construction equipment is not considered to be a commercial motor vehicle as that term is defined in Texas Transportation Code, §644.001.

(14) The phrase "The commercial driver's license requirements of part 383 of this subchapter" as used in Title 49, Code of Federal Regulations, §382.103(a)(1) shall mean the commercial driver's license requirements of Texas Transportation Code, Chapter 522.

(15) For purposes of removal from safety-sensitive functions for prohibited conduct as described in Title 49, Code of Federal Regulations, Part 382.501(c), commercial motor vehicle means a vehicle subject to the requirements of Texas Transportation Code, Chapter 522 and a vehicle subject to §4.22 of this title (relating to Contract Carriers of Certain Passengers), in addition to those vehicles enumerated in Title 49, Code of Federal Regulations, Part 382.501(c).

(c) Applicability.

(1) The regulations shall be applicable to the following vehicles:

(A) a vehicle or combination of vehicles with an actual gross weight, a registered gross weight, or a gross weight rating in excess of 26,000 pounds when operating intrastate;

(B) a farm vehicle or combination of farm vehicles with an actual gross weight, a registered gross weight, or a gross weight rating of 48,000 pounds or more when operating intrastate;

(C) a vehicle designed or used to transport more than 15 passengers, including the driver; and

(D) a vehicle transporting hazardous material requiring a placard.

(E) a motor carrier transporting household goods for compensation in intrastate commerce in a vehicle not defined in Texas Transportation Code, §548.001(1) is subject to the record keeping requirements in Title 49, Code of Federal Regulations, Part 395 and the hours of service requirements specified in this subchapter.

(F) a foreign commercial motor vehicle that is owned or controlled by a person or entity that is domiciled in or a citizen of a country other than the United States.

(G) a contract carrier transporting the operating employees of a railroad on a road or highway of this state in a vehicle designed to carry 15 or fewer passengers.

(2) The regulations contained in Title 49, Code of Federal Regulations, Part 392.9a, and all interpretations thereto, are applicable to motor carriers operating exclusively in intrastate commerce and to the intrastate operations of interstate motor carriers that have not been federally preempted by the United Carrier Registration Act of 2005. The term "operating authority" as used in Title 49, Code of Federal Regulations, Part 392.9a, for the motor carriers described in this paragraph, shall mean compliance with the registration requirements found in Texas Transportation Code, Chapter 643. For purposes of enforcement of this paragraph, peace officers certified to enforce this chapter, shall verify that a motor carrier is not registered, as required in Texas Transportation Code, Chapter 643, before placing a motor carrier out-of-service. Motor carriers placed out-of-service under Title 49, Code of Federal Regulations, Part 392.9a may request a review under §4.18 of this title (relating to Intrastate Operating Authority Out-of-Service Review) [~~chapter~~]. All costs associated with the towing and storage of a vehicle and load declared out-of-service under subsection (c)(2) of this section shall be the responsibility of the motor carrier and not the department or the State of Texas.

(3) All regulations contained in Title 49, Code of Federal Regulations, Parts 40, 380, 382, 385, 386, 387, 390 - 393 and 395 - 397, and all interpretations thereto pertaining to interstate drivers and vehicles are also adopted except as otherwise excluded.

(4) A medical examination certificate, issued in accordance with Title 49, Code of Federal Regulations, Part 391.41, 391.43, and 391.45, shall expire on the date indicated by the medical examiner; however, no such medical examination certificate shall be valid for more than two years from the date of issuance.

(5) Nothing in this section shall be construed to prohibit an employer from requiring and enforcing more stringent requirements relating to safety of operation and employee health and safety.

§4.12. Exemptions and Exceptions.

(a) Exemptions. Exemptions to the adoptions in §4.11 of this title (relating to General Applicability and Definitions) are made pursuant to Texas Transportation Code, §§644.052 - 644.054, and are adopted as follows:

(1) Such regulations shall not apply to the following vehicles when operated intrastate:

(A) a vehicle used in oil or water well servicing or drilling which is constructed as a machine consisting in general of a mast, an engine for power, a draw works, and a chassis permanently constructed or assembled for such purpose or purposes;

(B) a mobile crane which is an unladen, self-propelled vehicle constructed as a machine used to raise, shift, or lower weights;

(C) a vehicle transporting seed cotton; or,

(D) concrete pumps.

(2) Drivers in intrastate commerce will be permitted to drive 12 hours following eight consecutive hours off duty. Drivers in intrastate commerce may not drive after having been on duty 15 hours, following eight consecutive hours off duty. Drivers in intrastate commerce violating the 12 or 15 hour limits provided in this paragraph shall be placed out-of-service for eight consecutive hours. Drivers of vehicles operating in intrastate commerce shall be permitted to accumulate the equivalent of eight consecutive hours off duty by taking a combination of at least eight consecutive hours off duty and sleeper berth time; or by taking two periods of rest in the sleeper berth, providing:

(A) neither rest period in the sleeper berth is shorter than two hours duration;

(B) the driving time in the period immediately before and after each rest period in the sleeper berth, when added together, does not exceed 12 hours;

(C) the on duty time in the period immediately before and after each rest period in the sleeper berth, when added together, does not include any driving time after the 15th hour; and

(D) the driver may not return to driving subject to the normal hours of service requirements in this subsection without taking at least 8 consecutive hours off duty, at least 8 consecutive hours in the sleeper berth, or a combination of at least 8 consecutive hours off duty and sleeper berth time.

(3) Drivers in intrastate commerce who are not transporting placardable hazardous materials and were regularly employed in Texas as commercial vehicle drivers prior to August 28, 1989, are not required to meet the medical standards contained in the federal regulations.

(A) For the purpose of enforcement of this regulation, those drivers who reached their 18th birthday on or after August 28, 1989, shall be required to meet all medical standards.

(B) The exceptions contained in this paragraph shall not be deemed as an exemption from drug and alcohol testing requirements contained in Title 49, Code of Federal Regulations, Parts 40 and 382.

(4) The maintenance of a driver's record of duty status is not required if the vehicle is operated within a 150 air-mile radius of the driver's normal work reporting location if:

(A) the driver returns to the normal work reporting location and is released from work within 12 consecutive hours;

(B) the driver has at least 8 consecutive hours off duty separating each 12 hours on duty and

(C) the motor carrier that employs the driver maintains and retains for a period of 6 months true and accurate time and business records which include the following information:

(i) the time the driver reports for duty each day;

(ii) the total number of hours the driver is on duty each day;

(iii) the time the driver is released from duty each day;

(iv) the total time on duty for the preceding seven days in accordance with Title 49, Code of Federal Regulations, Part 395.8(j)(2) for drivers used for the first time or intermittently; and

(v) the motor carrier maintains business records that provide the date, time, quantity, and location of the delivery of a product or service, including delivery tickets or sales invoices.

(5) The provisions of Title 49, Code of Federal Regulations, Part 395 shall not apply to drivers transporting agricultural commodities in intrastate commerce for agricultural purposes within a 150 air-mile radius from the source of the commodities or the distribution point for the farm supplies during planting and harvesting seasons.

(6) Unless otherwise specified, a motor carrier transporting household goods for compensation in intrastate commerce in a vehicle not defined in Texas Transportation Code, §548.001(1) is subject to the record keeping requirements in Title 49, Code of Federal Regulations, Part 395 and the hours of service requirements specified in this subchapter.

(7) Unless otherwise specified, a contract carrier is subject only to Title 49, Code of Federal Regulations, Part 391, except 391.11(b)(4) and Subpart E, Parts 393, 395, and 396, except §396.17.

(b) Exceptions. Exceptions adopted by the director of the Texas Department of Public Safety not specified in Texas Transportation Code, §644.053, are as follows:

(1) Title 49, Code of Federal Regulations, Part 393.86, requiring rear-end protection shall not be applicable provided the vehicle was manufactured prior to September 1, 1991 and is used solely in intrastate commerce.

(2) Drivers of vehicles under this section operating in intrastate transportation shall not be permitted to drive after having worked and/or driven for 70 hours in any consecutive seven-day period. A driver may restart a consecutive seven-day period after taking 34 or more consecutive hours off-duty. Drivers in intrastate transportation violating the 70 hour limit provided in this paragraph will be placed out-of-service until no longer in violation.

(3) Drivers of vehicles operating in intrastate transportation claiming the 150 air mile radius exemption in subsection (a)(4) of this section must return to the work reporting location; be released from work within 12 consecutive hours; and have at least 8 consecutive hours off-duty separating each 12 hours on-duty.

(4) Title 49, Code of Federal Regulations, Part 391.11(b)(1), is not adopted for intrastate drivers. The minimum age for an intrastate driver shall be 18 years of age. Intrastate drivers in violation of this paragraph shall be placed out-of-service until no longer in violation.

(5) Title 49, Code of Federal Regulations, Part 391.11(b)(2), is not adopted for intrastate drivers. An intrastate driver must have successfully passed the examination for a Texas Commercial Driver's License and be a minimum age of 18 years old.

(6) Texas Transportation Code, §547.401 and §547.404, concerning brakes on trailers weighing 15,000 pounds gross weight or less take precedence over the brake requirements in the federal regulations for trailers of this gross weight specification unless the vehicle is required to meet the requirements of Federal Motor Vehicle Safety Standard No. 121 (Title 49, Code of Federal Regulations 571.121) applicable to the vehicle at the time it was manufactured.

(7) Title 49, Code of Federal Regulations, Part 390.23 (Relief from Regulations), is adopted for intrastate motor carriers with the following exceptions:

(A) Title 49, Code of Federal Regulations, Part 390.23(a)(2) is not applicable to intrastate motor carriers making emergency residential deliveries of heating fuels or responding to a pipeline emergency, provided the carrier:

(i) documents the type of emergency, the duration of the emergency, and the drivers utilized; and

(ii) maintains the documentation on file for a minimum of six months. An emergency under this paragraph is one that if left unattended would result in immediate serious bodily harm, death or substantial property damage but does not include routine requests to re-fill empty propane gas tanks.

(B) The requirements of Title 49, Code of Federal Regulations, Parts 390.23(c)(1) and (2), for intrastate motor carriers shall be:

(i) the driver has met the requirements of Texas Transportation Code, Chapter 644; and

(ii) the driver has had at least eight consecutive hours off-duty when the driver has been on duty for 15 or more consecutive hours, or the driver has had at least 34 consecutive hours off duty when the driver has been on duty for more than 70 hours in seven consecutive days.

(8) Title 49, Code of Federal Regulations, Part 380, (Subparts A - D), is not adopted for intrastate motor carriers and drivers. Title 49, Code of Federal Regulations, Part 380 (Subpart E) is adopted for intrastate motor carriers and drivers. Intrastate motor carriers and drivers must complete the requirements of Title 49, Code of Federal Regulations, Part 380.500 on or before July 31, 2005.

(9) In accordance with §4132 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETA-LU) (Pub. L. 109-59), the hours of service regulations in this subchapter are not applicable to utility service vehicles that operate in either interstate or intrastate commerce. Utility service vehicles are those vehicles operated by public utilities, as defined in the Public Utility Regulatory Act, the Gas Utility Regulatory Act, the Texas Water Code, Title 49, Code of Federal Regulations, Part 395.2, or other applicable regulations, and charged with the responsibility for maintaining essential services to the public to protect health and safety.

(10) The United States Department of Transportation number requirements in Texas Transportation Code, Chapter 643 do not apply to vehicles/motor carriers operating exclusively in intrastate commerce and that are exempted from the requirements by Texas Transportation Code, §643.002.

§4.16. Administrative Penalties, Payment, Collection, and Settlement of Penalties.

(a) Administrative Penalties.

(1) The compliance review may result in the initiation of an enforcement action based upon the number and degree of seriousness of the violations discovered during the review as well as those factors listed in Title 49, Code of Federal Regulations, Part 385.7. As a result of the enforcement action, the department may impose an administrative penalty against a motor carrier who violates a provision of the Texas Transportation Code, Title 7, Subtitle B, Chapter 522 (relating to Commercial Driver's License), Subtitle C, Chapters 541 - 600 (relating to the Rules of the Road), and Subtitle F, Chapter 644 (relating to Commercial Motor Vehicles), including any amendments not codified in the Texas Transportation Code. Each of these provisions relates to the safe operation of a commercial motor vehicle under Texas Transportation Code, §644.153(b).

(2) The department shall have discretion in determining the appropriate amount of the administrative penalty assessed for each violation, and adopts the Federal Uniform Fine Assessment Program as a method of determining penalty assessment. A penalty under this section may not exceed the maximum penalty provided for a violation of a similar federal safety regulation. The department retains the authority to reduce the administrative penalty calculated by the Federal Uniform Fine Assessment Program when the interests of justice require it.

(3) For motor carriers whose verified annual gross revenue is less than one million dollars, the department will assess an alternative administrative penalty according to the schedule listed in the figure, if the alternative administrative penalty would be less than the amount calculated by the Federal Uniform Fine Assessment Program.
Figure: 37 TAC §4.16(a)(3) (No change.)

(A) General motor carriers may be assessed an alternative administrative penalty, as listed in Table 1, that is the following percentage of their gross revenue.

(B) Passenger or hazardous materials motor carriers may be assessed an alternative administrative penalty, as listed in Table 2, that is the following percentage of their gross revenue

(4) Under certain circumstances, the department may deviate from the Federal Uniform Fine Assessment Program and instead issue up to the maximum penalty provided. These circumstances include, but are not limited to, the following:

(A) A motor carrier who does not provide credible information about the size of its operations (revenue, fleet mileage, number of trucks, and number of drivers), may be subject to maximum penalties under federal law for violations cited.

(B) A carrier which has been penalized (Notice of Claim issued) twice in the previous two years or three times in the previous six years for a given violation may be subject to maximum penalties for a current violation of the same section. Any prior violations used in accordance with this paragraph which are overturned on appeal before a current penalty becomes a "final agency decision" will result in reconsideration, and recalculation if applicable, of the current penalty amount.

(5) [~~(4)~~] In no case will any penalty or group of penalties assessed according to this section be less than a total of $500.

(6) [~~(5)~~] The department will send a Notice of Claim to the person(s), Firm, or business in violation of this subchapter by certified mail, return receipt requested, by personal service, or another manner of delivery that records the receipt of the notice by the person responsible requiring a response within 20 business days. The notice will contain the following language in bold, large face type: "FAILURE TO PAY THIS CLAIM OR RESPOND, AS SPECIFIED IN THE NOTICE OF CLAIM, WITHIN 20 BUSINESS DAYS WILL RESULT IN THIS NOTICE OF CLAIM BEING DEEMED A 'FINAL DEPARTMENT DECISION.' A PERSON WHO IS SUBJECT TO AN ADMINISTRATIVE PENALTY IMPOSED BY THE DEPARTMENT UNDER TEXAS TRANSPORTATION CODE, §644.153 IS REQUIRED TO PAY THE ADMINISTRATIVE PENALTIES OR RESPOND TO THE DEPARTMENT'S NOTICE OF CLAIM. A PERSON WHO FAILS TO PAY, OR BECOMES DELINQUENT IN THE PAYMENT OF THE ADMINISTRATIVE PENALTIES IMPOSED BY THE DEPARTMENT UNDER TEXAS TRANSPORTATION CODE, §644.153 SHALL NOT OPERATE OR DIRECT THE OPERATION OF A COMMERCIAL MOTOR VEHICLE ON THE HIGHWAYS OF THIS STATE UNTIL SUCH TIME AS THE ADMINISTRATIVE PENALTIES HAVE BEEN REMITTED TO THE DEPARTMENT."

(b) Payment, Collection and Settlement of Administrative Penalty.

(1) Payment. A person who is subject to an administrative penalty imposed by the department as authorized by Texas Transportation Code, §644.153(c) is required to pay the administrative penalty. If payment of costs, fees, expenses, and reasonable and necessary attorney's fees incurred by the state has been ordered, any payment of less than the full amount owed will be applied first to the costs, fees, expenses and attorney's fees, then the balance of the payment, if any, will be applied to the administrative penalty. The administrative penalty may be paid through one of the following options:

(A) Full Payment. Full payment of the administrative penalty in the form of a check, cashier's check, or money order made payable to the Department of Public Safety shall be submitted to the Texas Department of Public Safety, Attn: Motor Carrier Bureau, MSC 0522, 6200 Guadalupe, Building P, Austin, Texas 78752-4019. The department may allow payments to be made by electronic funds transfer or valid credit card issued by a financial institution chartered by a state or the federal government or by a nationally recognized credit organization approved by the department.

(i) The department may assess a discount, convenience, or service charge for a payment transaction for electronic funds transfers or credit card payments in an amount that will cover the direct costs to the department for accepting that payment.

(ii) The department may assess a service charge of $30 for a payment transaction that is dishonored or refused for lack of funds or insufficient funds.

(iii) Any charge added to an administrative penalty under paragraph (1)(A)(i) and (1)(A)(ii) of this subsection must be paid in full, along with the administrative penalty. The department's remedies, including issuing and continuing an impoundment order, apply to the charges as well as the administrative penalty.

(B) Installment Payments.

(i) A person(s), firm, or business may, upon approval of the director or the director's designee, be allowed to make installment payments of an administrative penalty, costs, fees, expenses, and reasonable and necessary attorney's fees incurred by the state upon submission of adequate proof of inability to pay the full amount of the claim. An application shall be submitted on a form approved by the department.

(ii) The person(s), firm, or business requesting the installment agreement must submit adequate documentation to support the request and make all relevant financial records of the person(s), firm, or business available to the department for inspection and verification.

(iii) In the event of a default of the installment agreement by the person(s), firm, or business, then the remaining balance of the installment agreement will be due immediately.

(iv) Upon default under an installment agreement, or failure to respond to the notice of claim within 20 business days, the person(s), firm, or business is no longer eligible for installment payments.

(v) Installment payments will be in the form, and subject to service charges, described in paragraph (1)(A) of this subsection.

(2) Non-Payment of Administrative Penalty. A person who fails to pay, reverses an electronic funds transfer payment or credit card payment, or otherwise becomes delinquent in the payment of the administrative penalty imposed by the department as authorized by Texas Transportation Code, §644.153(c) shall not operate or direct the operation of a commercial motor vehicle on the highways of this state until such time as the administrative penalty has been remitted to the department. The department will make every effort to collect an administrative penalty once an enforcement action has been deemed as a Final Departmental Decision, including referring the administrative penalty to the Office of the Attorney General, or issuing an Impoundment Order.

(A) Issuance of an Impoundment Order. Pursuant to Texas Transportation Code, §644.153(o) - (s), the department will issue an Impoundment Order for the impoundment of any commercial motor vehicle that is operated or directed by the person(s), firm, or business that fails to pay an administrative penalty issued under this subchapter.

(B) Timing and Content of Impoundment Order. The department shall issue an Impoundment Order if the person(s), firm, or business fails to respond as specified to the Notice of Claim within 20 business days, or becomes delinquent in the payment of the full amount under subsection (b)(1)(A) of this section or any installment payments under subsection (b)(1)(B) of this section when they become due. The Impoundment Order will contain the following information:

(i) Motor Carrier's name, address, city, zip code and telephone number;

(ii) The motor carrier's Texas Department of Motor Vehicles [~~Transportation~~], United States Department of Transportation, or Motor Carrier number, if any;

(iii) The amount of delinquent penalty assessment;

(iv) The date the Impoundment Order was issued;

(v) A contact number for the Motor Carrier Bureau;

(vi) Notice that the Impoundment Order will be lifted upon receipt of full payment of the administrative penalty as described in paragraph (5) of this subsection; and,

(vii) In bold, conspicuous letters, notice that the carrier is responsible for all costs of storage of the vehicle and its cargo, and towing.

(3) Prior to impounding any vehicle, the trooper shall verify the Impoundment Order is still valid. Verification can only be made by the Manager of the Motor Carrier Bureau or the Manager's designee during regular business hours, or via electronic inquiry into the Motor Carrier Bureau's Vehicle Impoundment Database after regular business hours. If a trooper is unable to verify the Impoundment Order is in force, then the vehicle shall not be impounded.

(4) Once a vehicle is impounded, the trooper impounding the vehicle shall immediately ensure the motor carrier is notified of impoundment of the vehicle. The trooper will inform the motor carrier of the name, location, and telephone number of the vehicle storage facility where the vehicle is impounded, notice the vehicle will not be released until the administrative penalty has been paid, and a contact number for the Motor Carrier Bureau. When a vehicle is impounded after regular business hours, the trooper will notify the Motor Carrier Bureau as soon as possible but not later than the next regular business day.

(5) Release of Impoundment Order and Impounded Vehicles.

(A) To cancel the Impoundment Order and to release a vehicle from impoundment, the motor carrier shall pay the administrative penalty in full, including costs, fees, expenses, and reasonable and necessary attorney's fees incurred by the state.

(B) The payment of the administrative penalty must be for the full amount. The payment must be made by cashier's check or money order payable to the Texas Department of Public Safety.

(C) The payment can be made in one of two ways only:

(i) by sending it to the following address as indicated: Texas Department of Public Safety, Motor Carrier Bureau, MSC 0522, 6200 Guadalupe, Bldg. P, Austin, Texas 78752-4019, Attn: Accounting Clerk, Impoundment Notice; or

(ii) directly to the trooper at the time of the actual impoundment or to any Commercial Vehicle Enforcement employee at any department regional, district or sub-district office. If payment is made on an impounded vehicle after regular business hours, the trooper will notify the Motor Carrier Bureau as soon as possible but not later than the next regular business day.

(D) The impounded vehicle will be released and the impoundment order will be cancelled only upon receipt of payment as specified under paragraph (5)(C)(i) or (ii) of this subsection.

§4.17. Notification and Hearing Processes.

(a) Notification.

(1) The department will notify a motor carrier of an enforcement action by the issuance of a claim letter as described in §4.16(a)(4) of this title (relating to Administrative Penalties, Payments, Collection and Settlement of Penalties).

(2) The notification may be submitted to the motor carrier's last known address as reflected in the records of the department by certified mail, return receipt requested, or personal service, or another manner of delivery that records the receipt of the notice by the person responsible. Electronic mail may be used provided the department verifies receipt by the person responsible. A notification sent by mail shall be presumed to have been received by the motor carrier five days after the date of the mailing.

(3) The motor carrier shall respond within 20 calendar days of receipt of the claim letter with one of the following options:

(A) Payment of the claim in the full amount as outlined in the claim letter; or

(B) Request, in writing, to make installment payments; or

(C) Request, in writing, an informal hearing; or

(D) Request, in writing, an administrative hearing.

(4) A request under paragraph (3)(C) or (D) of this subsection must contain the following:

(A) A concise statement of the issues to be presented at the hearing, including the occurrence of the violations, the amount of the penalty, or both;

(B) defenses the carrier asserts to the department's claim; and

(C) supporting documents to show defenses and/or financial condition of the carrier.

(5) A request under paragraph (3)(C) of this subsection that does not contain the information required in paragraph (4) of this subsection may, after notice and a reasonable opportunity to correct the defect, be set for an administrative hearing rather than an informal hearing, at the discretion of the department.

(b) Informal hearing.

(1) If requested, the department will hold an informal hearing to discuss a penalty recommended under this section. Such hearing will be scheduled and conducted by the manager of the Motor Carrier Bureau or the director's designee.

(2) An informal hearing shall not be subject to rules of evidence and civil procedure except to the extent necessary for the orderly conduct of the hearing. The department will summarize the nature of the violation and the penalty, and discuss the factual basis for such. The motor carrier will be afforded an opportunity to respond to the allegations verbally and/or in writing.

(3) After the conclusion of the informal hearing, the department [~~hearing officer~~] will issue a Memorandum of Decision, which will be provided to the motor carrier. The Memorandum of Decision will contain the following:

(A) a statement of findings by the department [~~hearing officer~~], including a statement of dismissal of charges, modification of penalties, or affirmation of penalties; and

(B) if the penalties are modified or affirmed, the Memorandum of Decision will be accompanied by a revised claim letter requiring the motor carrier to respond within 20 calendar days of receipt of claim letter with one of the following options:

(i) Payment of the claim in the full amount as outlined in the claim letter; or

(ii) Request to make installment payments; or

(iii) Request an administrative hearing before the State Office of Administrative Hearings.

(c) Administrative Hearing.

(1) If the motor carrier requests an administrative hearing, as required by subsection (a)(3)(D) or (b)(3)(B)(iii) of this section, the department shall request an administrative hearing before the State Office of Administrative Hearings. The department will provide written notice by certified mail, return receipt requested, or by personal service of such action to the motor carrier. The administrative law judge for the State Office of Administrative Hearings shall issue a proposal for decision setting out the judge's findings of fact, conclusions of law and recommendations in accordance with agency rules and statutes, including a recommendation regarding the award and amount of costs, fees, expenses, and reasonable and necessary attorney's fees incurred by the state.

(2) The director may adopt those findings and make it part of the director's order; or the director may, pursuant to §2001.058(e), Texas Government Code, increase or decrease the amount of the penalty recommended by the administrative law judge. Notice of the director's order and proposal for decision shall be given to the affected person as required by Chapter 2001, Texas Government Code, and must include a statement that the person is entitled to seek a judicial review of the order. Before the 31st calendar day after the date the director's order becomes final as provided in §2001.004, Texas Government Code, the person must:

(A) pay the penalty in full;

(B) pay the penalty in full and file a petition for judicial review contesting:

(i) the occurrence of the violation(s);

(ii) the amount of the penalty; or

(iii) both the occurrence of the violation(s) and the amount of the penalty.

(C) without paying the penalty, file a petition for review contesting:

(i) the occurrence of the violation(s);

(ii) the amount of the penalty; or

(iii) both the occurrence of the violation(s) and the amount of the penalty.

(3) A contested case under this subsection will be governed by Texas Government Code, Chapter 2001, subchapters C and D, Texas Transportation Code, §644.153, and 37 TAC, Chapter 29 of this title (relating to General Rules of Practice and Procedure), and not by Title 49, Code of Federal Regulations, Part 386, Subparts D and E.

(d) A final department decision is subject to judicial review under the substantial evidence rule, Texas Government Code, §2001.174. For purposes of collection of the administrative penalty, Final Departmental Decision is defined as:

(1) the most recent claim letter issued to a motor carrier who fails to request an informal hearing or an administrative hearing within 20 calendar days of receipt of the Notice of Claim; or

(2) the most recent claim letter issued to a motor carrier who fails to pay or becomes delinquent in the payment of an administrative penalty as outlined in §4.16 of this title (relating to Administrative Penalties, Payment, Collection and Settlement of Penalties); or

(3) a Final Order issued by the director as a result of an administrative hearing as outlined in this subchapter.

§4.19. Administrative Action by the Texas Department of Motor Vehicles [~~Transportation~~].

(a) The director or the director's designee will determine whether the department will request the Texas Department of Motor Vehicles [~~Transportation~~] to revoke a registration issued by the Texas Department of Motor Vehicles [~~Transportation~~] based upon the department's compliance review or safety audit. The director or the director's designee will determine whether the department will request the Texas Department of Motor Vehicles [~~Transportation~~] to take administrative action against a carrier required to register with the Texas Department of Motor Vehicles [~~Transportation~~] under Chapter 643 of the Texas Transportation Code.

(b) This determination may be based upon the following:

(1) an unsatisfactory safety rating under Title 49, Code of Federal Regulations, Part 385;

(2) multiple violations of Texas Transportation Code, Chapter 644, a rule adopted under Texas Transportation Code, Chapter 644, or Texas Transportation Code, Subtitle C (Relating to Rules of the Road); and/or

(3) not properly registering as a motor carrier with the Texas Department of Motor Vehicles [~~Transportation~~] as required in Texas Transportation Code, Chapter 643.

(c) Once the determination has been made the director or the director's designee will forward a letter to the executive director of the Texas Department of Motor Vehicles or the executive director's designee [~~Transportation~~] requesting said department initiate an administrative action against the motor carrier.

(d) Any administrative action initiated by the Texas Department of Motor Vehicles [~~Transportation~~], pursuant to this section, shall be administered in the manner specified by the rules of the Texas Department of Motor Vehicles [~~Transportation~~].

§4.21. Reports of Valid Positive Results on Alcohol and Drug Tests.

(a) Reporting Requirement. An employer required under the federal safety regulations to conduct alcohol and controlled substance testing of employees shall report to the department a valid positive result on an alcohol or controlled substance test performed as part of the carrier's alcohol and drug testing program or consortium, as defined by Title 49, Code of Federal Regulations, Part 382, on an employee of the carrier who holds a commercial driver license issued under Texas Transportation Code, Chapter 522.

(1) The report must be submitted by employers within 10 days of receiving notice of a valid positive result on an alcohol or drug test performed.

(2) Report Submission Requirements.

(A) The report must be submitted on a form prescribed by the department that is available at the following Internet web site address: http://www.txdps.state.tx.us/forms. All information requested on the form must be completed. The completed form must be mailed to MCS Section Supervisor, Motor Carrier Bureau, Texas Department of Public Safety, 6200 Guadalupe, MSC# 0521, Austin, Texas 78752-4019, or sent by facsimile to (512) 424-5310. Unless the report is for a refusal to submit a sample, employers must also attach a legible copy of either the Federal Drug Testing, Custody and Control Form (with at least steps one through six completed), the U.S. Department of Transportation (DOT) Alcohol Testing Form (with at least steps one through three completed), or the Medical Review Officer's or Breath Alcohol Technician's report of a positive, diluted, adulterated, or substituted alcohol or drug test.

(B) Any requestor who has obtained permission to request and receive release of information via electronic mail under subsection (b)(2) of this section may also submit reports via electronic mail. The complete report must be filled out in its entirety, and must be clearly scanned with attachments as described in paragraph (2)(A) of this subsection.

(3) When a valid positive result is obtained on an owner-operator, that owner-operator is responsible for submission of the Report of Valid Positive Drug or Alcohol test to the department.

(4) A Medical Review Officer, Breath Alcohol Technician, laboratory, consortium, or other individuals may submit a Report of Valid Positive Drug or Alcohol Test to the department. Reports by laboratories or other individuals will only be entered in the department's database when verified by the Medical Review Officer or Breath Alcohol Technician.

(5) A dilute positive drug test under Title 49, Code of Federal Regulations, Part 40.197(a) is a valid positive result. A dilute negative drug test is not a valid positive test. A positive drug test from a recollection under Title 49, Code of Federal Regulations, Part 40.197(b) is a valid positive test.

(b) Release of Information. Information regarding Reports of Valid Positive Drug or Alcohol Tests is confidential and only subject to release as provided in Texas Transportation Code, 521.053. A request must be submitted on a form prescribed by the department that is available at the following Internet web site address: http://www.txdps.state.tx.us/forms.

(1) The request form must be mailed to MCS Section Supervisor, Motor Carrier Bureau, Texas Department of Public Safety, 6200 Guadalupe, MSC# 0521, Austin, Texas 78752-4019, or sent by facsimile to (512) 424-5310.

(2) A requester may apply for and obtain permission to request and receive release of information via electronic mail. Electronic mail addresses are subject to initial and continuing verification by the

department. A request must be submitted on a form prescribed by the department that is available at the following Internet web site address: http://www.txdps.state.tx.us/forms. Once a requester has obtained permission to request and receive information via electronic mail, each individual request must still be made with a clearly scanned copy of the form described in subsection (b) of this section and be in compliance with the requirements of Texas Transportation Code, §521.053.

(c) A valid positive test result under §4.22 of this title (relating to Contract Carriers of Certain Passengers) must be reported and maintained in the same manner as reports under subsection (a) of this section. Such information may only be released in the same manner as described in subsection (b) 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 December 14, 2009.

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Stuart Platt
General Counsel
Texas Department of Public Safety
Earliest possible date of adoption: January 24, 2010
For further information, please call: (512) 424-5848

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37 TAC §4.22

The Texas Department of Public Safety (the department) proposes new §4.22 concerning Regulations Governing Transportation Safety.

The new proposed §4.22 is necessary to implement some of the regulations required by SB 481, relating to the regulation of certain contract carriers of railroad employees, passed by the 81st Legislature, effective September 1, 2009.

Cheryl MacBride, Assistant Director, 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.

In addition, Ms. MacBride has 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 rules will be to ensure to the public greater compliance by motor carriers with all of the statutes and regulations pertaining to the safe operation of commercial vehicles in this state.

Ms. MacBride has also determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the section 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.

The department has determined that this proposal is not a "major environmental rule" as defined by Texas Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. This 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 Texas Government Code does not apply to these rules. Accordingly, the department is not required to complete a takings impact assessment regarding these rules.

The Texas Department of Public Safety, in accordance with the Administrative Procedure and Texas Register Act, Texas Government Code, Chapters 2001, et seq., and Texas Transportation Code, Chapter 644, will hold a public hearing on January 7, 2010, at 9:00 a.m., at the Texas Department of Public Safety, Texas Highway Patrol Division, Building G Annex, 5805 North Lamar, Austin, Texas. The purpose of this hearing is to receive comments from all interested persons regarding adoption of the proposed new §4.22 regarding Hazardous Material and Transportation Safety, proposed for adoption under the authority of Texas Transportation Code, Chapter 644, which provides that the director shall, after notice and a public hearing, adopt rules regulating the safe operation of commercial motor vehicles.

Persons interested in attending this hearing are encouraged to submit advance written notice of their intent to attend the hearing and to submit a written copy of their comments. Correspondence should be addressed to Major David Palmer, Texas Highway Patrol Division, Texas Department of Public Safety, P.O. Box 4087, Austin, Texas 78773-0500.

Persons with special needs or disabilities who plan to attend this hearing and who may need auxiliary aids or services are requested to contact Major David Palmer at (512) 424-2775 at least three working days prior to the hearing so that appropriate arrangements can be made.

Other comments on this proposal may be submitted to Major David Palmer, Texas Highway Patrol Division, Texas Department of Public Safety, P.O. Box 4087, Austin, Texas 78773-0500, (512) 424-2775.

The new section is proposed pursuant to Texas Transportation Code, §644.051, which authorizes the director to adopt rules regulating the safe transportation of hazardous materials and the safe operation of commercial motor vehicles; and authorizes the director to adopt all or part of the federal safety regulations, by reference.

Texas Transportation Code, §644.051 is affected by this proposal.

§4.22. Contract Carriers of Certain Passengers.

A contract carrier transporting operating employees of a railroad in vehicles designed to carry 15 passengers or less, as described in Texas Transportation Code, §644.054(a), as well as a driver of any such vehicle, are both subject to the following regulations.

(1) A driver may not operate a vehicle subject to this section for more than 12 hours in a day and must obtain adequate rest in the same manner as is described in §4.12(a)(2) of this title (relating to Exemptions and Exceptions). This driver must comply with all other requirements described in Title 49, Code of Federal Regulations, Part 395.

(2) A driver operating a vehicle subject to this section must comply with Title 49, Code of Federal Regulations, Part 40 and Part 382, relating to USDOT drug and alcohol testing, regardless of whether this driver is a holder of a commercial driver's license.

(A) A valid positive result, whether from a refusal or from a determination of a medical review officer, will be reported to the department's valid positive results database as if the driver were a holder of a commercial driver's license.

(B) A driver who commits prohibited conduct under Title 49, Code of Federal Regulations, Part 382, Subpart B is prohibited from driving a vehicle subject to this section. A driver prohibited under this subsection may remove the prohibition by completing a return-to-duty process as described by Title 49, Code of Federal Regulations, Part 40, Subpart O.

(3) A contract carrier subject to this section must, at a minimum, maintain liability insurance in the amount of $1.5 million for each vehicle, unless a higher amount is required by another law. Whenever a vehicle is detained under Texas Transportation Code, §644.103, or premises are inspected under Texas Transportation Code, §644.104, the contract carrier must present the officer or the employee of the department proof of minimum liability insurance.

This 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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Stuart Platt
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CHAPTER 28. DNA, CODIS, FORENSIC ANALYSIS, AND CRIME LABORATORIES
SUBCHAPTER K. PRESERVATION OF BIOLOGICAL EVIDENCE

37 TAC §§28.171 - 28.175

The Texas Department of Public Safety (the department) proposes new Subchapter K, §§28.171 - 28.175, concerning Preservation of Biological Evidence. These rules are required by HB 3594, which added §411.052, Texas Government Code and amended Article 38.43, Code of Criminal Procedure. The rules provide a mechanism for counties of less than 100,000 population to deliver biological evidence, used in the prosecution and conviction of a defendant sentenced to 10 years or more in prison for an offense under Chapter 19, 21, or 22, Penal Code, to the department for storage, in compliance with Article 38.43, Code of Criminal Procedure.

Cheryl MacBride, Assistant Director, Finance, has determined that for each year of the first five-year period the rule is in effect, the only fiscal implication for state and local government or local economies will be the incidental cost to ship biological evidence to the department.

Ms. MacBride has also determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the section 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, Ms. MacBride has 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 department preserving the post conviction biological evidence.

The department has determined that this proposal is not a "major environmental rule" as defined by Texas Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. This 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 Texas 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 D. Pat Johnson, Director, Crime Laboratory Service, MSC 0460, Texas Department of Public Safety, P.O. Box 4143, Austin, TX 78765-4143, (512) 424-2143.

The new sections 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, §411.052, which states the department shall adopt rules relating to the delivery, cataloging, and preservation of evidence stored under these sections.

Texas Government Code, §411.004(3) and §411.052 are affected by this proposal.

§28.171. Applicability.

These rules apply to the preservation and transfer of biological evidence as specified in Article 38.43, Code of Criminal Procedure.

§28.172. Preservation of Evidence.

(a) Each item of biological evidence is to be packaged separately to prevent contamination.

(b) Each package of evidence will be labeled and marked for identification and sealed to preserve its chain-of-custody.

(c) The evidence will be stored in climate controlled conditions in a department facility, which provides security and limited access.

§28.173. Cataloging.

(a) The following information must accompany all evidence:

(1) full name of convicted person;

(2) date of offense for which he/she was convicted;

(3) county of offense;

(4) offense for which convicted;

(5) sentence that convicted person received;

(6) name of victim of offense; and

(7) name of investigating agency with agency case/incident number.

(b) The department will maintain a catalog of information on all evidence received. It will include the information in subsection (a) of this section.

§28.174. Delivery.

(a) The items of biological evidence must be packaged in a manner to avoid contamination.

(b) Each item shall be in a separate paper package completely sealed.

(c) Each package shall be labeled for identification.

(d) Multiple packages related to a single offense may be placed into one outer container (box).

(e) The sealed and labeled box may be delivered to the department warehouse site in person, by U.S. Postal Service, or by private carrier. The Department of Public Safety Crime Laboratory warehouse address will be posted on the department's web site at www.txdps.state.tx.us.

(f) The items must include a packing slip containing the cataloging information as specified in §28.173(a) of this title (relating to Cataloging).

§28.175. Disposition of Evidence.

(a) The submitting agency, prosecutor's office, or clerk's office shall notify the department at the warehouse address posted on the department's web site within 30 days of the date the inmate either completes his/her sentence, is released on parole or mandatory supervision, or dies.

(b) Upon receiving such notification, the department shall return the evidence to the submitting agency, prosecutor's office, or clerk's office.

This 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 6. TEXAS DEPARTMENT OF CRIMINAL JUSTICE

CHAPTER 152. CORRECTIONAL INSTITUTIONS DIVISION
SUBCHAPTER D. OTHER RULES

37 TAC §152.71

Proposed Amendment Preamble

The Texas Board of Criminal Justice (TBCJ) proposes amendments to §152.71, Acceptance of Gifts and Grants Related to Buildings for Religious and Programmatic Purposes. The proposed amendments are necessary to clarify the existing procedures.

Jerry McGinty, Chief Financial Officer for the Texas Department of Criminal Justice, has determined that for each year of the first five years the rule will be in effect, enforcing, or administering the rule will not have foreseeable implications related to costs or revenues for state or local government.

Mr. McGinty has also determined that, for the first five year period, there will not be an economic impact on persons required to comply with the rule. There will not be an adverse economic impact on small or micro businesses. Therefore, no regulatory flexibility analysis is required. The anticipated public benefit, as a result of enforcing the rule, is to ensure consistency in the manner in which donated buildings and enhancements to existing buildings related to religious and programmatic purposes are accepted by the TBCJ.

Comments should be directed to Melinda Hoyle Bozarth, General Counsel, Texas Department of Criminal Justice, P.O. Box 13084, Austin, Texas 78711, Melinda.Bozarth@tdcj.state.tx.us. Written comments from the general public should be received within 30 days of the publication of this proposal.

The amendments are proposed under Texas Government Code §492.013 and §501.009.

Cross Reference to Statutes: Texas Government Code §492.001.

§152.71. Acceptance of Gifts [~~and Grants~~] Related to Buildings for Religious and Programmatic Purposes.

(a) Policy. Only the [~~The~~] Texas Board of Criminal Justice (TBCJ) is authorized [~~is empowered~~] to accept gifts [~~and grants~~] on behalf of the Texas Department of Criminal Justice (TDCJ) from any public or private source, for use in maintaining and improving correctional programs and services. The TBCJ also specifically and earnestly encourages the involvement of volunteers and volunteer organizations for the purpose of providing reintegration of offenders through secular and spiritual programs. Correctional facilities of the TDCJ typically need additional space or amenities in existing space to provide religious services and programs. The TBCJ and the TDCJ shall actively encourage the donation of buildings and enhancements for buildings that are related to the provision of religious and secular programs.

(b) Procedures.

(1) The TDCJ shall meet with donor groups [~~set up a special account~~] for the purpose of accepting a building [~~funds to provide for buildings~~] or enhancement for a building [~~enhancements~~] related to the provision of religious and secular programs. The TBCJ respects the right of contributors [~~of funds~~] to designate a specific project at a specific TDCJ unit at [~~for~~] which the donated building or enhancement [~~funds~~] will be used.

(2) Subject to final project [~~available State funding and~~] approval by [~~of~~] the executive director or designee, all plans for the building or enhancement must be approved by the Facilities Division. The [~~Executive Director of the TDCJ, the TDCJ Facilities Division may design and build, and shall maintain the various buildings on TDCJ property for which funds have been donated. The TDCJ Facilities Division is authorized to quote a dollar amount needed to construct the building or enhancement. Alternatively, the TDCJ Executive Director may authorize the~~] donor or [~~the donor's~~] designee will [~~to~~] design and construct the donated buildings, at the donor's cost, after a determination that the donor or [~~the donor's~~] designee is qualified to design and construct the donated buildings in accordance with the TDCJ Administrative Plan for Capital Improvements by Donor Groups. All design and/or construction activities by the donor or [~~donor's~~] designee will [~~shall~~] be coordinated through the [~~TDCJ~~] Facilities Division. The

Capital Improvement Review Committee shall review and coordinate all steps pertaining to the project, ensuring all aspects of the TDCJ Administrative Plan for Capital Improvements by Donor Groups are followed.

(3) The TDCJ shall be the owner of the donated or enhanced building and shall be responsible for the operation, control, and maintenance of the building, which shall be used for religious and other correctional programs and services. The naming of buildings obtained under this rule is subject to 37 Texas Administrative Code §155.21 [~~of this title (relating to the Naming of TDCJ Owned Facilities)~~].

(4) Buildings that serve as chapels provided by or enhanced by donations under this rule [~~policy~~] shall provide a place for all offenders to practice their religion guaranteed by the First Amendment to the United States Constitution, in accordance with TDCJ policy and procedures on religious beliefs and practices of offenders [~~(currently embodied in Administrative Directive - 07.30, "Procedures for Religious Programming")~~], as well as to participate in programs with religious and other volunteers, the TDCJ Chaplaincy staff, and other programmatic personnel.

(5) These donations, including donations at privately-operated, state-owned facilities shall be presented at a regularly scheduled meeting of the TBCJ for discussion, consideration, and possible action.

This 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 December 14, 2009.

TRD-200905799
Melinda Hoyle Bozarth
General Counsel
Texas Department of Criminal Justice
Earliest possible date of adoption: January 24, 2010
For further information, please call: (936) 437-6003

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PART 7. TEXAS COMMISSION ON LAW ENFORCEMENT OFFICER STANDARDS AND EDUCATION

CHAPTER 211. ADMINISTRATION

37 TAC §211.1

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

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) proposes the repeal of §211.1, Definitions.

The section is proposed for repeal and a new section is proposed that incorporates additional definitions and changes to Texas Occupations Code, §1701.051 from House Bill 3389, Section 35.

The Commission has determined that for each year of the first five years the repeal as proposed will be in effect, there will be no effect on state or local governments as a result of administering the repeal of this section.

The Commission has determined that for each year of the first five years the repeal as proposed will be in effect, there will be a positive benefit to the public by clarifying definitions used throughout the rules.

The Commission has determined that for each year of the first five years the repeal as proposed will be in effect, there will be no anticipated cost to small business, individuals, or both as a result of the proposed repeal of this section.

Comments may be submitted electronically to *public.comment@tcleose.state.tx.us* or in writing to Mr. Timothy A. Braaten, Executive Director, Texas Commission on Law Enforcement Officer Standards and Education, 6330 E. Highway 290, Ste. 200, Austin, TX 78723-1035.

The repeal is proposed under Texas Occupations Code, Chapter 1701, §1701.151, General Powers of the Commission; Rulemaking Authority, which authorizes the Commission to promulgate rules for administration of this chapter. The repeal as proposed is in compliance with Texas Occupations Code, Chapter 1701, §1701.051, Commission Membership.

No other code, article, or statute is affected by this proposal.

§211.1. 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 December 10, 2009.

TRD-200905729
Timothy A. Braaten
Executive Director
Texas Commission on Law Enforcement Officer Standards and Education
Earliest possible date of adoption: January 24, 2010
For further information, please call: (512) 936-7713

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37 TAC §211.1

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) proposes new §211.1, Definitions.

The new section incorporates additional definitions and changes to Texas Occupations Code, §1701.051 from House Bill 3389, Section 35.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there will be no effect on state or local governments as a result of administering this section.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there will be a positive benefit to the public by clarifying definitions used throughout the rules.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there will be no anticipated cost to small business, individuals, or both as a result of the proposed section.

Comments may be submitted electronically to *public.comment@tcleose.state.tx.us* or in writing to Mr. Timothy A. Braaten, Executive Director, Texas Commission on Law Enforcement

Officer Standards and Education, 6330 E. Highway 290, Ste. 200, Austin, TX 78723-1035.

The new section is proposed under Texas Occupations Code, Chapter 1701, §1701.151, General Powers of the Commission; Rulemaking Authority, which authorizes the Commission to promulgate rules for administration of this chapter. The section as proposed is in compliance with Texas Occupations Code, Chapter 1701, §1701.051, Commission Membership.

No other code, article, or statute is affected by this proposal.

§211.1. Definitions.

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

(1) Academic provider--A school, accredited by the Southern Association of Colleges and Schools and the Texas Higher Education Coordinating Board, which has been approved by the commission to provide basic licensing courses.

(2) Academic alternative program--A program for college credit offered by a training provider recognized by the Southern Association of Colleges and Schools and the Higher Texas Education Board, authorized by the commission to conduct preparatory law enforcement training as part of a degree plan program, and consisting of commission-approved curricula.

(3) Accredited college or university--An institution of higher education that is accredited or authorized by the Southern Association of Colleges and Schools, the Middle States Association of Colleges and Schools, the New England Association of Schools and Colleges, the North Central Association of Colleges and Schools, the Northwest Commission on Colleges and Universities, the Western Association of Schools and Colleges, or an international college or university evaluated and accepted by a United States accredited college or university.

(4) Active--A license issued by the commission that meets the current requirements of licensure and training as determined by the commission.

(5) Agency--A law enforcement unit or other entity, whether public or private, authorized by Texas law to appoint a person licensed or certified by the commission.

(6) Administrative Law Judge (ALJ)--An administrative law judge appointed by the chief administrative law judge of the State Office of Administrative Hearings.

(7) Alternative delivery--A learning event characterized by a separation of place or time between the instructor and student, the students, and/or the student and learning resources; and in which the interaction between these is conducted through one or more media.

(8) Appointed--Elected or commissioned by an agency as a peace officer, reserve or otherwise selected or assigned to a position governed by the Occupations Code, Chapter 1701, without regard to pay or employment status.

(9) Background investigation--A pre-employment background investigation that is designed to satisfy:

(A) that an applicant is in compliance with all minimum standards for employment; and

(B) that an applicant is screened out, who, based on their past history or other relevant information, is found to be unsuitable for the position in question.

(C) The background investigation consists of a report that documents, but is not limited to the following:

(i) a review of all previous law enforcement employment, including contacting all former law enforcement employers;

(ii) an investigation looking specifically at a person's dependability; integrity; initiative; situational reasoning ability; self-control; writing skills; reading skills; oral communications skills; interpersonal skills; and physical ability; and

(iii) a report that documents an investigation into an applicant's suitability for licensing and appointment which includes: biographical data; scholastic data; employment data; criminal history data; interviews with references, supervisors, and other people who have knowledge of the person's abilities, skills, and character; and a summary of the investigator's findings and conclusions regarding the applicant's moral character and suitability.

(10) Basic licensing course--Any current commission developed course that is required before an individual may be licensed by the commission.

(11) Basic peace officer course--The current commission developed course(s) required for licensing as a peace officer, taught at a licensed law enforcement academy in accordance with commission requirements.

(12) Certified copy--A true and correct copy of a document or record certified by the custodian of records of the submitting entity.

(13) Chief administrator--The head or designee of a law enforcement agency.

(14) Commission--The Texas Commission on Law Enforcement Officer Standards and Education.

(15) Commissioned--Has been given the legal power to act as a peace officer or reserve, whether elected, employed, or appointed.

(16) Commissioners--The nine commission members appointed by the governor.

(17) Contract jail--A correctional facility, operated by a county, municipality or private vendor, operating under a contract with a county or municipality, to house inmates convicted of offenses committed against the laws of another state of the United States, as provided by Government Code, §511.0092.

(18) Contractual training provider--A law enforcement agency, a law enforcement association, alternative delivery trainer, or proprietary training contractor that conducts specific education and training under a contract with the commission.

(19) Convicted--Has been adjudged guilty of or has had a judgment of guilt entered in a criminal case that has not been set aside on appeal, regardless of whether:

(A) the sentence is subsequently probated and the person is discharged from probation;

(B) the charging instrument is dismissed and the person is released from all penalties and disabilities resulting from the offense; or

(C) the person is pardoned, unless the pardon is expressly granted for subsequent proof of innocence.

(20) Court-ordered community supervision--Any court-ordered community supervision or probation resulting from a deferred adjudication or conviction by a court of competent jurisdiction. However, this does not include supervision resulting from a pretrial diversion.

(21) Distance education--The enrollment and study with an educational institution, which provides lesson materials prepared in a sequential and logical order for study by students on their own.

(22) Duty ammunition--Ammunition required or permitted by the agency to be carried on duty.

(23) Endorsement--An official document stating that an individual has met the minimum training standards appropriate to the type of examination sought as determined by the commission.

(24) Executive director--The executive director of the commission or any individual authorized to act on behalf of the executive director.

(25) Experience--Includes each month, or part thereof, served as a peace officer, reserve, jailer, telecommunicator, or federal officer. Credit may, at the discretion of the executive director, be awarded for relevant experience from an out-of-state agency.

(26) Firearms--Any handgun, shotgun, precision rifle, patrol rifle, or fully automatic weapon that is carried by the individual officer in an official capacity.

(27) Firearms proficiency--Successful completion of the annual firearms proficiency requirements.

(28) Field training program--A program intended to facilitate a transition from the academic setting to the performance of the general duties of the appointing agency.

(29) Governing body resolution--A formal expression or action by a governing body authorizing a particular act, transaction, appointment, intention, or decision.

(30) High School Diploma--An earned high school diploma or passing score on the general education development test indicating a high school graduation level. Attainment of an associate or baccalaureate degree from an accredited college or university shall be evidence of having met this standard.

(31) Home School Diploma--An earned diploma from a student who predominately receives instruction in a general elementary or secondary education program that is provided by the parent, or a person in parental authority, in or through the child's home. (Education Code §29.916)

(32) Individual--A human being who has been born and is or was alive.

(33) Jailer--A person employed or appointed as a jailer under the provisions of the Local Government Code, §85.005, or Government Code §511.0092.

(34) Killed in the line of duty--A death that is the directly attributed result of a personal injury sustained in the line of duty.

(35) Law--Including, but not limited to, the constitution or a statute of this state, or the United States; a written opinion of a court of record; a municipal ordinance; an order of a county commissioners' court; or a rule authorized by and lawfully adopted under a statute.

(36) Law enforcement academy--A school operated by a governmental entity that has been licensed by the commission, which may provide basic licensing courses and continuing education.

(37) Law enforcement automobile for training--A vehicle equipped to meet the requirements of an authorized emergency vehicle as identified by Transportation Code §546.003 and §547.702.

(38) Lesson plan--Detailed guides from which an instructor teaches. The plan includes the goals, specific content and subject matter, performance or learning objectives, references, resources, and method of evaluating or testing students.

(39) License--A license required by law or a state agency rule that must be obtained by an individual to engage in a particular business.

(40) Licensee--An individual holding a license issued by the commission.

(41) Line of duty--Any lawful and reasonable action, which a Texas peace officer is required or authorized by rule, condition of employment, or law to perform. The term includes an action by the individual at a social, ceremonial, athletic, or other function to which the individual is assigned by the individual's employer.

(42) Moral character--The propensity on the part of a person to serve the public of the state in a fair, honest, and open manner.

(43) Officer--A peace officer or reserve identified under the provisions of the Occupations Code, §1701.001.

(44) Patrol rifle--Any magazine-fed repeating rifle with iron/open sights or with a frame mounted optical enhancing sighting device, 3 power or less, that is carried by the individual officer in an official capacity.

(45) Peace officer--A person elected, employed, or appointed as a peace officer under the provisions of the Occupations Code, §1701.001.

(46) Personal Identification Number (PID)--a unique computer-generated number assigned to individuals for identification in the commission's electronic database.

(47) Placed on probation--Has received an adjudicated or deferred adjudication probation for a criminal offense.

(48) POST--State or federal agency with jurisdiction similar to that of the commission, such as a peace officer standards and training agency.

(49) Precision rifle--Any rifle with a frame mounted optical sighting device greater than 3 power that is carried by the individual officer in an official capacity.

(50) Proprietary training contractor--An approved training contractor who has a proprietary interest in the intellectual property delivered.

(51) Public security officer--A person employed or appointed as an armed security officer by this state or a political subdivision of this state. The term does not include a security officer employed by a private security company that contracts with this state or a political subdivision of this state to provide security services for the entity.

(52) Reactivate--To make a license issued by the commission active after at least a two-year break in service and the licensee's failure to complete legislatively required training.

(53) Reinstate--To make a license issued by the commission active after disciplinary action or failure to obtain required continuing education.

(54) Renewed--Continued as an active license issued by the commission.

(55) Reserve--A person appointed as a reserve law enforcement officer under the provisions of the Occupations Code, §1701.001.

(56) Restore--To make a license issued by the commission active after surrender of license.

(57) Self-assessment--Completion of the commission created process, which gathers information about a training or education program.

(58) Separation--An explanation of the circumstances under which the person resigned, retired, or was terminated, reported on the form currently prescribed by the commission, in accordance with Occupations Code, §1701.452.

(59) SOAH--The State Office of Administrative Hearings.

(60) Successful completion--A minimum of:

(A) 70 percent or better; or

(B) C or better; or

(C) pass, if offered as pass/fail.

(61) TCLEDDS--Texas Commission on Law Enforcement Data Distribution System.

(62) Telecommunicator--A dispatcher or other emergency communications specialist appointed under or governed by the provisions of the Occupations Code, Chapter 1701.

(63) Training coordinator--An individual, appointed by a commission-recognized training provider, who meets the requirements of §215.9 of this title (relating to Training Coordinator).

(64) Training cycle--A 48-month period as established by the commission. Each training cycle is composed of two contiguous 24-month units.

(65) Training hours--Classroom or distance education hours reported in one-hour increments.

(66) Training program--An organized collection of various resources recognized by the commission for providing preparatory or continuing training. This program includes, but is not limited to, learning goals and objectives, academic activities and exercises, lesson plans, exams, skills training, skill assessments, instructional and learning tools, and training requirements.

(67) Training provider--A governmental body, law enforcement association, alternative delivery trainer, or proprietary entity credentialed by the commission to provide preparatory or continuing training for licensees or potential licensees.

(68) Verification (verified)--The confirmation of the correctness, truth, or authenticity of a document, report, or information by sworn affidavit, oath, or deposition.

(b) The effective date of this section is April 15, 2010.

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

Filed with the Office of the Secretary of State on December 10, 2009.

TRD-200905730

Timothy A. Braaten

Executive Director

Texas Commission on Law Enforcement Officer Standards and Education

Earliest possible date of adoption: January 24, 2010

For further information, please call: (512) 936-7713

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CHAPTER 217. LICENSING REQUIREMENTS

37 TAC §217.19

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) proposes an amendment to §217.19, Reactivation of a License. Subsection (e) is amended to reflect current licensing standards. Subsection (f) is amended to remove retired officers from this section. Subsection (g) is re-lettered and amended to reflect the effective date of the changes.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there will be no effect on state or local governments as a result of administering this section.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there will be a positive benefit to the public by eliminating confusion between reactivating licenses and the special requirements for retired peace officer reactivations.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there will be no anticipated cost to small business, individuals, or both as a result of the proposed section.

Comments may be submitted electronically to *public.comment@tcleose.state.tx.us* or in writing to Mr. Timothy A. Braaten, Executive Director, Texas Commission on Law Enforcement Officer Standards and Education, 6330 E. Highway 290, Ste. 200, Austin, TX 78723-1035.

The amendment is proposed under Texas Occupations Code, Chapter 1701, §1701.151, General Powers of the Commission; Rulemaking Authority, which authorizes the Commission to promulgate rules for administration of this chapter.

The rule amendment as proposed is in compliance with Texas Occupations Code, Chapter 1701, §1701.316, Reactivation of Peace Officer License.

No other code, article, or statute is affected by this proposal.

§217.19. Reactivation of a License.

(a) The commission will place all licenses in an inactive status when the licensee has not been reported to the commission as appointed for more than two years unless the licensee has met and continues to meet the continuing education required by §217.11 of this chapter.

(b) The holder of an inactive license is unlicensed for purposes of these sections and the Texas Occupations Code, Chapter 1701.

(c) This section includes any permanent peace officer qualification certificate with an effective date before September 1, 1981.

(d) This section includes any jailer licenses issued after March 1, 2001.

(e) In order to reactivate a license, an individual must:

(1) meet the current licensing standards[~~, with successful completion of a basic licensing course current at the time of initial licensure; fulfilling this requirement~~];

(2) successfully complete the legislatively required continuing education for the current training unit;

(3) make application and submit any required fee(s) for an endorsement in the format currently prescribed by the commission;

(4) obtain an endorsement, issued by the commission, giving the individual eligibility to take the required licensing examination; and

(5) pass the licensing examination for the license to be reactivated. After three failures the individual must re-qualify by repeating the entire training course for the license sought.

(f) The effective date of this section is April 15, 2010.

~~[(f) In order for a retired peace officer to reactivate a license, a retiree must:]~~

~~[(1) meet the current licensing standards, with successful completion of a basic licensing course current at the time of initial licensure; fulfilling this requirement;]~~

~~[(2) successfully complete the legislatively required continuing education for the current training unit; and]~~

~~[(3) make application and submit any required fee(s) for retired reactivation in the format currently prescribed by the commission;]~~

~~[(g) The effective date of this section is January 1, 2009.]~~

This 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 December 10, 2009.

TRD-200905731
Timothy A. Braaten
Executive Director
Texas Commission on Law Enforcement Officer Standards and Education
Earliest possible date of adoption: January 24, 2010
For further information, please call: (512) 936-7713

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37 TAC §217.20

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) proposes new §217.20, Retired Peace Officer Reactivation. This rule is added to cover the requirements for reactivating a retired peace officer license.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there will be no effect on state or local governments as a result of administering this section.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there will be a positive benefit to the public by clearly identifying the requirements of reactivating a retired peace officer license.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there will be no anticipated cost to small business, individuals, or both as a result of the proposed section.

Comments may be submitted electronically to *public.comment@tcleose.state.tx.us* or in writing to Mr. Timothy A. Braaten, Executive Director, Texas Commission on Law Enforcement Officer Standards and Education, 6330 E. Highway 290, Ste. 200, Austin TX 78723-1035.

The section is proposed under Texas Occupations Code, Chapter 1701, §1701.151, General Powers of the Commission; Rulemaking Authority, which authorizes the Commission to promulgate rules for administration of this chapter.

The rule section as proposed is in compliance with Texas Occupations Code, Chapter 1701, §1701.3161, Reactivation of Peace Officer License: Retired Peace Officers.

No other code, article, or statute is affected by this proposal.

§217.20. Retired Peace Officer Reactivation.

(a) A retired peace officer license becomes inactive when the licensee has not been reported to the commission as appointed for more than two years and the continuing education requirements have not been met.

(b) The holder of an inactive license is unlicensed for purposes of these sections and the Texas Occupations Code, Chapter 1701.

(c) In order for a retired peace officer to reactivate a license, a retiree must meet the reactivation requirements of Texas Occupations Code §1701.3161.

(d) The effective date of this section is April 15, 2010.

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

Filed with the Office of the Secretary of State on December 10, 2009.

TRD-200905732
Timothy A. Braaten
Executive Director
Texas Commission on Law Enforcement Officer Standards and Education
Earliest possible date of adoption: January 24, 2010
For further information, please call: (512) 936-7713

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CHAPTER 219. PRELICENSING AND REACTIVATION COURSES, TESTS, AND ENDORSEMENTS

37 TAC §219.1

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) proposes an amendment to §219.1, Eligibility to Take State Examinations. Subsection (i) is amended to clarify a basic licensing course after three failures. Subsection (j) is amended to a basic licensing course after three failures. Subsection (k) is amended to reflect the effective date of the changes.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there will be no effect on state or local governments as a result of administering this section.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there will be a positive benefit to the public by clarifying what courses are required after three failures on the licensing exams.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there will

be no anticipated cost to small business, individuals, or both as a result of the proposed section. Individuals currently have to repeat the basic licensing course after three failures.

Comments may be submitted electronically to *public.comment@tcleose.state.tx.us* or in writing to Mr. Timothy A. Braaten, Executive Director, Texas Commission on Law Enforcement Officer Standards and Education, 6330 E. Highway 290, Ste. 200, Austin, TX 78723-1035.

The amendment is proposed under Texas Occupations Code, Chapter 1701, §1701.151, General Powers of the Commission; Rulemaking Authority, which authorizes the Commission to promulgate rules for administration of this chapter.

The rule amendment as proposed is in compliance with Texas Occupations Code, Chapter 1701, §1701.304, Examination.

No other code, article, or statute is affected by this proposal.

§219.1. Eligibility to Take State Examinations.

(a) To be eligible to take a state licensing examination, an individual must have a valid endorsement.

(b) A valid endorsement is based on:

(1) a previously completed commission approved basic licensing course;

(2) an expired commission licensing examination result, over two years old;

(3) reactivating a Texas license under §217.19;

(4) out of state training, licensing, or certification the commission [~~Commission~~] accepts as a peace officer, federal or military training; or

(5) county corrections training accepted from Texas Occupations Code Chapter 1701, §1701.310.

(c) A valid endorsement shall:

(1) be in the approved commission format,

(2) be a completed original document bearing all required signatures,

(3) state that the examinee has met the current minimum training standards appropriate to the license sought, and

(4) include a date of issue and an expiration date.

(d) For an endorsement to be or remain valid:

(1) it must not be issued in error or based on false or incorrect information; specifically, the applicant must meet the current enrollment standards; or if previously licensed, have met the enrollment standards at initial licensure; and

(2) it must be presented before its expiration date.

(e) An endorsement to take an examination is issued by a training coordinator, the registrar of a licensed academic alternative provider, the executive director of the commission, or a person authorized by the executive director. Duplicate endorsements may only be issued by the executive director of the commission.

(f) In order to issue the endorsement, the person issuing such an endorsement, other than a commission employee, must have on file for the person to whom it is issued, written documentation of successful completion of the basic licensing course for the license sought; and

(1) written documentation that the person to whom it is issued was previously licensed by the commission, or

(2) if the person is not currently licensed by the commission, written documentation that the applicant meets the current enrollment standards.

(g) In order to receive an endorsement from the commission, individuals must meet all current requirements, to include submitting any required application currently prescribed by the commission, requested documentation, and any required fee.

(h) An examination may not be taken by an individual who already holds an active license or certificate to be awarded upon passing that examination.

(i) Once an endorsement is issued, an examinee will be allowed three opportunities to pass the examination while the examinee's endorsement remains valid. After three failures, the examinee must re-qualify by repeating the basic licensing course [~~entire training course~~] for the license sought. If an attempt is invalidated for any reason, except for a commission error, that attempt will count as one of the three opportunities.

(j) Once an endorsement from an academic alternative provider expires after three failures individuals will be required to re-qualify by completing the basic licensing course [~~standard coursework~~] for the license sought.

(k) The effective date of this section is April 15, 2010 [~~March 1, 2008~~].

This 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 December 10, 2009.

TRD-200905733
Timothy A. Braaten
Executive Director
Texas Commission on Law Enforcement Officer Standards and Education
Earliest possible date of adoption: January 24, 2010
For further information, please call: (512) 936-7713

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CHAPTER 223. ENFORCEMENT

37 TAC §223.13

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) proposes an amendment to §223.13, Voluntary Surrender of License. The title will be amended for clarity. Subsections (a), (d), and (f)(2) are amended to clarify language. Subsection (h) is amended to reflect the effective date of the changes.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there will be no effect on state or local governments as a result of administering this section.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there will be a positive benefit to the public by clarifying the language for surrender of a license.

The Commission has determined that for each year of the first five years the section as proposed will be in effect, there will be

no anticipated cost to small business, individuals, or both as a result of the proposed section.

Comments may be submitted electronically to *public.comment@tcleose.state.tx.us* or in writing to Mr. Timothy A. Braaten, Executive Director, Texas Commission on Law Enforcement Officer Standards and Education, 6330 E. Highway 290, Ste. 200, Austin, TX 78723-1035.

The amendment is proposed under Texas Occupations Code, Chapter 1701, §1701.151, General Powers of the Commission; Rulemaking Authority, which authorizes the Commission to promulgate rules for administration of this chapter.

The rule amendment as proposed is in compliance with Texas Occupations Code, Chapter 1701, §1701.501, Disciplinary Action.

No other code, article, or statute is affected by this proposal.

§223.13. [~~Voluntary~~] Surrender of License.

(a) A licensee may [~~voluntarily~~] surrender a license:

(1) as part of an employee termination agreement;

(2) as part of a plea bargain to a criminal charge;

(3) as part of an agreed settlement to commission action; or

(4) for any other reason.

(b) A license may be surrendered either permanently or for a stated term.

(c) Effective dates:[~~.~~]

(1) the [~~The~~] beginning date for any surrender shall be the date stated in the request or, if none, the date it was received by the commission;[~~.~~]

(2) a [~~A~~] term surrender shall have its ending date stated in the request; and[~~.~~]

(3) any [~~Any~~] request without a stated ending date shall be construed as a permanent surrender.

~~[(4) A permanent surrender shall have no ending date.]~~

(d) A licensee may [~~voluntarily~~] surrender any license by sending, or causing to be sent, a signed, notarized, written request to the executive director, who may accept or reject the request. The signed written request shall indicate that the licensee understands and has knowledge of the consequences of the document being signed. The executive director may accept requests for [~~voluntary~~] surrender submitted to the commission in any other form that indicates the licensee intends to [~~voluntarily~~] surrender the license to the commission. The executive director may liberally construe the intent of any request and may, specifically, construe the surrender of any single commission license to be a surrender of all other licenses held unless the request expressly states otherwise. The surrender should include a summary of the reason for the surrender.

(e) If accepted, the licensee is no longer licensed [~~under either type of surrender~~]:

(1) effective on the beginning date of the surrender; and

(2) except for permanent surrenders, until such person applies for and meets the requirements of a new license.

(f) In case of such application for reinstatement, the executive director:

(1) shall deny the new license based upon any failure to meet the current minimum standards for licensing;

(2) may deny a new license of the same or any other type based solely upon a [~~voluntary~~] surrender:

(A) if permanent; or

(B) [~~if~~] for a term that has not yet expired;

(3) may approve the reinstatement and may give notice to any agency or individual named in the original surrender, and then may impose any previously agreed conditions (such as suspensions, probated terms of suspension, etc.).

(g) The executive director shall inform the commission of any of the following that have occurred since the last meeting:

(1) any surrender that was accepted; and

(2) any application for reinstatement that was granted or denied.

(h) The effective date of this section is April 15, 2010 [~~June 1, 2004~~].

This 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 December 10, 2009.

TRD-200905734
Timothy A. Braaten
Executive Director
Texas Commission on Law Enforcement Officer Standards and Education
Earliest possible date of adoption: January 24, 2010
For further information, please call: (512) 936-7713

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 2. DEPARTMENT OF ASSISTIVE AND REHABILITATIVE SERVICES

CHAPTER 109. OFFICE FOR DEAF AND HARD OF HEARING SERVICES
SUBCHAPTER D. SPECIALIZED TELECOMMUNICATIONS ASSISTANCE PROGRAM

40 TAC §109.409, §109.411

The Texas Health and Human Services Commission (HHSC), on behalf of the Texas Department of Assistive and Rehabilitative Services (DARS), proposes amendments to the DARS rules in Title 40, Part 2, Chapter 109, Office for Deaf and Hard of Hearing Services, by amending Subchapter D, Specialized Telecommunications Assistance Program, §109.409, Eligibility, and §109.411, Entities Authorized to Certify Disability, and by administratively renaming the title of §109.411.

Specifically, DARS is proposing to amend §109.409, Eligibility, to clarify that a person with a claimed requisite disability must also

be certified by an authorized certifier as having such a disability to be eligible for Specialized Telecommunications Assistance Program (STAP) funded equipment or services; and to use language that more closely mirrors the language of the STAP authorizing statute, Texas Utilities Code, §56.152, Eligibility. DARS is also proposing to amend §109.411, to use language that more closely mirrors the language of the STAP authorizing statute, Texas Utilities Code, §56.151, Specialized Telecommunications Assistance Program. Finally, DARS is proposing to rename administratively the title of §109.411, Entities Authorized to Certify Disability, to "Persons Authorized to Certify Disability", to reflect that this section only identifies persons as authorized certifiers, as opposed to "entities", which could encompass businesses, as well as individuals.

The following statutes and regulations authorize the proposed rule amendments: Texas Human Resources Code, Chapters 81, 82, and 117; and Texas Utilities Code, Chapter 56.

Bill Wheeler, DARS Chief Financial Officer, estimates that for each year of the first five years that the proposed amendments are in effect, there will be no foreseeable fiscal implications for state or local governments' costs or revenues as a result of enforcing or administering the proposal. Mr. Wheeler has determined that there is no probable economic cost to persons who are required to comply with the proposal.

Mr. Wheeler also has determined that for each year of the first five years the proposed amendments are in effect, the public benefit anticipated as a result of enforcing the proposal will be clearer rules relating to eligibility for STAP services for the deaf and hard of hearing community.

Additionally, in accordance with Texas Government Code §2001.022, Mr. Wheeler has determined that the proposed amendments will not affect a local economy, and, therefore, no local employment impact statement is required. Finally, Mr. Wheeler has determined that the proposal will have no adverse economic effect on small businesses or micro-businesses.

Written comments on the proposal may be submitted within 30 days of publication of this proposal in the *Texas Register* to Nancy Mikulencak, Rules Coordinator, Texas Department of Assistive and Rehabilitative Services, 4800 North Lamar Boulevard, Suite 200, Austin, Texas 78756.

The amendments are proposed pursuant to HHSC's statutory rulemaking authority under Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of HHSC with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

No other statute, article, or code is affected by this proposal.

§109.409. Eligibility.

To be eligible for assistance from this program an individual must:

(1) be a resident of Texas;

(2) be a person with a disability that impairs [~~interferes with~~] the person's ability to effectively access the telephone network;

(3) be in a situation where no other individual in the household with the same type of disability needing the same type of equipment has received a voucher for equipment unless individuals in the household are financially independent of each other;

(4) not have received a voucher for any specialized telecommunications equipment or services before the 5th anniversary of the date the individual exchanged the previously issued voucher under this program, unless before that date, the individual develops a need for a different type of telecommunications equipment or service under this program because the individual's disability status changes; [~~and~~]

(5) be able to benefit from the specialized telecommunications equipment or service provided by the voucher; and[~~.~~]

(6) be certified as a person with a disability that impairs the person's ability to effectively access the telephone network, by a person or entity authorized in this subchapter to issue such certifications.

§109.411. Persons [~~Entities~~] Authorized to Certify Disability.

(a) An applicant must be certified as a person with a disability that impairs [~~which interferes with~~] the person's ability to effectively access the telephone network. The following can serve as certifiers:

(1) licensed hearing aid specialist;

(2) licensed audiologist;

(3) licensed physician;

(4) DARS rehabilitation counselor, or the Office approved state or federal employee, or the Office approved state or federal contractor;

(5) state certified teacher of individuals who are deaf or hard of hearing;

(6) licensed speech pathologist;

(7) state certified teacher of individuals who are visually impaired;

(8) state certified teacher of individuals who are speech impaired;

(9) state certified special education teacher;

(10) STAP specialist as named in an Office STAP Outreach and Training contract, or Office approved Resource Specialist; or

(11) licensed social worker.

(b) By certifying an application, a certifier is attesting to:

(1) being eligible to certify under the provisions of the program;

(2) having personally met with and assessed the applicant's disability to determine that the applicant is eligible, in accordance with the program eligibility criteria;

(3) having reviewed the information on the application to ensure that the form is completed properly and all requested information has been provided; and

(4) having determined that the applicant will be able to benefit from [~~for~~] access to the telephone network system provided by [~~from~~] the specialized telecommunications equipment or services requested on the application.

(c) An application must be certified before the Office can process and approve the application and issue the voucher.

This 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 December 10, 2009.

TRD-200905743

Sylvia F. Hardman
General Counsel
Department of Assistive and Rehabilitative Services
Earliest possible date of adoption: January 24, 2010
For further information, please call: (512) 424-4050

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PART 12. TEXAS BOARD OF OCCUPATIONAL THERAPY EXAMINERS

CHAPTER 367. CONTINUING EDUCATION

40 TAC §367.2

The Texas Board of Occupational Therapy Examiners proposes an amendment to §367.2 regarding Categories of Continuing Education. The amendment will remove case management as a category of disallowed continuing education, therefore allowing case management courses that meet the definitions of Type 1 and/or Type 2 to be recognized for continuing education by licensees.

John P. Maline, Executive Director of the Executive Council of Physical Therapy and Occupational Therapy Examiners, has determined that for the first five-year period the rule is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Mr. Maline 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 the ability of those licensees whose specialty is case management to take courses for their license renewal which meet the current continuing education requirements.

Comments on the proposed rule may be submitted to Augusta Gelfand, OT Coordinator, Texas Board of Occupational Therapy Examiners, 333 Guadalupe Street, Suite 2-510, Austin, Texas 78701, (512) 305-6900, or through email: augusta.gelfand@mail.capnet.state.tx.us.

The amendment is proposed under the Occupational Therapy Practice Act, Title 3, Subtitle H, Chapter 454, Occupations Code, which provides the Texas Board of Occupational Therapy Examiners with the authority to adopt rules consistent with this Act to carry out its duties in administering this Act.

Title 3, Subtitle H, Chapter 454 of the Occupations Code is affected by this amended section.

§367.2. Categories of Continuing Education.

(a) (No change.)

(b) Unacceptable Continuing Education Activities include but are not limited to:

(1) Any non-instructional time frames such as breaks, meals, introductions, and pre/post testing.

(2) Business meetings

(3) Exhibit hall attendance

(4) Reading journals

(5) Courses such as, but not limited to: grant writing, [~~case management,~~] massage therapy, general management and business, social work, defensive driving, water safety, team building, GRE, GMAT, MCAT preparation, cooking for health, weight management, women's health and stress management, reading techniques, geriatric anthology, general foreign languages.

(6) Facility-based annual required courses such as, but not limited to patient abuse, disposal of hazardous waste, patient privacy, HIPAA & FERPA, blood borne pathogens, and other annual facility required repetitive courses do not count toward continuing education.

(7) Program providers are prohibited from self-promotion of programs, products, and/or services during the presentation of 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.

Filed with the Office of the Secretary of State on December 8, 2009.

TRD-200905672
John P. Maline
Executive Director
Texas Board of Occupational Therapy Examiners
Earliest possible date of adoption: January 24, 2010
For further information, please call: (512) 305-6900

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WITHDRAWN RULES

Withdrawn Rules include proposed rules and emergency rules. A state agency may specify that a rule is withdrawn immediately or on a later date after filing the notice with the Texas Register. A proposed rule is withdrawn six months after the date of publication of the proposed rule in the Texas Register if a state agency has failed by that time to adopt, adopt as amended, or withdraw the proposed rule. Adopted rules may not be withdrawn. (Government Code, §2001.027)

TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 10. TEXAS WATER DEVELOPMENT BOARD

CHAPTER 371. DRINKING WATER STATE REVOLVING FUND

SUBCHAPTER B. PROGRAM REQUIREMENTS

31 TAC §371.22

The Texas Water Development Board withdraws the proposed amendments to §371.22 which appeared in the October 30, 2009, issue of the *Texas Register* (34 TexReg 7555).

Filed with the Office of the Secretary of State on December 8, 2009.

TRD-200905666
Kenneth L. Petersen
General Counsel
Texas Water Development Board
Effective date: December 8, 2009
For further information, please call: (512) 463-8061

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CHAPTER 375. CLEAN WATER STATE REVOLVING FUND

SUBCHAPTER A. GENERAL PROVISIONS

DIVISION 2. PROGRAM REQUIREMENTS

31 TAC §375.18

The Texas Water Development Board withdraws the proposed amendments to §375.18 which appeared in the October 30, 2009, issue of the *Texas Register* (34 TexReg 7556).

Filed with the Office of the Secretary of State on December 8, 2009.

TRD-200905667
Kenneth L. Petersen
General Counsel
Texas Water Development Board
Effective date: December 8, 2009
For further information, please call: (512) 463-8061

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ADOPTED RULES

Adopted rules include new rules, amendments to existing rules, and repeals of existing rules. A rule adopted by a state agency takes effect 20 days after the date on which it is filed with the Secretary of State unless a later date is required by statute or specified in the rule (Government Code, §2001.036). If a rule is adopted without change to the text of the proposed rule, then the *Texas Register* does not republish the rule text here. If a rule is adopted with change to the text of the proposed rule, then the final rule text is included here. The final rule text will appear in the Texas Administrative Code on the effective date.

TITLE 1. ADMINISTRATION

PART 4. OFFICE OF THE SECRETARY OF STATE

CHAPTER 79. BUSINESS ENTITY FILINGS

SUBCHAPTER B. DOCUMENT REVIEW

1 TAC §79.29

The Office of the Secretary of State adopts new §79.29, relating to consent to serve as registered agent. New §79.29 is adopted to implement the requirement in §5.201, Texas Business Organizations Code, that the secretary of state develop the form for written or electronic consent by a registered agent. The new rule is adopted without changes to the proposed text as published in the November 6, 2009, issue of the *Texas Register* (34 TexReg 7727) and will not be republished.

The rule sets forth the form of consent, as well as information pertaining to filing the consent with the secretary of state.

No comments were received regarding the new rule.

STATUTORY AUTHORITY

The new rule implements §5.201(b)(A)(ii) and (b)(B)(ii), Texas Business Organizations Code.

No other code or statute is affected by the adopted rule.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 9, 2009.

TRD-200905685
Lorna Wassdorf
Director, Business and Public Filings
Office of the Secretary of State
Effective date: January 1, 2010
Proposal publication date: November 6, 2009
For further information, please call: (512) 463-5562

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CHAPTER 87. NOTARY PUBLIC

The Office of the Secretary of State (the "agency") adopts the complete repeal and replacement of Chapter 87, concerning notaries public. Specifically, the agency adopts the repeal of §§87.1, 87.4, 87.22, 87.23, 87.25, 87.41 - 87.50, 87.52, 87.54, and 87.60 and new §§87.1 - 87.6, 87.10, 87.11, 87.20 - 87.25, 87.30, 87.40 - 87.44, 87.50, 87.60 - 87.62, and 87.70. New §§87.1, 87.20, 87.44, and 87.50 are adopted with changes to the proposed text as published in the October 16, 2009, issue of the *Texas Register* (34 TexReg 7159) and will be republished. The remaining new sections and the repeals are adopted without changes and will not be republished.

The revisions to Chapter 87 include the following general changes: reorganization of the rules, updates to the language based on statutory revisions, reference to the secretary of state's website, removal of redundant and unnecessary repetition of provisions contained in statute or forms, and clarification of certain procedures.

In addition to the general changes above, the following specific changes are made:

1. Section 87.2 sets forth the eligibility requirements for a Texas notary public. In response to Texas Attorney General Opinion GA-0733, the rejection of an application or revocation of a commission for a final conviction for a crime involving moral turpitude has been changed from discretionary to mandatory.

2. Section 87.6 sets forth the procedure for renewing a commission and clarifies that renewals are subject to the same eligibility criteria as initial applicants.

3. Section 87.11 amends good cause to include ineligibility due to a final felony conviction in an effort to be consistent in the treatment of felonies and crimes involving moral turpitude; to clarify that a final conviction for a crime involving moral turpitude makes an individual ineligible to hold office as a notary public in accordance with Tex. Atty Gen. Op. GA-0733; and to include a failure to respond to a request for public information in accordance with new §87.42 and §87.43.

4. Section 87.30 sets forth the instances when a notary may refuse a request to perform notarial services. This rule is proposed in an effort to provide guidance to notaries on an issue that is not addressed in Chapter 406 of the Texas Government Code.

5. Section 87.41 is added to provide guidance to notaries who want to maintain the notary record book electronically in accordance with §406.014(e) of the Texas Government Code. *Note: The preamble published in the October 16, 2009, issue of the Texas Register made an inadvertent reference to §406.016 instead of §406.014(e).*

6. Section 87.42 is added to provide guidance on requirements of §406.014(b)(c) of the Texas Government Code to provide copies of the notary record book and §87.40 relating to personal information in the notary book. Section 87.43 sets forth the possible disciplinary repercussions for failure to comply with the public information requirements.

7. Section 87.44 is added to provide guidance with respect to records retention requirements for notaries public. The proposed

retention schedule is based on the retention requirements for business records in §72.002 of the Texas Business and Commerce Code.

8. New §87.50 clarifies the process for changing the address of record with the secretary of state pursuant to §406.019 of the Texas Government Code, sets forth the possible disciplinary repercussions for failure to comply with the change of address requirement, and clarifies the process when a commissioned notary moves out of state.

9. New Subchapter G, §§87.60 - 87.62, is added to provide guidance on the new electronic submission of notary applications and bond process that was implemented by the secretary of state in 2009.

10. Section 87.70 is added to provide guidance on the appointment of qualified escrow officers living in adjacent states as Texas notaries public, pursuant to H.B. 652, 81st Leg., eff. Sept. 1, 2009.

11. Sections 87.50 - 87.54 of the previous rules, relating to the issuance of a subpoena, were repealed and were not replaced. The authority of a notary to issue a subpoena is not found in the Texas Government Code and therefore it was determined that Chapter 87 was not the appropriate place for rules regarding this particular authority.

The agency received a written comment on behalf of Notary Public Underwriters Agency of Texas supporting the rulemaking and a written comment on behalf of the American Society of Notaries supporting the rulemaking, with one minor change to §87.44, which has been taken into account in the revised wording of that section.

Sections 87.1(c) and 87.20(1) are revised to correct a typographical error in the agency's web site address. The correct address is "www.sos.state.tx.us/statdoc/statforms.shtml".

Section 87.44 is revised as follows:

§87.44. Records Retention.

A notary shall retain, in a safe and secure manner, copies of the records of notarization performed for the longer of the term of the commission in which the notarization occurred or three years following the date of notarization.

Section 87.50(a) is revised as follows, to correct a typographical error in the web site address and form number:

(a) A notary must notify the secretary of state in writing of a change in address within 10 days of the change. To notify the secretary of state of a change of address, the notary should complete and submit form 2302 (Notary Public Change of Address Form). This form is available on the secretary of state web site at www.sos.state.tx.us/statdoc/statforms.shtml.

SUBCHAPTER A. NOTARY PUBLIC QUALIFICATIONS

1 TAC §§87.1, 87.4, 87.22, 87.23, 87.25

Statutory Authority

The repeals are adopted under the authority of Texas Government Code, §406.023(a), which requires the secretary of state to establish rules for the enforcement and administration of Chapter 406.

Cross Reference to Statutes

The repeals affect Texas Government Code, Chapter 406.

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 December 11, 2009.

TRD-200905768
Lorna Wassdorf
Director, Business and Public Filings
Office of the Secretary of State
Effective date: January 1, 2010
Proposal publication date: October 16, 2009
For further information, please call: (512) 463-5562

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SUBCHAPTER B. REJECTION AND REVOCATION

1 TAC §§87.41 - 87.43

Statutory Authority

The repeals are adopted under the authority of Texas Government Code, §406.023(a), which requires the secretary of state to establish rules for the enforcement and administration of Chapter 406.

Cross Reference to Statutes

The repeals affect Texas Government Code, Chapter 406.

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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Lorna Wassdorf
Director, Business and Public Filings
Office of the Secretary of State
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For further information, please call: (512) 463-5562

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SUBCHAPTER C. ADMINISTRATIVE ACTION

1 TAC §§87.44 - 87.49

Statutory Authority

The repeals are adopted under the authority of Texas Government Code, §406.023(a), which requires the secretary of state to establish rules for the enforcement and administration of Chapter 406.

Cross Reference to Statutes

The repeals affect Texas Government Code, Chapter 406.

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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Lorna Wassdorf
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For further information, please call: (512) 463-5562

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SUBCHAPTER D. SUBPOENAS

1 TAC §§87.50, 87.52, 87.54

Statutory Authority

The repeals are adopted under the authority of Texas Government Code, §406.023(a), which requires the secretary of state to establish rules for the enforcement and administration of Chapter 406.

Cross Reference to Statutes

The repeals affect Texas Government Code, Chapter 406.

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 December 11, 2009.

TRD-200905771
Lorna Wassdorf
Director, Business and Public Filings
Office of the Secretary of State
Effective date: January 1, 2010
Proposal publication date: October 16, 2009
For further information, please call: (512) 463-5562

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SUBCHAPTER E. NOTARY RECORDS

1 TAC §87.60

Statutory Authority

The repeal is adopted under the authority of Texas Government Code, §406.023(a), which requires the secretary of state to establish rules for the enforcement and administration of Chapter 406.

Cross Reference to Statutes

The repeal affects Texas Government Code, Chapter 406.

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 December 11, 2009.

TRD-200905772
Lorna Wassdorf
Director, Business and Public Filings
Office of the Secretary of State
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Proposal publication date: October 16, 2009
For further information, please call: (512) 463-5562

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SUBCHAPTER A. NOTARY PUBLIC QUALIFICATIONS

1 TAC §§87.1 - 87.6

Statutory Authority

The new sections are adopted under the authority of Texas Government Code, §406.023(a), which requires the secretary of state to establish rules for the enforcement and administration of Chapter 406.

Cross Reference to Statutes

The new sections affect Texas Government Code, Chapter 406.

§87.1. Application for a Commission as a Notary Public.

(a) The secretary of state appoints notaries public under the provisions of article IV, §26 of the Texas Constitution and Chapter 406, Government Code.

(b) All persons applying for a notary public commission shall use the application form prescribed by the secretary of state.

(c) The application form is available on the secretary of state web site at www.sos.state.tx.us/statdoc/statforms.shtml or may be obtained by writing the Office of the Secretary of State, Notary Public Unit, P.O. Box 13375, Austin, Texas 78711. See form 2301. The application form for a notary who is an officer or employee of a state agency is form 2301-NB, available on the web site of the State Office of Risk Management at www.sorm.state.tx.us.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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

TRD-200905773
Lorna Wassdorf
Director, Business and Public Filings
Office of the Secretary of State
Effective date: January 1, 2010
Proposal publication date: October 16, 2009
For further information, please call: (512) 463-5562

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SUBCHAPTER B. REJECTION AND REVOCATION

1 TAC §87.10, §87.11

Statutory Authority

The new sections are adopted under the authority of Texas Government Code, §406.023(a), which requires the secretary of state to establish rules for the enforcement and administration of Chapter 406.

Cross Reference to Statutes

The new sections affect Texas Government Code, Chapter 406.

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 December 11, 2009.

TRD-200905774
Lorna Wassdorf
Director, Business and Public Filings
Office of the Secretary of State
Effective date: January 1, 2010
Proposal publication date: October 16, 2009
For further information, please call: (512) 463-5562

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SUBCHAPTER C. ADMINISTRATIVE ACTION

1 TAC §87.20 - 87.25

Statutory Authority

The new sections are adopted under the authority of Texas Government Code, §406.023(a), which requires the secretary of state to establish rules for the enforcement and administration of Chapter 406.

Cross Reference to Statutes

The new sections affect Texas Government Code, Chapter 406.

§87.20. Qualification Under New Name.

During the four-year term of office, a notary public may change the name on the notary commission by submitting the following to the secretary of state:

(1) an Application for Change of Name as a Texas Notary Public (Form 2305 available on the secretary of state web site at www.sos.state.tx.us/statdoc/statforms.shtml);

(2) a rider or endorsement to the bond on file with the secretary of state from the surety company or its agent or representative specifying the change of name;

(3) the current certificate of commission or a signed and notarized statement that the notary public will perform all future notarial acts under the name specified on the amended commission; and

(4) the statutory fees for the issuance of a commission and the filing of a bond.

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 December 11, 2009.

TRD-200905775
Lorna Wassdorf
Director, Business and Public Filings
Office of the Secretary of State
Effective date: January 1, 2010
Proposal publication date: October 16, 2009
For further information, please call: (512) 463-5562

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SUBCHAPTER D. REFUSAL TO PERFORM NOTARIAL SERVICES

1 TAC §87.30

Statutory Authority

The new section is adopted under the authority of Texas Government Code, §406.023(a), which requires the secretary of state to establish rules for the enforcement and administration of Chapter 406.

Cross Reference to Statutes

The new section affects Texas Government Code, Chapter 406.

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 December 11, 2009.

TRD-200905776
Lorna Wassdorf
Director, Business and Public Filings
Office of the Secretary of State
Effective date: January 1, 2010
Proposal publication date: October 16, 2009
For further information, please call: (512) 463-5562

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SUBCHAPTER E. NOTARY RECORDS

1 TAC §§87.40 - 87.44

Statutory Authority

The new sections are adopted under the authority of Texas Government Code, §406.023(a), which requires the secretary of state to establish rules for the enforcement and administration of Chapter 406.

Cross Reference to Statutes

The new sections affect Texas Government Code, Chapter 406.

§87.44. Records Retention.

A notary shall retain, in a safe and secure manner, copies of the records of notarization performed for the longer of the term of the commission in which the notarization occurred or three years following the date of notarization.

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 December 11, 2009.

TRD-200905777
Lorna Wassdorf
Director, Business and Public Filings
Office of the Secretary of State
Effective date: January 1, 2010
Proposal publication date: October 16, 2009
For further information, please call: (512) 463-5562

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SUBCHAPTER F. CHANGE IN ADDRESS

1 TAC §87.50

Statutory Authority

The new section is adopted under the authority of Texas Government Code, §406.023(a), which requires the secretary of state to establish rules for the enforcement and administration of Chapter 406.

Cross Reference to Statutes

The new section affects Texas Government Code, Chapter 406.

§87.50. Change of Address.

(a) A notary must notify the secretary of state in writing of a change in address within 10 days of the change. To notify the secretary of state of a change of address, the notary should complete and submit form 2302 (Notary Public Change of Address Form). This form is available on the secretary of state web site at www.sos.state.tx.us/statdoc/statforms.shtml.

(b) The secretary of state sends all official notices, including notices of complaints, to the notary at the address on file with the secretary's office. Requests to obtain copies of or inspect the records in the notary record book are also directed to the notary at the address on file. Failure to change the address may, consequently, result in a revocation of the notary commission if the notary fails to timely respond to a complaint or to a request for public information.

(c) A notary public who removes his or her residence from Texas vacates the office of notary public and must surrender the notary commission to the secretary of state.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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

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Lorna Wassdorf
Director, Business and Public Filings
Office of the Secretary of State
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For further information, please call: (512) 463-5562

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SUBCHAPTER G. ELECTRONIC SUBMISSIONS OF NOTARY APPLICATIONS AND BONDS

1 TAC §§87.60 - 87.62

Statutory Authority

The new sections are adopted under the authority of Texas Government Code, §406.023(a), which requires the secretary of state to establish rules for the enforcement and administration of Chapter 406.

Cross Reference to Statutes

The new sections affect Texas Government Code, Chapter 406.

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 H. APPOINTMENT OF QUALIFIED ESCROW OFFICER AS NOTARY PUBLIC

1 TAC §87.70

Statutory Authority

The new section is adopted under the authority of Texas Government Code, §406.023(a), which requires the secretary of state to establish rules for the enforcement and administration of Chapter 406.

Cross Reference to Statutes

The new section affects Texas Government Code, Chapter 406.

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 4. AGRICULTURE

PART 2. TEXAS ANIMAL HEALTH COMMISSION

CHAPTER 40. CHRONIC WASTING DISEASE

The Texas Animal Health Commission (Commission) adopts amendments to Chapter 40, Chronic Wasting Disease (CWD). Specifically, the Commission adopts the repeal of §40.5, concerning Identification and Recordkeeping Requirements for Elk, and new §40.5, concerning Testing. The rules are adopted without changes to the proposed text as published in the October 9, 2009, issue of the *Texas Register* (34 TexReg 6960) and will not be republished.

Background:

Chronic Wasting Disease (CWD) is a transmissible spongiform encephalopathy (TSE) of elk and deer and it is recognized as communicable by the veterinary profession and is considered to be is a serious threat to the Texas exotic wildlife industry and native Texas deer. There is currently no validated live animal test to determine the presence of the disease in living animals. The Commission works to prevent, control, and eradicate disease in Texas livestock, exotic livestock, domestic fowl, and exotic fowl and its mission includes: 1) protecting livestock and fowl from domestic, foreign, and emerging animal diseases; 2) increasing the marketability of Texas livestock commodities worldwide; 3) promoting and ensuring animal health and productivity; 4) protecting human health from animal disease and conditions that are transmissible to people; and 5) preparing for and responding to emergencies involving animals.

CWD was initially described as a clinical syndrome in native mule deer and black-tailed deer held in a wildlife research facility in Colorado in 1967. The disease was later reported in additional research facilities in Colorado and Wyoming. By the early 1990's, the disease had been documented in free-ranging mule deer and elk in north-central Colorado and southeastern Wyoming. In December 1997, the disease was confirmed in two commercial elk operations in South Dakota. CWD has since been diagnosed in additional commercial elk herds. Quarantines were placed on the affected commercial herds by the state animal health authorities. The susceptibility of other species of native and exotic cervidae is unknown. Clinical signs include chronic weight loss, emaciation, excessive thirst, and excessive frequency of urination, excessive salivation, and behavioral changes. The disease is progressive and always fatal. Based on the epidemiology of the disease, transmission is thought to be lateral and possibly maternal. Although not fully characterized, the causative agent is thought to be an infectious proteinaceous particle commonly referred to as a prion, which is known to be extremely resistant to conventional heat and chemical disinfection procedures.

In order to protect the exotic wildlife industry, the Commission has entry requirements for CWD where elk must originate from a herd monitored for at least 5 years under a state-approved chronic wasting disease herd certification program and that there have been no clinical signs of chronic wasting disease in the herd. The Commission has provided minimum standards for what is an acceptable state-approved chronic wasting disease certification program and the animals intended for entry must be certified by the veterinarian as meeting those minimum standards. The Commission's entry requirements for cervids and elk are found in 4 Texas Administrative Code, Chapter 51, Entry Requirements.

The Commission also has rules for a voluntary CWD Herd Monitoring program where participants can achieve an annual status based on monitoring the animals, testing mortalities, and conducting annual inventory. The program is established on nationally accepted standards and was implemented in 1999. The requirements for the program are found in 4 Texas Administrative Code, Chapter 40, Chronic Wasting Disease. The Commission also adopted specific identification requirements for elk beginning in 2005, and modified in 2006, which serve as the foundation for this rule.

CWD surveillance and monitoring is also done through the Texas Parks and Wildlife Department (TPWD). TPWD issues permits to qualified persons to possess, and has regulations governing the possession of, whitetail deer or mule deer for propagation, management, and scientific purposes. Currently, all breeders of whitetail deer, through the direction of the TPWD, participate in a CWD Monitoring program through either TPWD or the Commission.

The United States Department of Agriculture (USDA) has established interstate movement requirements to prevent the interstate movement of deer, elk, and moose that pose a risk of spreading CWD. They also have rules being considered for adoption for deer, elk, and moose herds that want to participate in the herd certification program which will have to meet requirements for animal identification, testing, herd management, and movement of animals into and from herds.

As stated in the rule proposal and noted above currently, all breeders of whitetail deer, through the direction of TPWD, participate in a CWD Monitoring program through either TPWD or the Commission. Because of this participation the state of Texas has done sufficient CWD surveillance testing of whitetail deer without disclosing any positive deer. Surveillance testing is a key, critical competent to determine if there is any disease present as well as helping to establish a prevalence number for how many animals may be affected. This also helps to support our animal industries in having confidence in the health of their animals and makes them more marketable. Failure to perform adequate surveillance allows any disease to circulate unnoticed among animal hosts and spread the disease creating a greater disease problem and a far more difficult response task. In today's current environment, the mobility and transportation of agricultural animals throughout the state and country has greatly increased exposure to diseases and for the Commission not to perform adequate disease surveillance for a disease that has national concerns would be inappropriate.

Though the whitetail deer have had adequate surveillance very few elk herds participate in a CWD monitoring program providing very little elk CWD testing surveillance. This has been a noted concern for a number of exotic livestock and deer associations because of the inequity of this situation. In implementing the first elk identification requirement in 2006 this was an issue of concern at that time, but the Commission believed that for now the most appropriate initial approach to CWD surveillance in elk was through voluntary participation by elk owners. The Commission at that time noted that if a sufficient level of surveillance cannot be achieved through this approach, the Commission will revisit the issue. The intent of the Commission is to require elk to participate in surveillance for CWD.

The Commission has historically worked with various associations such as Texas Deer Breeders, Texas Exotic Wildlife Association, and the Texas Wildlife Association, as well as TPWD, the Texas Veterinary Medical Diagnostic Laboratory (TVMDL) and USDA. This CWD task force helped to develop 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 tem-

plate 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.

Response to Comments:

Seven comments were received in response to the proposal, that raised a number of questions and different perspectives on the impact of the rule.

One commenter stated that "Elk are native to Texas and should not be treated as exotics" as well as that "not one case of CWD has been found and there is not one case of a human ever contacting CWD. Why don't you guys find another ghost to hunt and leave the rancher alone." Currently, under Texas law elk are considered as being non-indigenous to the state and therefore do not come under the regulatory jurisdiction of TPWA. As such, they are classified as exotic livestock under the statutory definition in the Texas Agriculture Code. Also, the mission of the Commission is to protect the various agricultural animal industries and CWD is a very serious disease concern throughout this country which is the purpose of these rules.

Another commenter stated that "I am all for this. I see our ranchers out in West Texas buying elk, holding them in pins and then releasing them right before they are so called hunted. I wish these type elk were required to have a tag in their ear. They are not free ranging elk." The Commission appreciates the comment, but would like to note that we do not have any regulatory authority over the hunting of these animals. The Commission's authority and the jurisdictional limits of this program are for disease control and surveillance.

The Rocky Mtn Elk Foundation sent in a comment stating that "(m)ost states only prohibit movement into the state from another state, but Kentucky and now Texas require testing for in-state movement. From a disease management standpoint, this makes perfect sense." The Commission appreciates the comment and support.

Another commenter stated that "we do not need to fix what is not broken, researchers do not even really know what causes CWD. Elk females were bringing 5,000.00 now they might bring 300.00. Tagging elk serves no purpose, it must not be a problem, whitetail deer carry it why don't you regulate and tag all them?" A couple of commenters have stated a general belief that these regulations have affected the price for these animals, but provide for no more than anecdotal statements. Evidently there is some misinformation or lack of understanding of the current CWD requirements with whitetail deer. Whitetail deer are considered indigenous to the state and fall under the regulatory authority of TPWD. Those individuals who own, manage, and maintain captive whitetail are licensed through TPWD and their deer breeder program. As part of their license requirements they do have to officially identify those animals. Furthermore, as part of their participation in the program they have to participate in a Chronic Wasting Disease (CWD) disease monitoring program. Whitetail deer breeders have already been participating in a surveillance program and this is the purpose of this rule to ensure that elk owners also participate.

Another commenter stated that "I think the proposed numbers of CWD tests that are required prior to moving elk from a captive herd are too severe. It isn't clear to me why CWD is the disease chosen for testing. Is this decision scientifically based? The proposed testing sets a bad precedent from my perspective." In response to the comment, the Commission would note the history provided above and the fact that we have had a CWD monitoring program that dates back to the 1990's as an attempt to get some voluntary surveillance.

Another commenter noted that "(t)he reason elk prices are as low as they are now is because of the state's program to test for a disease that does not exist here. You want to kill 20% of the elk population at the owner's expense. Elk prices have fallen so much they already don't pay for the feed they eat in a year. I can understand sending in 100% of harvested animals for testing. The owner benefits from that. After all, rewards are better than threats anytime. Record keeping is not that difficult of an issue. Most ranchers can do that." Once again the Commission would note the fact that there is no data or information provided to the Commission which supports this rule having any impact on the price of elk. Secondly, the Commission has urged for years for people who harvest elk to have them tested but to no avail. This step is being taken because there was a lack of participation by the collective Texas elk industry.

The commenter goes on to state that "(a)nother problem is you making it a misdemeanor. I do not own any elk. I only capture and transport for other people. In 22 years I have never killed an elk. Elk are very tolerable of the drugs that I use to capture. I personally do not have a problem with tagging elk when I move them." HB 3330 did provide for such a penalty and as such it is appropriate to include in the rules.

Another commenter stated that they had several serious concerns for the rules. They stated that they enjoy elk on their property and that they free range behind a 7 foot high perimeter fence. They state the elk are wild and it would be difficult to work them. They note these requirements are not required for cattle movements, but they are for elk. Based on this statement it is worth providing some background for disease surveillance programs. The commenter notes that there is not a similar type of requirement for cattle, but there are disease control and eradication programs where surveillance testing of other animal species. Also, as noted above TPWD requires that their Whitetail Deer Breeders do participate in surveillance monitoring in order to move their deer. The commenter goes on to state that "(w)e understand and sincerely share your concern for preventing and monitoring CWD, and of course want to fully cooperate. For many years elk have not been able to cross Texas borders alive. Many of we ranchers enjoy elk on our properties rather than cattle. This new classification and regulation is making this VERY difficult as initially proposed. Our ranch is well over 2,200 acres, and our elk free roam over that acreage but are protected by a perimeter fence about 7 foot high. Our elk are wild and would be very difficult to "work" like you are proposing - as if they were some sort of a pen raised deer or cattle. These type regulations are not currently mandated for cattle movement, and are only used for deer in TTT circumstances which is unfair and very difficult too - I have had tears streaming down my face as I was forced to needlessly kill 11 does to obtain required negative CWD brain samples in order to move 20 deer. Elk must be treated like the unique exotic wild creatures they are AND - don't forget their VALUE - $800 for a cow and up to $10,000 for a bull. To kill 4 or 5 elk to send in their brains to obtain the negative CWD testing in order to move 20 elk to a new ranch is an unfair and an extreme waste of a valuable animal! Therefore, we would like to register a protest against some of your currently proposed elk regulations as circulated by the yellow colored paper mail-out (not dated). It is not good law to distinguish "captive elk" merely as "those contained behind a 7' or higher fence" as currently proposed. This needs a designation that considers elk living conditions during at least the 3 months prior to 30 days before movement in an "ANIMAL UNIT PER ACRE" designation." The commenter seems to misunderstand the application of our rules. The commenter goes on to state "(you) must consider the value of these wild exotic animals, in conjunction with the protections already in place for CWD monitoring and the fact that there has never been a CWD case in Texas so these rules are prophylactic in nature. This would allow people with large herds of elk to occasionally dart/pen some of their elk for sale with a 30 day time to do it. If you have breeders who consistently keep a large amount of elk in a small confined area, perhaps the slaughter of 1 elk per 5 moved MIGHT be justified (1 per 10 elk is MUCH more reasonable for a true "pen farmed elk"), but not for ranchers with free roaming herds over thousands of acres who occasionally need to thin out the herds or get new genetics to keep them all healthy." The Commission appreciates the commenter's concern for the application of the rule, but feels there are several reasons worth reflection by the commenter. As noted by the comment, this action is intended to provide an equitable counter balance to the current surveillance by those moving whitetail deer. The Commission recognizes the longevity of these animals and believes that the ratio used by the Commission reflects that. Also, it should be noted that the capture of a formerly free ranging elk and moving it to a different part of the state does create a risk. CWD was documented in deer in New Mexico and north of El Paso. As these animals migrate and move there is a concern that an infected animal could migrate into this state and thereby become a source for infecting other animals. This is further amplified if animals are trapped and transported to another part of the state. With no surveillance, the disease could incubate and affect other elk as well as without surveillance it will negate our ability to have a meaningful epidemiological assessment. The Commission believes it is in the best interest of the state and the indigenous elk industry to have adequate surveillance.

Section by Section Analysis of the Rule.

Section 40.5(a), Definitions for "Captive elk", "Free ranging elk", "Premises", and "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.

4 TAC §40.5

The repeal is adopted 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.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Gene Snelson
General Counsel
Texas Animal Health Commission
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4 TAC §40.5

The new rule is adopted 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 an-

other 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.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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CHAPTER 51. ENTRY REQUIREMENTS

4 TAC §51.9

The Texas Animal Health Commission (Commission) adopts amendments to Chapter 51, Entry Requirements, §51.9, concerning Exotic Livestock and Fowl, without changes to the proposed text as published in the October 9, 2009, issue of the *Texas Register* (34 TexReg 6964) and will not be republished.

The purpose of these 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 Micheal 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 Micheal 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 or all movement within Texas may be restricted based on the risk."

One comment was received in support of the rule.

The Commission received one comment from the South Central Llama Association. They had requested the changes based on the technical information discussed below. They note the fact that there has not been a naturally occurring brucellosis in U.S. camelids. They hope that the change in the entry requirements will increase participation of owners who live in surrounding states to participate in Texas llama shows as all five major livestock shows in Texas include a llama or llama/alpaca show. They also note that the new entry requirements will lessen the burden on busy large animal veterinary practitioners and the diagnostic laboratory as well as reducing travel and testing stress on the animal. The Commission appreciates the comment.

The amendment is adopted under the following statutory authority as found in Chapter 161 of the Texas Agriculture Code. The Commission is vested by statute, §161.041(a), with the requirement to protect all livestock, exotic livestock, domestic fowl, or exotic 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 December 14, 2009.

TRD-200905814

Gene Snelson
General Counsel
Texas Animal Health Commission
Effective date: January 3, 2010
Proposal publication date: October 9, 2009
For further information, please call: (512) 719-0714

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TITLE 10. COMMUNITY DEVELOPMENT

PART 6. TEXAS DEPARTMENT OF RURAL AFFAIRS

CHAPTER 256. ADMINISTRATION

SUBCHAPTER B. GENERAL POLICIES AND PROCEDURES

10 TAC §256.600

The Texas Department of Rural Affairs (TDRA) adopts a new rule, §256.600, establishing an external complaint system, without changes to the proposal published in the October 23, 2009, issue of the *Texas Register* (34 TexReg 7277).

The new rule implements a process by which TDRA would handle external complaints. Complaints about the quality of services funded by a Community Development Block Grant (CDBG) contractor or subcontractor would continue to be governed by the CDBG program rules. Complaints regarding activities funded by the Disaster Recovery Division would be handled pursuant to this new rule.

The new rule is adopted in accordance with §487.030 of the Texas Government Code which requires TDRA to maintain a system to handle complaints.

No comments were received regarding the adoption of the new rule.

The new rule is adopted under §487.052 of the Texas Government Code, which provides TDRA with the authority to adopt rules concerning the implementation of the Department's responsibilities.

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 December 10, 2009.

TRD-200905715
Charles S. (Charlie) Stone
Executive Director
Texas Department of Rural Affairs
Effective date: December 30, 2009
Proposal publication date: October 23, 2009
For further information, please call: (512) 936-6726

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TITLE 16. ECONOMIC REGULATION

PART 1. RAILROAD COMMISSION OF TEXAS

CHAPTER 9. LP-GAS SAFETY RULES
SUBCHAPTER A. GENERAL REQUIREMENTS

16 TAC §9.3, §9.41

The Railroad Commission of Texas adopts amendments to §9.3, relating to LP-Gas Report Forms, and §9.41, relating to Testing of LP-Gas Systems in School Facilities. Section 9.41 is adopted with changes to the proposed version as published in the October 16, 2009, issue of the *Texas Register* (34 TexReg 7167). Section 9.3 is adopted without changes to the proposed version. Pursuant to House Bill 3918, 81st Legislature (Regular Session, 2009), the Commission changes the testing method of LP-gas systems in school facilities from pressure testing to leakage testing, and requires school districts to retain testing documentation for five years and allow the Commission to review that documentation. The conforming amendments to §9.3 add new LPG Form 30, Texas School LP-Gas Leakage Test Report.

The Commission adopts amendments in §9.41(a) to add definitions for "leakage test," "school district facility," and "school LP-gas system." The Commission defines "leakage test" as an operation performed on a school LP-gas system using LP-gas as the test medium at not more than normal operating pressure and a gauging instrument measuring gas pressure in psig, ounces/square inch, or inches of water column to verify there is no gas leakage. The Commission defines "school district facility" as each building or structure operated by a school district and equipped with a school LP-gas system in which students receive instructions or participate in school sponsored extracurricular activities, excluding maintenance or bus facilities, vehicle fueling facilities, administrative offices, and similar facilities not regularly used by students. The Commission defines "school LP-gas system" as all piping, fittings, valves, regulators, appliance connectors, equipment, and connections supplying fuel gas from the outlet of the shutoff valve at each LP-gas storage container or upstream of each meter to the shutoff valve(s) on each appliance in a school district facility. The Commission deletes the definition for "board of trustees" because that term is being deleted in other amendments to subsection (b).

In §9.41(b), the Commission changes the testing requirement for each school LP-gas system from a pressure test on the LP-gas piping system in each school district facility to a leakage test for each school LP-gas system. Other amendments in subsection (b) delete wording that refers to pressure testing requirements, specify what must be done if leakage is found, and require the school district to provide the LP-gas supplier with a copy of the LP-Gas Form 30 documenting the test and to retain testing documentation for at least five years.

The Commission adopts a significant change to the procedures a school district must follow if leakage is found. In §9.41(b)(1), the Commission requires that if a leak is found in a school LP-gas system, the school district must immediately remove the affected school district facility from LP-gas service until repairs are made and it passes a subsequent school LP-gas system leakage test. If an employee of a school district performs the initial test, then the subsequent test may not be performed by a school district employee.

The Commission adopts new subsections (c) and (d) that specify the leakage test requirements and the methods for conducting the test, including that the results of each leakage test must be documented on LPG Form 30; LP-gas must be used as the test medium; leakage test pressure must not exceed normal operating pressure; leakage test duration must not be less than 30 minutes; test pressure must be monitored with a manometer or with a pressure-measuring instrument; and the manual shutoff valve installed in the piping upstream of each appliance must be open and must supply pressure to the appliance. The methods for conducting a leakage test may be upstream of the first stage regulator; between the first stage and second stage regulators; or downstream of the final stage regulators.

The Commission adopts amendments in current subsection (c), redesignated as subsection (e), to state that the supplier must receive notification of the test from the school district, the LP-gas licensee, or the person conducting the leakage test, and that the supplier must receive a copy of LPG Form 30.

The Commission adopts amendments in current subsection (d), redesignated as subsection (f), to delete the requirement that the Commission retain the school district's written notice for at least one year, which would be unnecessary because of the requirement that school districts retain the testing documentation for at least five years.

The Commission adopts amendments in current subsection (e), redesignated as subsection (g), to change the compliance deadlines for school districts. Current wording requires school districts to perform pressure tests at least once every two years beginning with the 2002-2003 school year. The adopted amendments provide that, beginning with the 2010-2011 school year, school districts must perform a leakage test at least once every two years.

The Commission received one comment from an individual, and no comments from any groups or associations. The individual commented specifically on §9.41(d)(2), which requires the tester to release the LP-gas from the system to lower the pressure gauge reading by at least 5 psig. The commenter states that if the first-stage regulator is set to be less than 5 psig, then the test would be impossible to perform. The commenter recommended that wording be added to allow for at least half the operating pressure if the system's operating setting is less than 5 psig pressure setting.

The Commission agrees with this comment as being technically correct and adopts a minor clarifying change in the wording in subsection (d)(2). While the industry standard pressure setting for first stage regulators is normally 10 psig, NFPA 58 allows first stage regulators to be installed at a pressure setting lower than 10 psig. Changing the requirement from 5 psig to "one-half the inlet pressure of the second stage regulator" will result in a 5 psig pressure drop for those systems with a 10 psig inlet pressure to the second stage regulator and a correspondingly lower pressure drop setting for those systems with an inlet pressure less than 10 psig.

Finally, the Commission adopts §9.41(f) with a change. As proposed, paragraph (2) specified that the Safety Division will initiate any enforcement proceedings under Texas Natural Resources Code, Chapter 113. Following the publication of the proposal in this rulemaking proceeding, the Commission approved an administrative reorganization and the creation of a new Alternative Energy Division that includes LPG Operations. As adopted, this paragraph will specify that the Alternative Energy Division will initiate any enforcement proceedings under Texas Natural Resources Code, Chapter 113.

The Commission adopts the amendments under Texas Natural Resources Code, §113.051, which authorizes the Commission

to adopt rules relating to any and all aspects or phases of the LP-gas industry that will protect or tend to protect the health, welfare, and safety of the general public, and Texas Natural Resources Code, §§113.351 - 113.357, which require the testing of LP-gas systems in school districts, as amended by HB 3918, 81st Texas Legislature (Regular Session, 2009).

Texas Natural Resources Code, §113.051 and §§113.351 - 113.357, as amended by HB 3918, 81st Texas Legislature (Regular Session, 2009), are affected by the adopted amendments.

Issued in Austin, Texas, on December 8, 2009.

§9.41. Testing of LP-Gas Systems in School Facilities.

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

(1) Leakage test--An operation performed on a school LP-gas system using LP-gas as the test medium at not more than normal operating pressure and a gauging instrument measuring gas pressure in psig, ounces/square inch, or inches of water column to verify there is no gas leakage.

(2) School district--An entity created under the laws of this state and accredited by the Texas Education Agency under Texas Education Code, Chapter 39, Subchapter D; a private elementary or secondary school, other than a school in a residence; or a state or regional school for the blind and visually impaired or the deaf created under Texas Education Code, Chapter 30.

(3) School district facility--Each building or structure operated by a school district and equipped with a school LP-gas system, in which students receive instructions or participate in school sponsored extracurricular activities, excluding maintenance or bus facilities, vehicle fueling facilities, administrative offices, and similar facilities not regularly used by students.

(4) School LP-gas system--All piping, fittings, valves, regulators, appliance connectors, equipment, and connections supplying fuel gas from the outlet of the shutoff valve at each LP-gas storage container or upstream of each meter to the shutoff valve(s) on each appliance in a school district facility.

(5) Supplier--An individual or company that sells and delivers LP-gas to a school district facility. If more than one individual or company sells and delivers LP-gas to a school district facility, each individual or company is a supplier for purposes of this section.

(b) School district requirements. A school district shall ensure that a leakage test is performed on each school LP-gas system as specified in this section. The leakage test shall be performed by an LP-gas licensee, an individual registered with the Commission pursuant to §9.13 of this title (relating to General Installers and Repairman Exemption), or an employee of the school district who has been certified by the Commission to perform such a test.

(1) If a leak is found in a school LP-gas system, the school district shall immediately remove the affected school district facility from LP-gas service until repairs are made and it passes a subsequent school LP-gas system leakage test. If an employee of a school district performs the initial test, then the subsequent test may not be performed by a school district employee.

(2) Each school district shall provide the district's supplier with a copy of the most current LP-Gas Form 30 as proof the school LP-gas system has been tested in accordance with this section.

(3) A school district shall retain LPG Form 30 specifying the date and result of the leakage test performed on each school LP-gas system for a minimum of five years from the date each test was performed. A school district shall make LPG Form 30 readily available for review by the Commission or its authorized representative upon request.

(c) Leakage test requirements.

(1) The results of each leakage test shall be immediately documented on LPG Form 30.

(2) LP-gas shall be used as the test medium.

(3) Leakage test pressure shall not exceed normal operating pressure.

(4) Leakage test duration shall not be less than 30 minutes.

(5) Test pressure shall be monitored with a manometer or with a pressure-measuring instrument designed and calibrated to read, record, or indicate a pressure loss caused by leakage during the test period. Mechanical gauges used to measure test pressures shall have a range such that the highest end of the scale is not greater than five times the test pressure.

(6) The manual shutoff valve installed in the piping upstream of each appliance must be open and must supply pressure to the appliance. To prove the integrity of the 100 percent pilot shutoff valve on each appliance so equipped, the manual control on the 100 percent pilot shutoff valve must be turned to the on position. Pilots not incorporating a 100 percent pilot shutoff valve and all manual gas valves not incorporating safety shutoff systems shall be in the off position prior to the leakage test.

(d) Methods for conducting a leakage test.

(1) Upstream of first stage regulator. Insert a pressure gauge between the manual shutoff valve on the container(s) and the first stage regulator. Admit full container pressure to the system, and then close the manual shutoff valve on the container(s). Release gas from the system to lower the pressure gauge reading by 10 psig. If there is no decrease or increase in gauge pressure after the minimum test duration, the system has no leakage and may remain in service.

(2) Between first stage and second stage regulators. Insert a pressure gauge with a 30-psig scale downstream of the first stage regulator, pressurize the system to normal operating pressure, and then close the manual shutoff valve on the container(s). Release LP-gas from the system to lower the pressure gauge reading by at least one-half the inlet pressure to the second stage regulator. If there is no decrease or increase in gauge pressure after the minimum test duration, the system has no leakage and may remain in service.

(3) Downstream of final stage regulator(s). For systems serving appliances that receive gas at pressures of 1/2 psig or less, insert a water manometer or pressure gauge into the system downstream of the final system regulator. Pressurize the system to normal operating pressure and close the manual shutoff valve on the container(s). To ensure that all regulators in the system are unlocked and a leak anywhere in the system is communicated to the gauging instrument, release enough gas from the system, through a range burner or other suitable means, to drop the pressure to 9 (plus or minus 1/2) inches of water column. If there is no decrease or increase in gauge pressure after the minimum test duration, the system has no leakage and may remain in service.

(e) Supplier requirements. A supplier shall terminate LP-gas service to a school district facility if:

(1) the supplier receives official notification from the school district, the LP-gas licensee, or the person conducting the leakage test that there is leakage in a school LP-gas system;

(2) the leakage test performed on a school LP-gas system was not performed in accordance with the requirements of this section; or

(3) the supplier has not received a copy of LPG Form 30 from the school district verifying that the school LP-gas system has been tested in accordance with this section.

(f) Commission requirements.

(1) At the request of a school district, the Commission shall assist the district in providing for the certification of an employee of the school district or school, as applicable, to conduct a leakage test.

(2) The Alternative Energy Division shall initiate any enforcement proceedings necessary under Texas Natural Resources Code, Chapter 113.

(g) Compliance deadlines.

(1) Each school district shall ensure a leakage test is performed as required by this section at least once every two years beginning with the 2010-2011 school year.

(2) School districts shall complete the initial leakage tests before the beginning of the 2010-2011 school year. In the case of a year-round school, a school district shall ensure that a leakage test in each school district facility is conducted and reported not later than July 1 of the year in which the test is performed, with the first test due by July 1, 2010.

(3) A school district may perform the leakage tests on a two-year cycle provided that at least one-half of the school district's facilities are tested each year.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 8, 2009.

TRD-200905657
Mary Ross McDonald
Managing Director
Railroad Commission of Texas
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Proposal publication date: October 16, 2009
For further information, please call: (512) 475-1295

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CHAPTER 12. COAL MINING REGULATIONS
SUBCHAPTER G. SURFACE COAL MINING AND RECLAMATION OPERATIONS, PERMITS, AND COAL EXPLORATION PROCEDURES SYSTEMS
DIVISION 2. GENERAL REQUIREMENTS FOR PERMITS AND PERMIT APPLICATIONS

16 TAC §12.108

The Railroad Commission of Texas (Commission) adopts amendments to §12.108, relating to Permit Fees, without changes to the version published in the November 6, 2009, issue of the *Texas Register* (34 TexReg 7744). The amendments implement provisions of Senate Bill 1, 81st Texas Legislature, Regular Session (2009), and, specifically, Article VI, Railroad Commission Rider 10, which makes the amounts appropriated from general revenue for State Fiscal Years 2010 and 2011 to cover the cost of permitting and inspecting coal mining facilities contingent upon the Commission assessing fees sufficient to generate, during the 2010-2011 biennium, revenue to cover the general revenue appropriation.

The Commission amends the fees set forth in subsection (b) as follows. In paragraph (1), the Commission decreases the annual fee for each acre of land within a permit area on which coal or lignite was actually removed during a calendar year from the current $150 to $130. In paragraph (2), the Commission increases the annual fee for each acre of land within a permit area covered by a reclamation bond on December 31st of each year, as shown on the map required at §12.142(2)(C) of this chapter (relating to Operation Plan: Maps and Plans), from the current $3.75 to $5.50. Finally, in paragraph (3), the Commission increases the annual fee for each permit in effect on December 31st of a year from the current $4,200 to $4,250. The Commission anticipates that annual fees at these new amounts will result in revenue of $1,467,500 in each year of the 2010-2011 biennium.

Based on a formula and schedule agreed to by the coal mining industry and the Commission in 2005, every two years since 2005, the Commission has adjusted the surface mining fees based on that predetermined formula. This adjustment phases in fee changes based on bonded acreage for each permit as of December 31 of each year. At the same time, the fee for mined acreage correspondingly decreases and a revised annual permit fee is set based on this formula. This adjustment in fees is designed to take place over a ten-year period; this is the third adjustment to the fee schedule.

The Commission received no comments on the proposed amendments.

The Commission adopts the amendments under Texas Natural Resources Code, §134.013, which authorizes the Commission to promulgate rules pertaining to surface coal mining operations; and §134.055, which authorizes the Commission to obtain annual fees and mandates the fee structure in §12.108; and Senate Bill 1, 81st Texas Legislature, Regular Session (2009), Article VI, Railroad Commission Rider 10, which requires the Commission to assess fees sufficient to generate during the 2009-2010 biennium, revenue to cover the general revenue appropriations.

Texas Natural Resources Code, §134.013 and §134.055, are affected by the adopted amendments.

Statutory authority: Texas Natural Resources Code, §134.013 and §134.055; Senate Bill 1, 81st Texas Legislature, Regular Session (2009).

Cross-reference to statute: Texas Natural Resources Code, §134.013 and §134.055; Senate Bill 1, 81st Texas Legislature, Regular Session (2009).

Issued in Austin, Texas, on December 8, 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.

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TRD-200905663

Mary Ross McDonald
Managing Director
Railroad Commission of Texas
Effective date: December 28, 2009
Proposal publication date: November 6, 2009
For further information, please call: (512) 475-1295

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PART 4. TEXAS DEPARTMENT OF LICENSING AND REGULATION

CHAPTER 70. INDUSTRIALIZED HOUSING AND BUILDINGS

The Texas Commission of Licensing and Regulation ("Commission") adopts amendments to Chapter 70, §§70.10, 70.20 - 70.23, 70.30, 70.50, 70.51, 70.60, 70.62 - 70.65, 70.70, 70.71, 70.73 - 70.75, 70.77, 70.80, 70.100, 70.102, and 70.103; adopts new §§70.24, 70.25, 70.61, 70.72, and 70.79; and adopts the repeal of §70.61 and §70.72, regarding the industrialized housing and buildings program.

The amendments to §§70.10, 70.50, 70.51, 70.62, 70.65, 70.70, 70.71, 70.73 - 70.75, 70.77, 70.80, 70.102, and 70.103; and new §70.24 and §70.79 are adopted with changes to the proposed text as published in the September 11, 2009, issue of the *Texas Register* (34 TexReg 6222), and these rules will be republished.

The amendments to §§70.20 - 70.23, 70.30, 70.60, 70.63, 70.64, 70.72, and 70.100; new §§70.25, 70.61, and 70.72; and the repeal of §70.61 and §70.72 are adopted without changes to the proposed text as published in the September 11, 2009, issue of the *Texas Register* (34 TexReg 6222), and these rules will not be republished. The adopted rules take effect January 1, 2010.

The adopted amendments, new rules, and repeals implement changes defined in House Bill (HB) 2763, 81st Legislature, Regular Session (2009), which address new regulatory authority over buildings utilized as relocatable educational facilities; and update and clarify existing rules as a result of the agency's rule review process. A summary of each rule as reorganized was included in the notice of proposed rules published in the September 11, 2009, issue of the *Texas Register* (34 TexReg 6222).

The proposed rules were published in the *Texas Register* on September 11, 2009. The 30-day public comment period closed on October 12, 2009. The Department received comments from the following interested parties: (1) American Homestar Corporation, (2) RCS Enterprises, LP, (RCS), (3) Williams Scotsman, Inc., and (4) Palm Harbor Homes, Inc. The specific comments are summarized below, followed by the Department's responses.

General Comments

American Homestar Corporation recommended that the rule changes be delayed until further review could be done by persons involved in the day-to-day inspections. They were concerned the rules will increase the complexity of the program, and increase cost of the modular homes and buildings, having an adverse effect on the industry. They also proposed to increase the IHB task force to include more people from the industry. This view was shared by RCS and additionally RCS voiced concerns that the Department's Enforcement division has 'targeted' some registrants with fines, and that the new rules would increase the authority of the Department to levy fines and 'remove a registration' with little or no limitation.

Department Response: The rules primarily clarify the requirements for site construction and inspections and do not increase the complexity of the program. Concern was raised over certain rule requirements that were not changed, but just relocated within the rule sections. The Department has not taken disciplinary action against a registrant without following the due process procedures set by the Commission and Chapter 51 of the Occupations Code. Only registrants that are not in compliance are turned over to Enforcement and only after attempts have been made to obtain compliance.

RCS commented generally that the proposed changes to field inspections would increase the cost of inspections.

Department Response: Changes included adding the responsibilities of the industrialized builder for the site construction, clarifying that the foundation inspection is required prior to pouring the concrete, defining what is meant by a successful final inspection, and adding the Council's requirements for the use of ground anchors in a foundation system. Most of these changes were already part of the inspection procedures referenced in the rule. The other proposed amendments were not changes to the requirements, but a relocation of the requirements from other rule sections or subsections. The addition of a new third party site inspector registration was made partly in response to complaints from other registrants about the availability of inspectors to perform site inspections. This new registration should increase the number of inspectors available to perform site inspections.

RCS commented that the proposed rules will greatly increase the Department's administration and that an individual qualified by ICC certifications would not likely be familiar with modular homes and their construction. RCS also indicated that inspectors are expected to be qualified and independent of the work they are inspecting.

Department Response: The Department already registers and monitors the performance of third party inspectors. There will be no increase in the department's administration. Third party inspectors and site inspectors are only responsible for verifying compliance with the mandatory building codes and approved documents. Inspectors are not required to determine if the construction process is adequate or acceptable. There also appears to be conflict in the comments received from RCS. Here RCS indicates that inspectors should be independent of the work they are inspecting. In RCS' comments to the new §70.24, however, RCS objected to an inspector having to certify that they will not provide design services for anyone for whom they provide inspections. How can the inspector be independent of the work they are inspecting if they also designed the work?

RCS comments also addressed issues that are part of the procedures for performing site inspections and were not part of the proposed rules.

Department Response: These issues will be addressed with the Council task force and the Council.

American Homestar Corporation expressed concern that there has been little clarity given in the past to the industry regarding responsibilities of builders/manufacturers once the home is no longer under the manufacturer's warranty.

Department Response: The IHB statute does not give the Department any authority over manufacturers' warranties. The Department can only verify that the construction is code compliant.

The residential installation permit and changes being proposed in the site inspection procedures will help the Department determine responsibilities for non-code compliant construction on future consumer complaint cases.

RCS comments also addressed the issue of remedial inspections and suggested that the requirements for remedial inspections be added to the rules.

Department Response: Remedial inspections were developed to provide a method of determining compliance if the required inspections were not obtained and the need for remedial inspections are clearly defined in the site inspection procedures. Registrants who are required to obtain remedial inspection are not in compliance with the site inspection requirements and are also subject to administrative penalties. As such, the remedial inspection requirements should not be added to the rules.

RCS also had comments on communication and clarification of Department policies.

Department Response: The Department cannot respond to a comment when there are no details about what policies require clarification.

Williams Scotsman commented that there are references throughout the proposed rules to §70.101, but §70.101 was not part of the proposals.

Department Response: No changes were proposed to §70.101, so the rule was not published in the *Texas Register.*

Comments on Specific Rules

§70.10. Definitions.

Provision: Section 70.10(13) defines a Design Review Agency (DRA) as an entity that reviews designs and plans for modular buildings.

Public Comments: RCS suggested adding a clarification that a DRA reviews the modular unit only, and not any site specific details or additions.

Department Response: Historically, nothing precludes a DRA from reviewing site construction details for code compliance.

Provision: Section 70.10(48) defines a Third Party Site Inspector.

Public Comments: RCS recommended that the word 'qualifications' be added to the definition.

Department Response: The Department believes the definition is adequate as it is. The same language is used to define third party inspectors, third party inspection agencies, and DRA's.

§70.21. Registration of Design Review Agencies, Third Party Inspection Agencies and Inspectors, and Third Party Site Inspectors.

Provision: The proposed §70.21 includes registration requirements for third party site inspectors, requiring a fee in accordance with §70.80, and points to existing rules for administrative sanctions for violations of the law and rules.

Public Comment: RCS commented that the fee to register the third party site inspector was not included in §70.80, that fees should be consistent for all parties while recommending that no fees be charged for third party site inspectors.

Department Response: The Department acknowledges the oversight in failing to include the fee for third party site inspector registration fee in §70.80. The rules have been revised to include the fee of $100 in §70.80. The Department is required to set fees that cover the costs of administering the program.

Public Comment: RCS commented that the administrative sanctions allow the department head or executive director to not recommend an inspector for approval or to remove an inspector who has been approved by the Council.

Department Response: The rule regarding administrative sanctions is not new and follows the requirements of the Commission and Chapter 51 of the Occupations Code. The Department declines to make any revisions.

§70.23. Criteria for Approval of Third Party Inspection Agencies and Inspectors.

Provision: Section 70.23 sets criteria for approval for third party inspection agencies and inspectors.

Public Comment: RCS commented that the rules allow third party inspectors to perform both in-plant inspections and site inspections while third party site inspectors can only perform site inspections.

Department Response: Historically third party inspectors have been allowed to perform all inspections for the IHB program. The purpose of the new third party site inspector registration type is to broaden the number of inspectors available to perform the site inspections. Many of the current third party inspectors are located outside Texas and are not available to perform inspections at the installation or building site or the cost for performing these inspections would be prohibitive due to travel costs.

Provision: Section 70.23(b)(3): This rule requires a formal description of the agency's supervision and training program for inspectors, among other requirements.

Public Comment: RCS commented that this was invasive and recommended deleting it entirely.

Department Response: The requirements have not been changed, only reorganized. The Department declines making any changes at this time. The requirements for third parties, as required by statute, are set by the Texas Industrialized Building Code Council and should not be changed without a full review by the Council.

Provision: Section 70.23(b)(4)(A): This rule requires a third party inspection agency applicant submit a statement of certification that its board of directors are free to exercise independence of judgment in the performance of their duties within the agency.

Public Comments: RCS commented that this requirement would limit the ability of a company to take a position on an item if an employee disagreed.

Department Response: The requirements have not been changed, only reorganized. The Department declines making any changes at this time. The requirements for third parties, as required by statute, are set by the Texas Industrialized Building Code Council and should not be changed without a full review by the Council.

Provision: Section 70.23(b)(4)(D) states that a third party inspection agency will not provide design services or prepare compliance control manuals for manufacturers for whom it acts as a third party inspection agency.

Public Comments: RCS and Palm Harbor Homes commented that this should not be a conflict and RCS recommended deletion of this section.

Department Response: The requirements have not been changed, only reorganized. The Department declines making any changes at this time. The requirements for third parties, as required by statute, are set by the Texas Industrialized Building Code Council and should not be changed without a full review by the Council.

§70.24. Criteria for Approval of Third Party Site Inspectors.

Provision: Section 70.24 sets criteria for approval of third party site inspectors.

Public Comment: RCS, Palm Harbor Homes and American Homestar Corporation expressed concern that licensed professional engineers would not be able to perform these inspections.

Department Response: The relevant sections in §70.51 and §70.73 were revised to state that council-approved inspectors may perform site inspections.

Public Comment: RCS commented that the criteria for third party inspectors and inspection agencies require the submittal to document and submit training requirements for inspectors to the Department, but there is no similar requirement for third party site inspectors.

Department Response: Third party site inspectors were added to increase the number of inspectors available to perform site inspections. TPSIs are required to have more experience and specific certifications to perform certain types of inspections than what is required for third party inspectors because there is no oversight by a licensed engineer or architect. In addition, continuing education credits are required to maintain the ICC certifications required by the criteria.

Public Comment: RCS commented that third party inspectors are permitted to perform both in-plant and site inspections while the new third party site inspectors may only perform inspections at the installation site or inspections of site-built REFs.

Department Response: The purpose of the new third party site inspector registration type is to broaden the number of inspectors available to perform the site inspections. Many of the current third party inspectors are located outside Texas and are not available to perform inspections at the installation or building site or the cost for performing these inspections would be prohibitive due to travel costs. In addition, third party inspection agencies are reluctant to add inspectors to perform site inspections. Adding an individual site inspector registration will allow qualified individuals not associated with an agency to perform these inspections.

Provision: Section 70.24(a)(C) stating that the inspector will not provide design services for anyone for whom he performs inspections.

Public Comments: RCS, Palm Harbor Homes and American Homestar Corporation expressed concern.

Department Response: The Council revised this rule to state that the inspector will enforce the mandatory building codes adopted by the council when performing inspections.

§70.25. Permits

Generally: This section allows the owners of industrialized housing and buildings to obtain a permit to complete all or part of the installation or alteration process.

Public Comment: RCS, Palm Harbor Homes and American Homestar Corporation expressed concern that the owners would not effectuate the installation or other modifications in compliance with code, and render it difficult to pass the inspection.

Department Response: These types of permits are not new and were relocated from §70.20. However, the installation permits were revised to require separate permits for housing and buildings. This would allow home owners to perform part of the construction involved in the installation of the house. Historically, homeowners in Texas have been allowed to perform their own electrical work, plumbing work, HVAC work, and even build their own house without a license or registration. The owner is required to comply with the same rules as the industrialized builder and the builder is not responsible for the construction, including inspections, covered by the permit. This change was also requested by industry. The Department declines to make revisions.

Provision: Section 70.25(b)(4): The installation permit application shall identify all construction to be completed by the permit holder.

Public Comment: American Homestar Corporation commented that greater detail was needed to explain the responsibilities of the permit holder, including whether they need to comply with IRC code, have the building inspected and if so, which inspections are required.

Department Response: Section 70.25 sets forth registration requirements. The requirements of the permit holder are detailed in §70.73. Section 70.102 requires all construction to comply with the mandatory building codes.

§70.50. Manufacturer's and Industrialized Builder's Monthly Reports.

Provision: Section 70.50(b)(2)(C): Date construction began at the installation site.

Public Comment: Palm Harbor Homes asked how to define this date.

Department Response: The department will more fully address this matter in the Building Site Inspection Program and the Builder's Guide, which outlines requirements specific to industrialized builders.

§70.51. Third Party Inspection Reports.

Provision: Section 70.51(c)(1): The third party inspection agency or third party site inspector shall keep a copy of all inspection reports for a minimum of 5 years from the date of successful completion of each phase of a site inspection.

Public Comment: RCS expressed concern that the date could be arbitrary.

Department Response: This section was revised to state that the inspector shall keep a copy of all inspection reports for a minimum of 5 years from the date of inspection.

Public Comment: American Homestar commented that requiring the inspector to maintain a copy of the inspection report is unnecessary and a duplicate rule since the industrialized builder is required to maintain the reports for 10 years.

Department Response: The requirement is not new, but was moved to this section from another rule as the more appropriate location for the requirement. It is the Department's experience that the industrialized builder is not always able to provide a copy of the inspection report for a variety of reasons, including, but not limited to, the builder has moved and cannot be located, the builder has not maintained the records as required, or the inspector did not provide the builder with a copy. This allows another avenue for the Department to obtain a copy of the report if needed for a compliance issue or for a consumer complaint.

Provision: Section 70.51(c)(2): The third party inspection agency or third party site inspector shall make a copy of the inspection report available to the Department upon request.

Public Comment: RCS expressed concern that there might be a legal prohibition against providing the copy to the department, and recommended changing the rule to read: In the event the company that contracted for inspection is no longer a legal entity, the third party inspection agency or third party site inspector shall make a copy of the inspection report available to the department upon request."

Department Response: The requirement is not new, but was moved to this rule section as more appropriate place for the requirement. The department is required to verify code compliance. If the industrialized builder is unable to provide a copy of the inspection report, then the department requires another avenue to obtain this information. The department will only ask for copies of site inspection reports if the industrialized builder is unable to provide the report. Other council-approved inspectors are required to provide a copy of all inspection reports to the department, not only upon request. The department declines to make any revisions.

Provision: Section 70.51(c)(3) requires that the third party inspection agency or third party site inspector forward a copy of each site inspection report to the department whenever the industrialized builder or installation permit holder fails to call for a final inspection within 180 days.

Public Comment: RCS questioned the legality of the request and recommended changing the rule to: "the third party inspection agency or third party site inspector shall furnish the department notification that an industrialized builder or installation permit holder failed to call for a final inspection within 180 days of the start of construction as required by §70.73."

Department Response: The department revised the section to read: "The council-approved inspector shall notify the department whenever the industrialized builder or installation permit holder fails to call for final inspection within 180 days of the start of construction as required by §70.73. The Department can request a copy of the report if needed."

Provision: Section 70.51(c)(4): The third party inspection agency or third party site inspector shall forward a copy of each site inspection report to the department whenever the industrialized builder or installation permit holder fails to correct deviations prior to occupation of the industrialized house or building.

Public Comment: RCS expressed concerns about the legality of this requirement.

Department Response: The department revised the section to read: "The council-approved inspector shall notify the department whenever the industrialized builder or installation permit holder fails to correct deviations prior to occupation of the industrialized house or building. The Department can request a copy of the inspection report if needed.

§70.61. Responsibilities of the Department-Monitoring Inspections.

Provision: The department shall monitor and evaluate the performance of third party inspection agencies, third party inspectors, third party site inspectors, and design review agencies.

Public Comment: RCS questioned the necessity for this rule and Palm Harbor commented that this could put undue stress on the registrants responsible for fees.

Department Response: These requirements are not new except for the third party site inspectors, which is a new registration type, and were just moved from another section. The Council recommended this monitoring procedure so that the Department could report on the performance of the third parties to the Council. The Department is also required to set fees that cover the costs of administering the program. The department declines to make any revisions.

§70.70. Responsibilities of the Registrants--Manufacturer's Design Package.

Provision: Section 70.70(d)(3) minimum requirements for connection and attachment of all modules and modular components to the foundation system.

Public Comment: RCS recommended deleting this section because this load and connection detail is site and application specific and thus would fall under the specification or consideration of the engineer designing the foundation.

Department Response: This section is not new and there were no changes proposed for this item. The manufacturer knows the load limits for which the house or building was designed and should provide the minimum requirements for use by the foundation designer. The Department declines to make any revisions.

§70.73. Responsibilities of the Registrants--Building Site Construction and Inspection.

Provision: Section 70.73(c)(1): The industrialized builder or installation permit holder is responsible for assuring that all subcontractors are licensed as required by applicable state law.

Public Comment: RCS expressed concern that the rules do not provide for a method of verification of the company and license number of the person or company that completed the work. RCS recommended that the rules require all licensed parties that complete work on the installation of the modular home to designate their company name and license number on a label placed near the data plate.

Department Response: The department declined to make changes to the rules. This item can be addressed in the inspection procedures.

Provision: Section 70.73(e): Responsibility for inspections outside the jurisdiction of a municipality or within a municipality without a building inspection agency or department.

Public Comment: RCS, Palm Harbor Homes and American Homestar Corporation expressed concern that a licensed professional engineer appeared to not be able, under the rules, to perform third party site inspector or site inspector services.

Department Response: The department revised the rule to replace the term third party site inspector and third party inspector with "council-approved inspector."

Provision: Section 70.73(e)(8): The industrialized builder or installation permit holder shall not permit occupancy until a successful final inspection has been completed. Exception: Occupancy of the house or building may be allowed provided the outstanding violations are not life safety issues or are non-structural in nature and the industrialized builder or installation permit holder agrees to correct the outstanding violations within 90 days of occupancy.

Public Comment: RCS wanted to add "stairs, steps, handrails" to life safety examples. Palm Harbor Homes was concerned that the builder may not be able to control the actions of the homeowner and it is difficult to re-inspect if the homeowner has taken possession.

Department Response: The Council determined that allowing the industrialized builder to permit occupancy of a house or building if there are no life safety violations was too subject to interpretation and that the exception needed to be revised to allow occupancy with outstanding items provided there were no outstanding code violations. The Council made the same change for a similar exception in §70.79.

Provision: Section 70.73(e)(7)(C): Upon request, a copy of all site inspection reports shall be given to the owner of the house or building.

Public Comment: RCS and Palm Harbor Homes recommended this be deleted because a non-conforming issue during construction should not be a concern to the homeowner provided the issue is corrected prior to the homeowner taking possession.

Department Response: The Council did not see any reason why the owner could not have a copy of the site inspection reports, but changed the requirement to only require the builder to release a copy of the inspection reports if requested by the owner.

Provision: Section 70.73(g)(1): Foundation system designs. ...Foundation system designs shall comply with the mandatory building code referenced in §70.101 and shall contain complete details for the construction and attachment of the house or building on the foundation, including, but not limited to the address or area for which the foundation is suitable.

Public Comment: RCS expressed concern that the word 'area' is too broad a term, and recommended "site specific address for which the foundation is suitable".

Department Response: These requirements are not new, but were relocated from another section. The department recommends that the Council may look into this issue in further rule review.

Provision: Section 70.73(g)(2): Minimum load specifications, including wind loads, seismic design loads, soil bearing capacity and if the foundation is designed for expansive soils.

Public Comment: RCS recommended that the rule be revised to delete the expansive soils requirement and to provide for acceptable levels of foundation movement, and recommended "soil bearing capacity" for economic reasons.

Department Response: The requirement that the foundation be designed for expansive soils is a requirement of the mandatory building codes, and the cost of correcting the foundation if not designed for expansive soils would be far greater. The department declined to make any changes.

Provision: Section 70.73(h): Ground anchors. The use of ground anchors in the installation of industrialized housing is not permitted...The foundation design shall be prepared by a licensed professional engineer and shall contain complete details for the construction and attachment of the building on the foundation, including, but not limited to the following (1) address or area for which the foundation is suitable...(9) details for enclosure of the crawl space, including details for ventilation and access.

Public Comment: RCS and Williams Scotsman expressed concern that items (1) - (9) were not meant to be included with the 'ground anchor' description. RCS recommended removing those items that do not apply to soil anchors and adding "ground anchors should be designed for the soil type on the site". Williams Scotsman expressed concern that §70.73(g) and (h) were once combined, and recommended recombining the two sections or purging irrelevant line items from each section.

Department Response: Ground anchors are an alternate method of construction from the requirements of the mandatory building codes. Previously the requirements were in the procedures. The Council has the authority under the IHB law to determine all questions concerning code alternates and determined that ground anchors could be used under certain conditions as outlined in this rule. The requirements were separated from the requirements for foundations because they may only be used for commercial installations. Ground anchors are considered a temporary foundation system and housing is required to be permanently installed on a permanent foundation system. Other requirements set in the rule are applicable code requirements that must still be met. The department declines to make changes.

Provision: Section 70.73(h)(1) address or area for which the foundation is suitable, including a soil investigative report prepared by a qualified engineer or a description of the soil type for which the anchoring system is suitable.

Public Comment: American Homestar Corporation expressed that there is no need for the report as the engineer is responsible for designing a site-specific foundation, and that this would be a burden and increase costs to the industry.

Department Response: Ground anchors are an alternate method of construction from the requirements of the mandatory building codes. The Council has the authority under the IHB law to determine all questions concerning code alternates and determined that ground anchor could be used under certain conditions, including requiring a soil investigative report. The department declines to make changes.

§70.79. Responsibilities of the Registrants-Site-Built REF Construction and Inspection.

Provision: Section 70.79(c): Responsibility for inspections outside the jurisdiction of a municipality.

Public Comment: The Council expressed some concerns that the rule would prohibit a licensed engineer from performing inspections.

Department Response: The department revised the section to replace "third party site inspector" and "third party inspector" with "council-approved inspector."

§70.80. Commission Fees.

Public Comment: RCS noted that the fee to register a third party site inspector was omitted.

Department Response: The fee was added in as §70.80(f), and additionally, a fee was added for duplication or copying of a license and a typographical error was corrected in §70.80(e).

16 TAC §§70.10, 70.20 - 70.25, 70.30, 70.50, 70.51, 70.60 - 70.65, 70.70 - 70.75, 70.77, 70.79, 70.80, 70.100, 70.102, 70.103

The amendments and new rules are the result of a rule review conducted in accordance with Texas Government Code §2001.039. The amendments and new rules are adopted under Texas Occupations Code, §51.201(b) and §51.203, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement Chapter 51 and any other law establishing a program regulated by the Department. Also, the amendments and new rules are adopted under Texas Occupations Code, Chapter 1202 which authorizes the Texas Commission of Licensing and Regulation, the Department's governing body to adopt rules as necessary to implement this chapter.

The statutory provisions affected by the adopted amendments and new rules are those set forth in Texas Occupations Code, Chapters 51 and 1202. No other statutes, articles, or codes are affected by the adoption.

§70.10. Definitions.

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

(1) Alteration--Any construction, other than ordinary repairs of the house or building, to an existing industrialized house or building after affixing of the decal by the manufacturer or REF builder. Industrialized housing or buildings that have not been maintained shall be considered altered.

(2) Alteration decal--The approved form of certification issued by the department to an industrialized builder to be permanently affixed to an industrialized building module indicating that alterations have been constructed to meet or exceed the code requirements and in compliance with this chapter.

(3) Building site--A lot, the entire tract, subdivision, or parcel of land on which industrialized housing or buildings are sited.

(4) Building system--The design and/or method of assembly of modules or modular components represented in the plans, specifications, and other documentation which may include structural, electrical, mechanical, plumbing, fire protection, and other systems affecting health and safety.

(5) Chapter 1202--Texas Occupations Code, Chapter 1202, Industrialized Housing and Buildings.

(6) Closed construction--That condition where any industrialized housing or building, modular component, or portion thereof is manufactured in such a manner that all portions cannot be readily inspected at the site without disassembly or destruction thereof.

(7) Commercial structure--An industrialized building classified by the mandatory building codes for occupancy and use groups other than residential for one or more families.

(8) Compliance Control Program--The manufacturer's system, documentation, and methods of assuring that industrialized housing, buildings, and modular components, including their manufacture, storage, handling, and transportation conform with Chapter 1202 and this chapter.

(9) Construction Documents--The aggregate of all plans, specifications, calculations, and other documentation required to be submitted to the design review agency for compliance review to the mandatory building code.

(10) Component--A sub-assembly, subsystem, or combination of elements for use as a part of a building system or part of a modular component that is not structurally independent, but may be part of structural, plumbing, mechanical, electrical, fire protection, or other systems affecting life safety.

(11) Decal--The approved form of certification issued by the department to the manufacturer or REF builder to be permanently affixed to the module or to a site-built REF indicating that it has been constructed to meet or exceed the code requirements and in compliance with this chapter.

(12) Design package--The aggregate of all plans, designs, specifications, and documentation required by these sections to be submitted by the manufacturer to the design review agency, or required by the design review agency for compliance review, including the compliance control manual and the on-site construction documentation. Unique or site specific foundation drawings and special on-site construction details prepared for specific projects are not a part of the design package.

(13) Design review agency--An approved organization, private or public, determined by the council to be qualified by reason of facilities, personnel, experience, demonstrated reliability to review designs, plans, specifications, and building systems documentation, and to certify compliance to these sections evidenced by affixing the council's stamp.

(14) IAS--International Accreditation Service.

(15) ICC--International Code Council, Inc.

(16) ICC ES--International Code Council Evaluation Services.

(17) Industrialized builder--A person who is engaged in the assembly, connection, and on-site construction and erection of modules or modular components at the building site or who is engaged in the purchase of industrialized housing or buildings modules or modular components for sale or lease to the public. An industrialized builder also includes a person who assembles and installs site-built REFs that are moved from the initial construction site.

(18) Insignia--The approved form of certification issued by the department to the manufacturer to be permanently affixed to the modular component indicating that it has been constructed to meet or exceed the code requirements and in compliance with the sections in this chapter.

(19) Installation--On-site construction of industrialized housing or buildings. (see paragraph (29)).

(20) Lease, or offer to lease--A contract or other instrument by which a person grants to another the right to possess and use industrialized housing or buildings for a specified period of time in exchange for payment of a stipulated price.

(21) Local building official--The agency or department of a municipality or other local political subdivision with authority to make inspections and to enforce the laws, ordinances, and regulations applicable to the construction, alteration, or repair of residential and commercial structures.

(22) Manufacturer--A person who constructs or assembles modules or modular components at a manufacturing facility which are offered for sale or lease, sold or leased, or otherwise used.

(23) Manufacturing facility--The place other than the building site, at which machinery, equipment, and other capital goods are assembled and operated for the purpose of making, fabricating, constructing, forming, or assembly of industrialized housing, buildings, modules, or modular components.

(24) Model--A specific design of an industrialized house, building, or modular component which is based on size, room arrangement, method of construction, location, arrangement, or size of plumbing, mechanical, or electrical equipment and systems therein in accordance with an approved design package.

(25) Module--A three dimensional section of industrialized housing or buildings, designed and approved to be transported as a single section independent of other sections, to a site for on-site construction with or without other modules or modular components.

(26) Modular building--Industrialized housing and buildings as defined in Texas Occupations Code §1202.002 and §1202.003, and any relocatable, educational facility as defined in §1202.004, regardless of the location of construction of the facility.

(27) NFPA--National Fire Protection Association.

(28) Non site-specific building--An industrialized house or building for which the permanent site location is unknown at the time of construction.

(29) On-site construction--Preparation of the site, foundation construction, assembly and connection of the modules or modular components, affixing the structure to the permanent foundation, connecting the structures together, completing all site-related construction in accordance with designs, plans, specifications, and on-site construction documentation.

(30) Open construction--That condition where any house, building, or portion thereof is constructed in such a manner that all parts or processes of manufacture can be readily inspected at the building site without disassembly, damage to, or destruction thereof.

(31) Permanent foundation system--A foundation system for industrialized housing or buildings designed to meet the applicable building code as set forth in §§70.100, 70.101, and 70.102.

(32) Permanent industrialized building--An industrialized building that is not designed to be transported from one commercial site to another commercial site.

(33) Permit, Alteration--A registration issued by the department to a person who is responsible for the alteration construction of industrialized housing, buildings or site-built REF's and who is not also registered as an industrialized builder.

(34) Permit, Commercial Installation--A registration issued by the department to a person who purchases an industrialized building for the person's own use and who assumes responsibility for the installation of the industrialized building.

(35) Permit, Residential Installation--A registration issued by the department to a person who purchases an industrialized house for the person's own use and who assumes responsibility for all or part of the construction relating to the installation of the industrialized house.

(36) Person--An individual, partnership, company, corporation, association, or any other legal entity, however organized.

(37) Public--The people of the state as a whole to include individuals, companies, corporations, associations or other groups, however organized, and governmental agencies.

(38) REF, Site-built--A relocatable educational facility (REF) as defined by Texas Occupations Code §1202.004 that is constructed at the first installation site by an REF builder.

(39) REF Builder--A person who constructs REF's at the first installation site. A person who assembles REFs constructed in a manufacturing facility is not an REF builder.

(40) Registrant--A person who, or which, is registered with the department pursuant to the rules of this chapter as a manufacturer, a REF builder, an industrialized builder, a design review agency, a third party inspection agency, a third party inspector, a third party site inspector, or a permit holder.

(41) Residential structure--Industrialized housing designed for occupancy and use as a residence by one or more families.

(42) Sale, sell, offer to sell, or offer for sale--Includes any contract of sale or other instrument of transfer of ownership of property, or solicitation to offer to sell or otherwise transfer ownership of property.

(43) Site or building site--A lot, the entire tract, subdivision, or parcel of land on which industrialized housing or buildings are sited.

(44) Special conditions and/or limitations--On-site construction documentation which alerts the local building official of items, such as placement of the building on the property or the requirements for roof ventilation, which may need to be verified by the local building official for conformance to the mandatory building codes.

(45) Structure--An industrialized house or building that results from the complete assemblage of the modules or modular components designed to be used together to form a completed unit.

(46) Third party inspection agency (TPIA)--An approved person or entity determined by the council to be qualified by reason of facilities, personnel, experience, demonstrated reliability, and independence of judgment to inspect industrialized housing, building, site-built REFs, and portions thereof for compliance with the approved plans, documentation, compliance control program, and applicable codes.

(47) Third party inspector (TPI)--An approved person determined by the council to be qualified by reason of experience, demonstrated reliability, and independence of judgment to inspect industrialized housing, buildings, site-built REFs, and portions thereof for compliance with the approved plans, documentation, compliance control program, and applicable code. A third party inspector works under the direction of a third party inspection agency or TPIA.

(48) Third party site inspector (TPSI)--An approved person determined by the council to be qualified by reason of experience, demonstrated reliability, and independence of judgment to inspect construction of REF's or the foundation and installation of industrialized housing, buildings, and portions thereof for compliance with the approved plans or engineered plans and the applicable code.

(49) Unique on-site construction details--Construction details that are not part of, or that differ from, the manufacturer's approved on-site construction details or REF builder's approved construction plans. Unique on-site construction details include additions that may affect the code compliance of the house or building such as car ports, garages, porches, decks, and stairs.

(b) Other definitions may be set forth in the text of the sections in this chapter. For purposes of these sections, the singular means the plural, and the plural means the singular.

(c) Where terms are not defined in this section or in other sections in this chapter and are defined in the mandatory building codes

as referenced in §70.100, such terms shall have the meanings ascribed to them in these codes unless the context as the term is used clearly indicates otherwise. Where terms are not defined in this section or other sections in this title or in the mandatory building codes, such terms shall have ordinarily accepted meanings such as the context implies.

§70.24. Criteria for Approval of Third Party Site Inspectors.

(a) A person seeking approval as a third party site inspector shall submit a written application to the executive director. The application will include the following information.

(1) A resume that includes the inspector's academic and professional qualifications, experience in related areas, and relevant ICC certifications.

(2) Evidence of current ICC certifications required for approval by the council.

(3) A statement signed by the inspector certifying that:

(A) the inspector's activities pursuant to the discharge of responsibilities as a third party site inspector will not result in financial benefit to the inspector via stock ownership or other financial interests in any producer, supplier, or vendor of products involved other than through standard fees for services rendered;

(B) the inspector will consistently and uniformly implement the policies and determinations of the council with regard to interpretations of the mandatory building codes and rules;

(C) the inspector will enforce the mandatory building codes adopted by the council;

(D) all information contained in the application for approval as a third party site inspector is true, timely, and correct; and

(E) all future changes will be immediately communicated to the department.

(b) The minimum qualifications for a third party site inspector are as follows:

(1) a high school diploma or equivalent;

(2) a minimum of three years experience in building code enforcement, building inspections, or building experience. At least one year of experience shall be in the performance of building inspections; and

(3) one of the following energy code certifications: certification as a residential energy inspector/plans examiner, as a commercial energy inspector, or both. The inspector must have a residential energy certification to inspect housing and a commercial energy certification to inspect buildings.

(4) one of the following code certification combinations:

(A) a residential combination inspector as granted by ICC. In lieu of a residential combination inspector the inspector may have one of each of the individual certifications that are needed for certification as a residential combination inspector, commercial combination inspector, or combination inspector. Inspectors with residential inspector certifications may only perform site inspections for industrialized housing complying with the International Residential Code; or

(B) a commercial combination inspector as granted by ICC. In lieu of a commercial combination inspector the inspector may have one of each of the individual certifications that are needed for certification as a commercial combination inspector or a combination inspector. Inspectors with a commercial inspector certification may only perform site inspections for industrialized buildings or site-built REFs; or

(C) a combination inspector as granted by ICC. In lieu of a combination inspector the inspector may have one of each of the individual certifications that are needed for certification as a combination inspector. Inspectors with this certification may perform site inspections for any industrialized housing, buildings, or site-built REFs.

§70.50. Reporting Requirements for Manufacturers, Industrialized Builders, REF Builders, and Permit Holders.

(a) The manufacturer shall submit a monthly report to the department, of all industrialized housing, buildings, modules, and modular components that were constructed and to which decals and insignia were attached during the month.

(1) The report shall be filed in a format required by the department by no later than the 10th day of the following month.

(2) The manufacturer shall keep a copy of the monthly report on file for a minimum of five years.

(3) Any corrections to reports previously filed shall clearly indicate the corrections to be made and the month and date of the report that is being corrected.

(4) The report shall contain:

(A) the serial or identification number of the units;

(B) the decal or insignia number attached to each identified unit;

(C) the name and registration number of the industrialized builder (as assigned by the department), or the installation permit number (as assigned by the department) of the person, to whom the units were sold, consigned, and shipped. The requirements contained in §70.20(3) shall apply when an installation permit is reported in lieu of the registration number of an industrialized builder;

(D) the date the decal or insignia was attached to the unit;

(E) an identification of the use of the structure for which the units are designed. For example, will the complete structure be used as a single family residence, a classroom or school, a duplex, a church, a restaurant, an equipment shelter, a bank building, a hazardous storage building, etc. Modular building, kiosk and similar terms are not to be used to describe the use of the completed building;

(F) any other information the department may require; and

(G) an indication of zero units if there was no activity for the reporting month.

(5) A manufacturer that takes possession of units that have not been installed, but that were previously reported as shipped, shall report the disposition of those units on the manufacturer's monthly report.

(b) Each industrialized builder shall keep records of all industrialized housing, buildings, modules, and modular components that were sold, leased, or installed.

(1) These records shall be kept for a minimum of ten years from the date of successful completion of the final site inspection and shall be made available to the department for review upon request. If the industrialized builder is not responsible for the installation, then the records shall be maintained for a period of 5 years from the date of sale or lease and shall be made available to the department upon request.

(2) An annual audit of units sold, leased, or installed by industrialized builders shall be conducted by the department. The audit will identify the modules or modular components by the name and

Texas registration number of the manufacturer of each unit and the assigned Texas decal or insignia numbers and the corresponding identification, or serial numbers, as assigned by the manufacturer. The industrialized builder shall report, or provide, the following information to the department for each unit identified in the audit within the timeframe set by the audit.

(A) Evidence of compliance with §70.75.

(B) The address where each unit was installed. If the industrialized builder is not responsible for the installation, then the address to where each unit was delivered. If the unit has not been installed, then the address where the unit is stored.

(C) Date construction began at the installation site.

(D) Date of occupation by owners or leasers or date released to owners or leasers for occupation.

(E) The occupancy use of each building containing modules or modular components. For example, is the building used as a classroom or school, a restaurant, a bank, an equipment shelter, a single-family residence, etc.

(F) If the industrialized builder is responsible for the installation and site work, then the industrialized builder:

(i) shall keep a copy of the foundation plans;

(ii) shall keep a copy of any unique on-site construction plans;

(iii) shall keep a copy of the site inspection report in accordance with §70.73 or evidence of the city responsible for the site inspection, such as a permit number or copy of a certificate of occupancy; and

(iv) give a copy of these documents or information to the department upon request.

(G) If the industrialized builder is not responsible for all of the construction related to the installation and site work, then the industrialized builder:

(i) shall keep a copy of the engineered construction plans for that portion of the construction work for which he is responsible;

(ii) shall keep a copy of the site inspection report for that portion of the construction work for which he is responsible in accordance with §70.73 or evidence of the city responsible for the site inspection, such as a permit number or copy of a certificate of occupancy; and

(iii) shall give a copy of these documents or information to the department upon request.

(H) If the industrialized builder is not responsible for the installation and site work, or if the industrialized builder has transferred or sold the unit to another person, then the industrialized builder shall provide identification of the installation permit number, assigned by the department, or industrialized builder registration number, assigned by the department, of the person responsible.

(c) Each REF builder shall keep records of all REFs constructed for a minimum of 10 years and provide a copy of these records to the department upon request. At a minimum the records shall include copies of the approved construction documents, inspection reports, and construction address for each REF.

(d) An installation permit holder shall keep a copy of the foundation plans and other construction plans and, for units installed outside the jurisdiction of a municipality, the site inspection report in accordance with §70.73 for a period of ten years from the date of successful completion of the final inspection of the industrialized house or building. A copy of these records shall be provided to the department upon request.

§70.51. Third Party Inspection Reports.

(a) In-plant inspections. A third party inspector or third party inspection agency shall file inspection reports on the forms and in the format required by the department (in accordance with any requirements set by the council).

(1) The TPIA must keep on file, for a minimum of 5 years, a copy of all inspection reports for inspections performed by the TPIA/TPI.

(2) Reports shall be filed with the department each week or at such other intervals as the department may require pursuant to council instructions.

(b) On-site inspections--construction of site-built REF's. A council-approved inspector shall file inspection reports on the forms and in the format required by the department (in accordance with any requirements set by the council).

(1) The council-approved inspector shall keep a copy of all inspection reports for a minimum of 5 years from the date each unit covered by the inspection report receives a Texas decal.

(2) Reports shall be filed with the department each week or at such intervals as the department may require pursuant to council instructions.

(c) On-site inspections--installation of industrialized housing and buildings. A council-approved inspector shall document inspections on the forms and in the format required by the department (in accordance with any requirements set by the council).

(1) The council-approved inspector shall keep a copy of all inspection reports for a minimum of 5 years from the date of inspection.

(2) The council-approved inspector shall make a copy of the inspection report available to the department upon request.

(3) The council-approved inspector shall notify the Department if the industrialized builder or installation permit holder fails to call for final inspection within 180 days of the start of construction as required by §70.73.

(4) The council-approved inspector shall notify the department whenever the industrialized builder or installation permit holder fails to correct deviations prior to occupation of the industrialized house or building.

§70.62. Responsibilities of the Local Building Official--Inspections.

(a) Installation inspections. When the installation site is within a municipality that has a building inspection agency or department, the local building official will inspect all on-site construction and the attachment of the structure to the foundation to assure completion and attachment in accordance with the approved design package, the engineered foundation system, any unique on-site details, and the mandatory building codes. As a minimum the local building official shall:

(1) perform an overall visual inspection for obvious nonconformity to the approved design manual, the engineered foundation system, any unique on-site details, and the mandatory building code;

(2) require final inspections along with any tests that are required by the approved installation instructions, on-site construction documentation, and/or the mandatory building code;

(3) require the correction of deficiencies identified by the tests or discovered in inspections; and

(4) issue a certificate of occupancy in accordance with locally adopted rules and regulations.

(b) Site-built REFs. When an REF is constructed within a municipality that has a building inspection agency or department, the local building official will inspect all construction to assure completion in accordance with the approved construction documents in accordance with §70.70(b) and other construction documentation in accordance with §70.70(e).

§70.65. Responsibilities of the Commission--Reciprocity.

(a) Industrialized housing and buildings designed and constructed by a manufacturer in this state for delivery and placement on a building site in another state are not subject to this chapter unless the units are constructed under the terms of a reciprocity agreement with the other state.

(b) The commission may enter a reciprocal agreement with another state to authorize building inspections of industrialized housing or buildings constructed in that state to be performed by an inspector of the equivalent regulatory agency of that state provided that:

(1) the commission finds that the standards prescribed by the statute or rules of the other state meet the objectives of Texas Occupations Code, Chapter 1202;

(2) the commission finds that the standards are satisfactorily enforced by the other state or its agents; and

(3) the standards of the other state shall not be deemed to be adequately enforced unless the other state provides for immediate written notification to the executive director of suspensions or revocations of approvals of manufacturers by the other state.

(c) If the commission enters a reciprocity agreement with another state, then the commission will accept industrialized housing and buildings which have been inspected by the reciprocal state and which have the appropriate decal, label, or insignia of the reciprocal state. Manufacturers in the reciprocal state who construct industrialized housing and buildings for Texas will be subject to the following.

(1) Manufacturers must be registered in Texas in accordance with §70.20. The manufacturer must submit evidence that its building system and compliance control program have been approved by the reciprocal state. The executive director shall verify the approval and maintain a list of manufacturers approved under the terms of the reciprocity agreement.

(2) Industrialized housing, buildings, modules, and modular components will be constructed in accordance with the codes referenced in §70.100 and any amendments to those codes in accordance with §70.101. The code used will be determined in accordance with §70.102.

(3) Review and approval of the manufacturer's design package will be in accordance with §70.70 except that the reciprocity agreement with the reciprocal state will accept the compliance control program approved by the reciprocal state for that manufacturer. All inspections performed by the reciprocal state must be in accordance with documents reviewed and approved by a council-approved design review agency or the department when acting as a design review agency.

(4) The manufacturer will assign a Texas decal or insignia to each module or modular component for Texas in accordance with §70.77. The Texas decal or insignia will be placed in the vicinity of the decal, label, or insignia of the reciprocal state.

(5) The manufacturer will permanently attach a data plate to each industrialized house or building in accordance with §70.71.

(6) The manufacturer will submit a monthly report to the executive director in accordance with §70.50.

(d) If the commission determines that the standards for the manufacture and inspection of industrialized housing and buildings in a reciprocal state, with which the commission has entered a reciprocal agreement, do not meet the objectives of Chapter 1202 or are not being enforced by the reciprocal state, then the commission shall suspend or revoke the reciprocal agreement. The reciprocal state and affected manufacturers will receive written notification of the reasons for the suspension or revocation of the agreement.

§70.70. Responsibilities of the Registrants--Manufacturer's Design Package and REF Builder's Construction Documents.

(a) Review and approval. The manufacturer's design package and the REF builder's construction documents must be reviewed and approved in accordance with the following.

(1) The manufacturer or REF builder shall select a council-approved design review agency (DRA) to perform all required review and evaluation of plans, designs, specifications, compliance control, and on-site construction documentation, etc. This selection shall be made in writing to the executive director and will state the name, address, and registration number of the design review agency selected.

(2) An approved DRA shall review all designs, plans, specifications, calculations, compliance control programs, on-site construction documentation or specifications, and other documents as necessary to assure compliance with the mandatory building codes in accordance with the interpretations, instructions, and determinations of the council.

(A) The reviews are to be performed or directly supervised by the DRA's certified plans reviewers for the discipline (electrical, plumbing, mechanical, structural, building planning, or fire safety) as listed and approved in the agency's organizational chart. A DRA's plans reviewers must be certified pursuant to the criteria established by the council as set forth in §70.22.

(B) The DRA will obtain from the manufacturer or REF builder all information necessary to assure that the manufacturer's designs and procedures are in compliance with the mandatory building codes and the sections in this chapter.

(3) All documents shall have pages numbered and arranged in accordance with a table of contents. The floor plans shall have no scale smaller than 1/8th inch equals one foot. All documents shall be identified to indicate the manufacturer's or REF builder's name and registered physical address.

(4) The DRA will signify approval of a drawing, specification, calculation, or any other document, including revisions and additions, in the manufacturer's design package and in the REF builder's construction documents by applying the council's stamp to each page.

(A) An alternate council stamp as approved by the council may be used on all designs, plans, specifications, calculations, and other documentation with the exception of the first or cover page and the table of contents or index pages of the design package.

(B) The original council stamp with original signature will be required on the first or cover page and the table of contents or index pages of the design package.

(C) The signature on the original council stamp must be the signature of the manager or chief executive officer of the DRA. The manager or chief executive officer of the DRA must be licensed in the State of Texas as a professional engineer or architect in accordance with the criteria for approval of DRA's established by the council.

(D) The stamp shall not be placed on any designs, plans, or specifications that do not meet the requirements of the applicable mandatory building codes or the requirements of these sections.

(E) The DRA shall forward a copy of all approved documents to the department within 5 days of approval and shall forward one approved copy to the manufacturer or the REF builder.

(F) The DRA shall keep copies of all approved documents for a minimum of 5 years from the date that these documents are superseded by adoption of later editions of the mandatory building codes and make a copy of these documents available to the department upon request.

(G) The manufacturer shall keep a copy of all approved documents for a minimum of ten years from the date the last unit constructed from the documents is shipped and make a copy of these documents available to the department upon request.

(H) The REF builder shall keep a copy of all approved construction documents for a minimum of 10 years from the date of completion of the units covered by the documents and make a copy of these documents available to the department upon request.

(I) The manufacturer or the REF builder shall make a copy of all approved documents available to the person performing inspections.

(5) Manufacturers and REF builders will be notified of the change in code editions 180 days before the effective date of the change. Manufacturers or REF builders who wish to continue building to previously approved documents must resubmit these documents to their DRA for review and approval to the new code editions. Only documents that meet the new code editions may be approved. Approval of these documents will be evidenced by application of a new approval date and the council's stamp of approval to each document.

(A) All construction begun on or after effective date of adoption of the new code editions must comply with the new code editions and be constructed in accordance with design packages approved to the new code editions.

(B) Construction to plans approved to the old code editions begun prior to effective date of adoption of the new code editions, or prior to the manufacturer's effective transition date, must be completed, inspected by a Texas approved inspector, and labeled (TX decal must be attached to the unit) within 180 days of the adoption of the new code editions, or the unit shall not be eligible for a Texas decal.

(C) A manufacturer may transition from the current code edition to the new code edition as follows.

(i) The approval date on all documents in the manufacturer's design package will be on or after the effective date of adoption of the new edition of the codes in §70.100. Approvals dated before the effective date of adoption of the codes in §70.100 will no longer be valid for new construction by the manufacturer.

(ii) The manufacturer may transition approval of documents in his design package any time within the 180 days prior to the effective date of the adoption of the new editions of the codes. The manufacturer must notify the department in writing of the effective date of transition. All documents approved on or after that date shall be to the new editions of the codes. All previously approved supporting documentation, such as compliance control manuals, system calculations, etc., must be resubmitted to the DRA for review and approval to the new code editions and must be approved as of the effective date of transition specified by the manufacturer. Approvals dated before the transition date of adoption of the codes in §70.100 will no longer be valid for new construction by the manufacturer.

(6) A DRA may withdraw the approval of any document whenever the approval is later found to be in violation of code requirements or the rules and regulations in this chapter. Notice of the withdrawal of the approval shall be in writing and shall set forth the reasons for the withdrawal. Any withdrawal of approval shall have prospective effect only, except for life safety items.

(7) A DRA may not revise or correct documents submitted for review and approval by the manufacturer or REF builder except as provided in this subsection. DRAs may make red ink corrections to documents provided the corrections meet all of the following criteria:

(A) limited to corrections of minor deviations;

(B) the corrected items can be verified by reference to prescriptive code requirements;

(C) the change does not involve any change of design or require design;

(D) the red ink correction is valid for 10 working days and may not be extended; and

(E) the corrections must be numbered and initialed by the DRA and the statement, "As noted with (number) corrections" shall appear near the stamp of the council with the number of corrections entered.

(b) In-plant documentation for manufacturers and construction documents for REF builders. The manufacturer and REF builder shall provide the DRA the documentation necessary to demonstrate compliance with the mandatory building codes in §70.100 and §70.101. At a minimum the documentation shall include the following:

(1) specifications or detail drawings for all materials, devices, appliances, equipment, and fasteners used in construction, including listings and evaluation reports for materials or methods of construction where required by the mandatory building code or to demonstrate compliance of an approved alternate material or method of construction in accordance with §70.103;

(2) detailed drawings of all assemblies and components (with cross-sections as necessary to identify major building components);

(3) floor plans for all models and options;

(4) electrical schematics for all models and options;

(5) water system and drain-waste-vent system drawings for all models and options;

(6) gas piping system drawings for all models and options;

(7) mechanical system drawings for all models and options;

(8) fire protection, fire safety, and exit details;

(9) energy compliance details;

(10) heating, ventilation, and air conditioning details;

(11) structural, thermal, and electrical load calculations;

(12) weather resistance details;

(13) condensation protection details;

(14) decay protection details;

(15) insect and vermin protection details;

(16) fastening schedule;

(17) assembly and connection instructions for all components, materials, devices, equipment, and appliances;

(18) together on either the floor plan or the cover or title sheet for each model or project in a title block format:

(A) name and date of applicable codes;

(B) identification of permissible type of gas for appliances;

(C) maximum snow load (roof) (psf);

(D) maximum wind speed (mph) and exposure;

(E) seismic design criteria;

(F) occupancy/use group type;

(G) construction type;

(H) special conditions and/or limitations;

(I) the location of the data plate on the building or dwelling unit; and

(J) the location of the decal or insignia on each module or modular component, or for REF builders, the location of the decal on the building;

(19) compliance control manual (reference subsection (c)); and

(20) on-site construction documentation (reference subsection (d)).

(c) Compliance control program for manufacturers. The utilization of mass production techniques and assembly line methods in the construction of industrialized housing, buildings, modules, and modular components along with the fact that a large part of such construction cannot be inspected at the ultimate building site, requires manufacturers to develop an adequate compliance control program to assure that these structures meet or exceed mandatory code requirements and are in compliance with the rules and regulations of this chapter. The compliance control program shall be documented in the form of a manual that must be approved by the design review agency. The council may waive the compliance control program as set forth in the rules upon written request from the manufacturer. Waiver of the compliance control program shall require that each module or modular component be individually inspected at each and every stage of the manufacturing process. The manufacturer shall provide the design review agency a compliance control manual that must, at the minimum, contain the following:

(1) a table of contents;

(2) a chart indicating the manufacturer's organizational structure to assure compliance and to assure that the compliance control staff shall maintain independence from the production personnel;

(3) a statement that defines the obligation, responsibility, and authority for the manufacturer's compliance control program;

(4) identification of compliance control personnel, their accountability by position, responsibility for inspections, method of marking nonconformances observed, and system for assuring corrections are made;

(5) materials handling methods, including inspection checklists, for receiving materials and methods for marking and removing rejected materials both upon receipt and from the production line. The area for rejected materials must be clearly indicated to assure that such material is not used;

(6) a description of an identification system to mark each individual module, or modular component, at the first stage of production to assure appropriate inspection and rechecking of any deviation corrections;

(7) a diagram of the manufacturing sequence with the plant layout, including a description of the activities to be performed along with a listing of those that may be performed at one or more stations;

(8) an inspection checklist including:

(A) a list of inspections to be made at each production station; and

(B) accept/reject criteria (each significant dimension and component should be given tolerances);

(C) an energy compliance checklist that enumerates the energy code-compliance features of the module or modules and includes a signature space for the compliance control inspector or manager. A copy of this checklist shall be shipped with the module or modules.

(9) step-by-step test procedures, a description of the station at which each production test is performed, a description of required testing equipment, and procedures for periodic checking, recalibration, and readjustment of test equipment. Procedures shall be included for, but not limited to, electrical tests as specified in the National Electrical Code, Article 550-17, gas supply pressure tests, water supply pressure tests, drain-waste-vent system tests, concrete slump tests, and concrete strength tests;

(10) storage procedures for completed structures at the plant and for any other locations prior to installation;

(11) a statement indicating the person who is responsible for compliance control at each manufacturing facility and who will assume responsibility for decals and insignia, application of the decals and insignia, and the reporting procedure;

(12) a procedure for maintaining reliable, retrievable records of the inspections performed, decal and insignia numbers assigned, the deficiencies and how they were corrected, and the site to which the modules or modular components were transported;

(13) procedures and information to demonstrate how the modules and modular components are to be transported to the building site so that damage will not occur or that compliance deviations will not result (actual transportation without damage or deviation is evidence sufficient to justify the method); and

(14) procedures that assure that the compliance control procedures are complied with on all regulated structures. As a minimum, regulated structures must be identified prior to commencing construction.

(d) On-site construction specifications or documentation for manufacturers. All work to be performed on the building site shall be specifically identified and distinguished from construction to be performed in the manufacturing facility, e.g., assembly and connection of all modules, modular components, systems, equipment, and appliances and attachment to the foundation system. The work to be performed on-site shall be described in detail in documents (architectural sheets, specifications, instructions, etc.) which shall be made available to the builder for use at the site and provided as required for review and inspection to the agency having local authority. The manufacturer shall provide the design review agency on-site construction documentation which must, at the minimum, contain the following:

(1) critical load points for attachment of the house or building or component to the foundation;

(2) details for module to module or modular component assembly and connection;

(3) minimum requirements for connection and attachment of all modules and modular components to the foundation system;

(4) firestopping and draftstopping details;

(5) details for fire exits, balconies, walkways, and other site-built attachments;

(6) exterior weatherproofing details;

(7) details for thermal, condensation, decay, corrosion, and insect protection;

(8) electrical, mechanical, heating, cooling, and plumbing system completion details;

(9) electrical, mechanical, heating, cooling, and plumbing system test procedures;

(10) fire safety provisions; and

(11) specifications and instructions for cooling equipment, and complete information necessary to calculate sensible heat gain along with information on the sizing of the air distribution system, if applicable, and the R values of insulation in the ceiling, walls, and floors.

(e) Other construction documentation for REF builders. Construction documentation for the foundation and site specific elements, such as ramps and stairs, of the site-built REF's shall be reviewed and approved by the DRA, the local building official, or, in areas where the building site is outside a municipality or within a municipality with no building department or agency, by the school district. At a minimum the documentation shall include all construction documentation necessary to complete the building at the first commercial site including a foundation system design meeting the requirements of §70.73(g). The use of ground anchors shall comply with §70.73(h).

(f) Non-site specific buildings. Whenever the manufacturer does not know, at the time of construction, where the building is to be placed, in lieu of providing the site specific construction details or typical site construction details as required in subsection (d), the manufacturer may provide special conditions and/or limitations on the placement of the building. These special conditions and/or limitations will serve to alert the local building official of items, such as handicapped accessibility and placement of the building on the property, which the local building official may need to verify for conformance to the mandatory building codes. Certain site-related details, such as module to module connections, must still be provided by the manufacturer. It is the responsibility of the DRA to verify that such site-related details are included in the manufacturer's approved design package.

§70.71. Responsibilities of the Registrants--Data Plates.

(a) The manufacturer shall attach a data plate to each dwelling unit of a residential structure containing industrialized housing and buildings modules and to each appropriate unit of a commercial structure containing industrialized housing and buildings modules.

(b) The REF builder shall attach a data plate to each site-built REF.

(c) The data plate shall be made of a material that will not deteriorate over time and be permanently placed so that it cannot be removed without destruction. The data plate shall be placed in an easily accessible location as designated on the floor plan or on the cover or title sheet for each model or project. The data plate shall not be located on any readily removable item such as a cabinet door or similar component. Location of the data plate on the cover of the electrical distribution panel is acceptable.

(d) The data plate must contain, as a minimum, the following information:

(1) the manufacturer's or REF builder's name, registration number, and address;

(2) for manufacturers, the serial or identification number of the unit; for REF builders an identification or project number for the building;

(3) the State decal numbers;

(4) the name and date of applicable codes;

(5) an identification of permissible type of gas for appliances;

(6) the maximum snow load (roof) (psf);

(7) the maximum wind speed (mph) and exposure;

(8) the seismic design criteria;

(9) the occupancy/use group type;

(10) the construction type; and

(11) special conditions and/or limitations.

(e) All modular components shall be marked with, or otherwise have permanently affixed, a data plate containing the following information:

(1) the manufacturer's name, registration number, and address;

(2) the serial or identification number of the component or components;

(3) the State insignia number or numbers;

(4) the name and date of applicable codes;

(5) the design loads for the component; and

(6) any special conditions of use for the component.

(f) The information required in subsection (c) may be placed in the crate in which the component or components are shipped or on a tag attached to the crate or to the component if the component is such that the information may not be marked or permanently affixed to the component.

§70.73. Responsibilities of the Registrants--Building Site Construction and Inspections.

(a) Industrialized housing shall be installed on a permanent foundation system.

(b) The initial construction and inspection of a site-built REF at the 1st commercial site falls under the provisions of §70.79. Subsequent installation of REFs shall comply with this section.

(c) Responsibility for building site construction. The industrialized builder or installation permit holder shall be responsible for assuring that the foundation and the installation of an industrialized house, building, or site-built REF complies with the manufacturer's or REF builder's on-site construction specifications or documentation that have been approved in accordance with §70.70, any unique on-site construction details, the engineered foundation design, and the mandatory building codes.

(1) The industrialized builder or installation permit holder is responsible for assuring that all sub-contractors are licensed as required by applicable state law.

(2) The industrialized builder is not responsible for construction performed by the installation permit holder as specified on the installation permit application submitted to the department. Construction not covered by the installation permit is the responsibility of the industrialized builder.

(3) The installation permit holder is responsible only for the construction specified on the installation permit application submitted to the department.

(d) Responsibility for inspections within jurisdiction of a municipality. When the building site is within a municipality that has a building inspection agency or department, the local building official will inspect all on-site construction done at the site and the attachment of the structure to the foundation to assure completion and attachment in accordance with the documents approved in accordance with §70.70, the foundation system design, any unique on-site construction details, and the mandatory building codes.

(1) A municipality that regulates the on-site construction or installation of industrialized housing or buildings may require and review, for compliance with the mandatory building codes, a complete set of plans and specifications, including the foundation system design and any unique on-site construction details.

(2) The industrialized builder or installation permit holder shall not permit occupation of, or release for occupation, the industrialized house or building unless approved by the municipality.

(e) Responsibility for inspections outside the jurisdiction of a municipality or within a municipality without a building inspection agency or department. When the building site is outside a municipality, or within a municipality that has no building department or agency, a council-approved inspector will perform the required inspections in accordance with this section and the inspection procedures established by the council to assure completion and attachment in accordance with the documents approved in accordance with §70.70, the mandatory building codes, the foundation system design, and any unique on-site construction details.

(1) The on-site inspection is normally accomplished in three phases: foundation inspection, set inspection, and final inspection. The foundation inspection shall be performed before the concrete is poured.

(2) The final inspection shall be completed within 180 days of the start of construction. The department may grant an extension upon receipt of a written request that demonstrates a justifiable cause.

(3) Site inspections are required for the first installation of all industrialized housing and permanent industrialized buildings. Exception: Site inspections are not required for the installation of unoccupied industrialized buildings not open to the public, such as communication equipment shelters, that are not also classified as a hazardous occupancy by the mandatory building code.

(4) Site inspections are required for industrialized buildings that are designed to be moved from one commercial site to another commercial site if the buildings are used as a school or place of religious worship.

(5) The industrialized builder, or installation permit holder, is responsible for scheduling each phase of the inspection with the inspector. Additional inspections will be scheduled as required for larger structures and to correct discrepancies. The industrialized builder, or installation permit holder, may utilize a different inspector for different projects, but may not change the inspector for a project once started without the written approval of the department.

(6) The inspector shall provide the industrialized builder or installation permit holder a copy of the site inspection report upon completion of each phase of the inspection. If the inspector finds a structure, or any part thereof, does not meet the approved design package, the mandatory building codes, the engineered foundation plans, or the engineered on-site construction details, then the inspection report shall include a list of violations. The industrialized builder or installation permit holder is responsible for assuring that all violations are corrected.

(7) The industrialized builder, or installation permit holder, shall not permit occupancy, or release the house or building for occupation, until a successful final inspection has been completed. A final inspection report shall be issued showing no outstanding violations prior to occupation, or release for occupation, of the house or building. Exception: Occupancy of the house or building may be permitted and approved with outstanding items provided that the items are not in violation of the mandatory building codes.

(A) A successful final inspection means that all on-site construction has been completed, that all violations have been corrected, and that the construction has been found to be in compliance with the mandatory building codes, the approved on-site construction documentation, the engineered foundation system, and the engineered on-site construction documents.

(B) The industrialized builder or installation permit holder shall maintain a copy of each site inspection report for a minimum of ten years from the date of successful final inspection and make a copy of the report available to the department upon request. The report shall include a list of all violations and documentation from the inspector showing that all outstanding violations have been corrected.

(C) Upon request a copy of all site inspection reports shall be given to the owner of the house or building.

(f) Destructive disassembly shall not be performed at the site in order to conduct tests or inspections, nor shall there be imposed standards or test criteria different from those required by the approved installation instructions, on-site construction documentation, and the applicable mandatory building code. Nondestructive disassembly may be performed only to the extent of opening access panels and cover plates.

(g) Foundation system designs. A licensed professional engineer (or architect for one and two family dwellings or buildings having one story and total floor area of 5,000 square feet or less) shall design and seal the foundation systems for each industrialized house or building. Review by a DRA is not needed or required. A municipality that regulates the on-site construction or installation of industrialized housing or buildings may review the foundation system design for compliance with the mandatory building code. Foundation system designs shall comply with the mandatory building code referenced in §70.100 and §70.101 and shall contain complete details for the construction and attachment of the house or building on the foundation, including, but not limited to the following:

(1) address or area for which the foundation is suitable;

(2) minimum load specifications, including wind loads, seismic design loads, soil bearing capacity, and if the foundation is designed for expansive soils;

(3) site preparation details;

(4) material specifications;

(5) requirements for corrosion resistance, protection against decay, and termite resistance;

(6) size, configuration, and depth below grade of all footings, piers, and slabs including, but not limited to, details of concrete reinforcement, spacing of footings and piers, capping of piers, and mortar or concrete fill requirements for piers;

(7) fastening requirements, including, but not limited to, size, spacing, and corrosion resistance;

(8) requirements for surface drainage; and

(9) details for enclosure of the crawl space, including details for ventilation and access.

(h) Ground anchors. The use of ground anchors in the installation of industrialized housing is not permitted. The use of ground anchors in the installation of industrialized buildings is allowed if deemed appropriate by a municipality or other political subdivision. The foundation design shall be prepared by a licensed professional engineer and shall contain complete details for the construction and attachment of the building on the foundation, including, but not limited to the following:

(1) address or area for which the foundation is suitable, including a soil investigative report prepared by a qualified engineer or a description of the soil type for which the anchoring system is suitable;

(2) minimum load specifications, including wind loads, seismic design loads, soil bearing capacity, and if the foundation is designed for expansive soils;

(3) site preparation details;

(4) material specifications;

(5) requirements for corrosion resistance, protection against decay, and termite resistance;

(6) size, configuration, and depth below grade of all footings and piers including spacing of footings and piers;

(7) specification and installation requirements for the tie-down anchoring system, including specifications for corrosion resistance for the ground anchors and associated tie-down system;

(8) requirements for surface drainage; and

(9) details for enclosure of the crawl space, including details for ventilation and access.

(i) Unique on-site construction details. Unique on-site construction details as defined by §70.10(a) shall be designed and sealed by a licensed Texas professional engineer (or architect for one and two family dwellings or buildings having one story and total floor area of 5,000 square feet or less) and review by a DRA is not needed or required. The unique on-site construction details shall comply with the mandatory building codes referenced in §70.100 and §70.101. A municipality that regulates the on-site construction or installation of industrialized housing or buildings may require and review the unique on-site details for compliance with the mandatory building code.

§70.74. Responsibilities of the Registrants--Alterations.

(a) The manufacturer shall not alter construction of the industrialized house or building from the approved design package. Industrialized builders or installation permit holders shall not alter construction performed at the installation from the approved on-site construction documentation except in accordance with this section or §70.73(g). Alterations of industrialized housing or buildings shall be as specified in this section.

(b) An alteration of an industrialized house or building prior to, or during installation, that results in a structure that does not comply with the mandatory building codes is prohibited. An alteration after installation of an industrialized building that is designed to be moved from one commercial site to another commercial site that does not comply with the mandatory building codes is prohibited. Alterations after installation of industrialized housing or permanent industrialized buildings shall be in accordance with the requirements of the local building code authorities.

(c) Ordinary repairs and work exempt from permit requirements as specified in the mandatory building codes referenced in §70.100 and §70.101 shall not be considered alterations. Ordinary repairs shall include the removal and replacement of the covering of existing materials, elements, equipment, or fixtures using like or the same new materials, elements, equipment, or fixtures that serve the same purpose.

(d) Alteration decals are used to recertify industrialized buildings designed to be moved from one commercial site to another commercial site. Each decal is assigned to a specific module or modular component. The control of the decals shall remain with the department. The department will issue alteration decals to the third party inspection agency responsible for the inspections of the alterations upon application and payment of the fee for the decal by the industrialized builder or alteration permit holder. By affixing the decal the industrialized builder or alteration permit holder and third party inspection agency certify that the module has been altered and inspected in accordance with the mandatory building codes and this section. The third party inspector shall not affix the decal to any module where inspection reveals that the building does not comply with the approved recertification or alteration construction documents or the mandatory building codes.

(e) Alterations of industrialized housing and permanent industrialized buildings.

(1) *Prior to, or during, installation outside the jurisdiction of a municipality.* The industrialized builder, or installation permit holder, shall submit the original approved construction documents for the house or building, as reference, along with a complete set of construction documents describing a proposed alteration to a design review agency for approval prior to construction in accordance with the procedures established by the council. The design review agency responsible for review and approval of alteration construction documents for a project, industrialized house, or permanent industrialized building may not be changed without the written approval of the department. Alterations on the house or building shall not begin prior to approval of the construction documents and shall be performed only by persons licensed to perform this work. Inspections of alterations shall be performed by a third party inspector in accordance with procedures established by the council. The third party inspection agency responsible for inspections for a project may not be changed without the written approval of the department.

(A) An alteration data plate shall be affixed to any house or building where the alteration results in a reclassification of the occupancy group or construction type, a change in the permissible type of gas required for appliances, or a change in the wind speed and exposure, maximum snow (roof) load, seismic design criteria, or special conditions or limitations. The data plate shall contain such information as specified in subsection (g).

(B) All records pertinent to the alteration, including a copy of the alteration data plate, shall be retained by the industrialized builder or installation permit holder for a minimum of 10 years from the date of successful completion of the final inspection and be made available to the department upon request.

(C) All records pertinent to the review and approval of the alteration construction documents shall be retained by the DRA for a minimum of 5 years from the date of approval and shall be made available to the department upon request.

(D) All records pertinent to the alteration inspections shall be retained by the TPIA for a minimum of 5 years from the completion of the alteration construction and inspections and shall be made available to the department upon request.

(2) *Prior to installation within the jurisdiction of a municipality.* Alterations prior to installation within a jurisdiction shall be in accordance with paragraph (1).

(3) *During, or after, installation within the jurisdiction of a municipality.* Approval of plans and inspection of alterations shall be in accordance with the permitting and inspection procedures of the municipality.

(f) Recertification of industrialized buildings designed to be moved from one commercial site to another commercial site. An industrialized building that has been certified by application of a Texas decal in accordance with §70.77 and that is designed to be moved from one commercial site to another commercial site may be recertified in accordance with this section. A copy of the data plate on each building to be recertified shall be submitted to the DRA responsible for the plan review and approval of recertification and alteration documents. Repairs, other than ordinary repairs as defined by the mandatory building codes, shall be considered alterations. The industrialized builder or alteration permit holder shall purchase an alteration decal from the department to affix to each module that is recertified or altered. The alteration decal shall be released only to the third party inspection agency responsible for the alteration inspections.

(1) Recertification class 1: original approved construction documents exist and the building has not been previously altered. The industrialized builder or alteration permit holder shall:

(A) submit a copy of the original approved construction documents for the building to the design review agency for reference purposes;

(B) submit a copy of the construction documents for alteration of the building to the design review agency for review and approval in accordance with the requirements established by the council and subsection (f)(6). The construction documents shall include the serial number assigned by the manufacturer and the Texas decal number or insignia number of each module or modular component;

(C) not begin construction of the alteration of the building prior to the approval of the construction documents by the design review agency. Construction shall be performed only by persons licensed to perform this work; and

(D) have the construction inspected by a third-party inspector in accordance with the procedures established by the council and subsection (f)(7). A minimum of one rough in inspection and a final inspection of the alteration construction shall be required.

(2) Recertification class 2: original approved construction documents do not exist. The industrialized builder or alteration permit holder shall:

(A) have a structural analysis of the existing building made by an engineer licensed to practice in Texas to determine the adequacy of the structural systems in accordance with Chapter 16 of the current edition of the International Building Code adopted in §70.100. The industrialized builder or alteration permit holder shall submit a copy of this analysis and a set of plans depicting the as built construction of the building to the design review agency for review and approval in accordance with the requirements established by the council and with subsection (f)(6). These documents shall include the serial number assigned by the manufacturer and the Texas decal or insignia number of each module or modular component contained in the building;

(B) bring into compliance those areas of the building identified by the structural analysis and the design review agency as not in compliance with the mandatory building code. The industrialized builder or alteration permit holder shall submit construction documents to bring the building into compliance to the design review agency for review and approval in accordance with the requirements established by the council and with subsection (f)(6);

(C) have the building inspected by a third party inspector in accordance with the procedures established by the council and subsection (f)(7) to verify that the building complies with the approved as built construction documents;

(D) not begin construction to bring the building into compliance, or to alter the building, prior to approval of the construction documents. The construction shall be performed only by persons licensed to perform this work; and

(E) have the construction to bring the building into compliance, and to alter the building, inspected by a third-party inspector in accordance with the procedures established by the council and subsection (f)(7). A minimum of one rough in inspection and a final inspection of the construction shall be required.

(3) Recertification class 3: original approved construction documents exist, but the building has been altered from those plans and the building has not been recertified in accordance with other paragraphs in this section. The industrialized builder or alteration permit holder shall:

(A) submit a copy of the original approved construction documents for the building to the design review agency for reference;

(B) submit a copy of construction documents that depict the alterations or repairs to the building to the DRA for review and approval in accordance with the requirements established by the council and with subsection (f)(6). Where structural elements have been altered, a structural analysis of the existing building made by an engineer licensed to practice in Texas to determine the adequacy of the structural systems in accordance with Chapter 16 of the current edition of the International Building Code adopted in §70.100 shall also be submitted. The construction documents shall include the serial number assigned by the manufacturer and the Texas decal or insignia number of each module or modular component contained in the building;

(C) bring into compliance those areas of the building identified by the structural analysis or the design review agency as not in compliance with the mandatory building codes. The industrialized builder or alteration permit holder shall submit construction documents to bring the building into compliance to the design review agency for review and approval in accordance with the requirements established by the council and with subsection (f)(6);

(D) have the building inspected by a third party inspector in accordance with the procedures established by the council and subsection (f)(7) to verify that the building complies with the approved as built construction documents;

(E) not begin construction to bring the building into compliance, or to alter the building, prior to approval of the construction documents. The construction shall be performed only by persons licensed to perform this work; and

(F) have the construction to bring the building into compliance, and to alter the building, inspected by a third-party inspector

in accordance with the procedures established by the council and subsection (f)(7). A minimum of one rough in inspection and a final inspection of the construction shall be required.

(4) Recertification class 4: buildings that are to be altered again after recertification. The industrialized builder or alteration permit holder shall:

(A) submit a copy of all previous recertification construction documents, including original and as built construction documents where applicable, to the design review agency in accordance with the requirements established by the council and subsection (f)(6);

(B) include the alteration decal numbers from previous recertifications on the construction documents for altering the building; and

(C) comply with subsection (f)(1)(B) - (D).

(5) Emergency repairs. Equipment replacement and repairs, which do not qualify as ordinary repairs in accordance with the mandatory building codes, that must be performed in an emergency situation may be performed prior to recertification of the building. The industrialized builder or alteration permit holder shall submit documents as necessary to recertify the building in accordance with the requirements of subsection (f)(1) - (3) within the next working business day with the following exceptions.

(A) The industrialized builder or alteration permit holder shall have 10 working days to submit as built construction documents for the entire building where required by the recertification requirements of subsection (f)(1) - (4).

(B) The industrialized builder or alteration permit holder shall have 10 working days to submit a structural analysis performed by an engineer licensed to work in Texas where required by the recertification requirements of subsection (f)(1) - (4).

(6) The industrialized builder or alteration permit holder shall choose an approved DRA to perform the review and evaluation of all construction documents for the recertification of an industrialized building. The industrialized builder or alteration permit holder may choose a different DRA for different projects or buildings, but may not change DRA's for a project or building once the plan review has begun without prior written approval from the department.

(A) Construction documents submitted to the DRA shall include all information pertinent to assuring compliance with the mandatory building code and shall include structural, thermal, and electrical load calculations.

(B) As built construction documents shall be reviewed to determine the existence of any potential nonconformance with the provisions of the mandatory building codes. The review and approval of construction documents to recertify a building shall comply with the requirements of §70.70(a)(2) - (4) and (6) - (8) with the following exceptions.

(i) Based on the engineering analysis and the DRA's review of the as built construction documents, the DRA will prepare a report to the industrialized builder or alteration permit holder that describes the nonconformances of the building to be recertified.

(ii) The DRA will signify approval of a drawing, specification, calculation, or any other document submitted for review and approval by the application of the council's stamp of approval for altered or recertified buildings.

(iii) The design review agency shall complete a recertification transmittal form in accordance with the requirements of the council and forward a completed copy of the form to the department. A copy of all documents pertinent to the recertification of the building shall be supplied to the department upon request.

(iv) The design review agency shall forward a completed copy of the recertification transmittal form and one approved copy of the construction documents to the industrialized builder.

(v) The design review agency shall keep a copy on file of the original approved documents, the engineering analysis, and approved construction documents for recertification of the building for 5 years from the latest date of approval of the recertification or alteration construction documents.

(7) The third party inspector shall affix the alteration decal to each industrialized building module or modular component upon completion of the construction and successful completion of all required inspections in accordance with this section and the requirements of the council. Successful completion of all required inspections means that all construction has been completed, that all violations have been corrected, and that the construction has been found to be in compliance of the applicable mandatory building codes and the approved construction documents.

(A) The decal shall be affixed in the vicinity of the original decal or insignia on the module or modular component as depicted on the approved construction documents.

(B) The industrialized builder or alteration permit holder may not change the third party inspection agency for a project or building once started without prior written approval of the department.

(C) All plans pertinent to the alteration or recertification shall be available for use by the third party inspector during the inspection. A copy of the mandatory building codes shall be available for the inspector's use during the inspection.

(D) A rough-in inspection shall be scheduled by the industrialized builder or alteration permit holder while construction is still open to inspection. The inspector shall begin the inspection by verifying that the units to be inspected are those depicted in the original approved, the approved as built, or the previously approved recertification construction documents and shall verify the original decal and serial number of each unit to be inspected. The third party inspector may require the industrialized builder to uncover portions of the building as necessary to verify compliance.

(i) The inspection shall be terminated and the alteration decals returned to the department if inspection reveals that the units have been altered from the original approved, the approved as built, or the previously approved recertification construction documents.

(ii) The inspection shall be terminated and the alteration decals returned to the department if inspection reveals that the units are not those identified by serial number and decal number in the approved construction documents.

(E) A final inspection shall be scheduled by the industrialized builder or alteration permit holder after construction is completed.

(F) Inspection of system testing shall be scheduled by the industrialized builder or alteration permit holder as necessary to assure that tests required by the mandatory building code are witnessed by the third party inspector.

(G) The industrialized builder or alteration permit holder shall schedule a reinspection with the third party inspector wherever a deviation from the approved plans is identified that cannot be corrected and inspected during the rough-in or final inspection.

(H) The inspector shall complete a recertification inspection report on the forms and in the format required by the department and the council. A copy of the inspection report shall be provided to the industrialized builder or alteration permit holder for his records and submitted to the department upon request. The third party inspection agency shall maintain records of all recertification inspection reports for five years from the date of successful completion of inspections for a building or project.

(I) Only one inspection shall be required where a building is recertified in accordance with subsection (f)(2) or (f)(3) and no construction is required to bring the building into compliance or to complete alterations on the building.

(i) The third party inspector shall verify that the units to be inspected are those depicted in the approved construction documents and shall verify the original decal and serial number of each unit to be inspected.

(ii) The third party inspector may require the industrialized builder or alteration permit holder to uncover portions of the building as necessary to verify compliance.

(iii) The inspection shall be terminated, and the alteration decals returned to the department, if inspection reveals that the units have been altered from the approved construction documents.

(J) Only one inspection shall be required where emergency repairs are performed in accordance with subsection (f)(5) and where further construction is not required to bring the building into compliance with the mandatory building code.

(i) The inspector shall verify that the units to be inspected are those depicted in the approved construction documents and shall verify the original decal and serial number of each unit to be inspected.

(ii) The third party inspector may require the industrialized builder or alteration permit holder to uncover portions of the building as necessary to verify compliance.

(iii) The inspection shall be terminated, and the alteration decals returned to the department, if inspection reveals that the units have been altered from the approved construction documents.

(iv) The inspection shall be terminated and the alteration decals returned to the department if inspection reveals that the units are not those identified by serial number and decal number in the approved construction documents.

(8) An alteration data plate shall be attached to the altered building as required by subsection (g).

(9) The industrialized builder or alteration permit holder shall maintain all records pertinent to the recertification and make these records available to the department upon request. Records shall be maintained for as long as the building remains a part of the inventory for that industrialized builder or alteration permit holder.

(10) Buildings constructed on or after October 31, 2006 may not be recertified in accordance with subsection (f)(1) or (4) without prior written authorization from the department.

(g) A recertification or alteration data plate shall be placed by the third party inspector on each altered or recertified house or building as required by this section. The data plate shall be supplied by the industrialized builder or alteration permit holder.

(1) An alteration data plate shall be affixed to any building where the alteration or recertification results in a reclassification of the occupancy group or construction type, a change in the type of gas required for appliances, or a change in the wind speed and exposure, maximum snow (roof) load, seismic design criteria, or special conditions or limitations.

(2) A copy of the data plate shall be retained by the industrialized builder and be made available to the department upon request.

(3) An alteration data plate shall be made of a material that will not deteriorate over time and shall be permanently placed so that it cannot be removed without destruction.

(4) The data plate shall be placed adjacent to the original data plate in an easily accessible location as designated in the alteration plans, but shall not be located on any readily removable item such as a cabinet door or similar component. Location of the data plate on the cover of the electrical distribution panel is acceptable.

(5) An alteration data plate shall contain, as a minimum, the information required on a manufacturer's data plate as required by §70.71(d)(2) - (11) plus the following information:

(A) the name, address, and registration number assigned by the department of the industrialized builder, or the name, address, and alteration permit number assigned by the department of the owner of the building; and

(B) the Texas alteration decal numbers.

§70.75. Responsibilities of the Registrants--Permit/Owner Information.

(a) The manufacturer shall provide the industrialized builder, or a person who has obtained an installation permit in accordance with §70.20, the following information:

(1) the name, Texas registration number, and address of the manufacturer of the building;

(2) the location of the decal(s) or insignia on the modules or modular components;

(3) the location of the data plate and explanation of the information thereon;

(4) a set of approved plans, in accordance with §70.70, as necessary to obtain a building permit and as necessary to complete construction of the house or building at the installation site. The documents shall include critical load points for attachment of the house or building to the foundation, the floor plan of the building, and drawings of the plumbing, electrical, and heating/ventilation systems;

(5) a completed signed copy of the energy compliance checklist (referenced in §70.70(c)(8)(C)); and

(6) the information required by §70.78(b).

(b) The REF builder shall provide the owner of the REF the following information:

(1) the name, Texas registration number, and address of the REF builder;

(2) the location of the decal(s) on the REF;

(3) the location of the data plate;

(4) a set of approved plans, in accordance with §70.70;

(5) other construction documentation in accordance with §70.70(e); and

(6) the information required by §70.78(b).

(c) The industrialized builder shall provide the purchaser (owner) or installation permit holder of any industrialized house or building the following information:

(1) the name, Texas registration number, and address of the manufacturer or REF builder and industrialized builder;

(2) the location of the data plate and explanation of the information thereon;

(3) upon request a copy of the site inspection reports in accordance with §70.73;

(4) a complete set of approved plans and specifications in accordance with §70.70, including all records pertinent to alterations of the house or building in accordance with §70.74;

(5) a copy of the foundation system design and any unique on-site details in accordance with §70.73;

(6) the location of the decal(s) or insignia on the module, modular components, or site-built REF;

(7) a site plan showing the on-site location of all utilities and utility taps;

(8) a completed signed copy of the energy compliance checklist (referenced in subsection (a)(5)); and

(9) the information required by §70.78(b).

(d) The manufacturer shall maintain evidence for a minimum of 5 years that the information in subsection (a) was delivered to the industrialized builder or installation permit holder and provide a copy of the evidence to the department upon request.

(e) The REF builder shall maintain evidence for a minimum of 5 years that the information in subsection (b) was delivered to the owner or lessee of the REF and provide a copy of the evidence to the department upon request.

(f) The industrialized builder shall maintain evidence for a minimum of 5 years that the information in subsection (c) was delivered to the purchaser (owner) or installation permit holder and provide a copy of the evidence to the department upon request.

§70.77. Responsibilities of the Registrants--Decals and Insignia for New Construction.

(a) Decals are used for module and site-built REF certification and insignia are used for modular component certification.

(1) Decals and insignia shall be ordered on a form supplied by the department and shall contain such information as may be required by the department.

(2) The department will issue decals and insignia to a manufacturer on application and payment of the fee following certification of the manufacturing facility in accordance with §70.60.

(3) The department will issue decals to a REF builder on application and payment of the fee following successful completion of all construction in accordance with §70.78.

(b) By attaching the decal or insignia the manufacturer or REF builder certifies that:

(1) the module, modular component, or site-built REF is constructed in accordance with the approved design package or construction documents and the mandatory building codes; and

(2) the module, modular component, or site-built REF has been inspected in accordance with §70.72 or §70.79.

(c) The control of the decals and insignia shall remain with the department.

(1) Decals shall be confiscated by the department or the third party inspector or inspection agency if a manufacturer fails to correct violations identified during an inspection or for failure to abide by the approved compliance control procedures.

(A) Decals or insignia that are confiscated for construction violations shall not be returned to the manufacturer until the violations have been corrected.

(B) Decals or insignia that are confiscated for compliance control violations shall be released for each building in accordance with the inspection procedures approved by the council. Control of the decals or insignia shall not be returned to the manufacturer until the TPI/TPIA determines that the problems have been corrected.

(C) New decals or insignia shall not be issued until the manufacturer has shown evidence of compliance.

(2) Decals shall not be released to a REF builder or attached to a REF until all construction is complete and all violations identified during an inspection have been corrected.

(d) Responsibilities of the manufacturer. It is the manufacturer's responsibility to assure that the certification inspection has been accomplished as outlined in §70.60 prior to attaching the decal or insignia. It is the manufacturer's responsibility to assure that the in-plant inspection has been performed as outlined in §70.72 prior to attaching the decal or insignia. Each decal or insignia shall be attached to a specific module or modular component before leaving the manufacturing facility.

(1) The manufacturer shall assure that the house or building is released only to an industrialized builder registered with this department or to a person who has obtained an installation permit from this department.

(2) The decal or insignia shall be placed in a visible location as designated on the floor plan or on the title or cover sheet for each model or project in the approved design package. The decal or insignia shall be permanently attached so that it cannot be removed without destruction and shall not be placed on any readily removable item such as a cabinet door or other similar component. Location of the decal on the cover of the electrical distribution panel is acceptable.

(3) The manufacturer shall keep records as necessary to show, by decal or insignia number, the module or modular component (by identification number) to which the decal or insignia was attached. The manufacturer shall keep complete records of all decals and insignia received, decals and insignia used, and those which are on-hand. The manufacturer shall maintain these records for a minimum of 5 years from the date the building is reported shipped in accordance with §70.50 and the records shall be made available to the department or in-plant inspector on request.

(4) Decals or insignia may not be transferred from one manufacturing facility to another without prior written approval from the department. Decals or insignia that are transferred without department approval are void and shall be returned to, or shall be confiscated by, the department.

(5) Decals or insignia that have been attached to a module or modular component may not be transferred to another module or modular component. Decals or insignia that are removed from the module or modular component to which they were attached are void and shall be returned to, or shall be confiscated by, the department.

(6) Decals or insignia that have not been attached to a module or modular component shall be returned to the department if the manufacturer does not renew the registration in accordance with §70.20.

(7) Decals or insignia that have been reported in accordance with §70.50(a) shall be returned to the department if the module or modular component is damaged or destroyed.

(8) Decals or insignia that have been attached to a module or modular component prior to inspection in accordance with §70.72 are void and shall be returned to the department, or shall be confiscated by the department or third party inspection agency.

(9) Decals or insignia that are attached to a module or modular component before all construction is complete and before all inspections by the facility's compliance control personnel have been completed are void and shall be returned to the department, or shall be confiscated by the department or third party inspection agency.

(e) Responsibilities of the REF builder. A REF builder shall assure that all construction documents are approved as required by §70.70 and that all required inspections have been performed in accordance with §70.79 before the decal or decals are attached to the site-built REF.

(1) A site-built REF becomes an industrialized building upon attachment of the decal or decals.

(2) Decals shall be purchased for each separate REF building. Each separate REF building shall be assigned a unique identification or project number. The name of the school district, the project address, and the unique identification number for each separate REF will be reported to the department on the decal order form.

(3) Decals may not be transferred to another REF project without prior written consent of the department. Decals that are transferred to another site-built REF project without written consent are void and shall be returned to, or confiscated by, the department.

(4) Decals that have been attached to a site-built REF may not be transferred to another site-built REF. Decals that are removed from the site-built REFs to which they were attached are void and shall be returned to, or confiscated by, the department.

(5) Decals shall or be returned to the department if the site-built REF is damaged or destroyed.

§70.79. Responsibilities of the Registrants--Site-built REF Construction and Inspection.

(a) Responsibility for construction. The REF builder shall be responsible for assuring that the foundation and all construction pertaining to the REF complies with the approved construction documentation required by §70.70(b) and (e) and the mandatory building codes. The REF builder is responsible for assuring that all sub-contractors are licensed as required by applicable state law.

(b) Responsibility for inspections within jurisdiction of a municipality. When the building site is within a municipality that has a building inspection agency or department, the local building official will inspect all construction to assure that it complies with the approved construction documents and the mandatory building codes.

(1) The municipality may require and review, for compliance with the mandatory building codes, a complete set of construction documents, and any other construction documents necessary to complete construction of the REF in accordance with §70.70(e).

(2) The REF builder shall not permit occupation of the building until a certificate of occupancy has been issued.

(c) Responsibility for inspections outside the jurisdiction of a municipality. When the building site is outside a municipality, or within a municipality that has no building inspection department, a council-approved inspector shall perform the required inspections in accordance with this section and the inspection procedures of the council to assure completion in accordance with the approved construction documents, other construction documentation approved in accordance with §70.70(c), and the mandatory building codes.

(1) The REF builder is responsible for scheduling inspections and assuring that the inspector is given a minimum of 48 hours notice before each inspection. The REF builder may utilize a different inspector for different projects, but may not change the inspector for a project once started without prior written approval of the department.

(2) The REF builder shall assure that the following inspections are completed in accordance with the inspection procedures of the council. Inspections may be combined where appropriate and the inspector determines that the completion of one stage does not does not interfere with the inspection of another stage. These inspections are minimum requirements and shall not limit the scope of the inspections that may be necessary to adequately inspect the building. Additional inspections may also be required to assure compliance of actions taken to correct violations.

(A) First inspection--Temporary or construction power.

(B) Second Inspection--Plumbing rough/Water and sewer.

(C) Third inspection--Foundation and reinforcement/Water supply lines/Building drain lines.

(D) Fourth inspection--Frame and exterior sheathing/Plumbing top-out/Mechanical rough/Electrical rough/Lead test.

(E) Fifth inspection--Frame re-inspection and or insulation/Energy compliance.

(F) Sixth inspection--Wallboard.

(G) Seventh inspection--Gas lines/Electrical meter loop.

(H) Eighth inspection--Building final/Mechanical final/Plumbing final/Electrical final/Attachment of decal.

(3) The inspector shall provide the REF builder a copy of the inspection reports upon completion of each phase of the inspection. If the inspection finds that the construction does not meet the mandatory building codes, the approved construction documents, or other construction documents in accordance with §70.70(c), then the inspection report shall include a list of violations. The REF builder is responsible for assuring that all violations are corrected and inspected prior to occupation of the building or attachment of the decal or decals.

(4) The REF builder shall not permit occupancy, or release the building for occupation, until a successful final inspection has been completed. A final inspection report shall be issued showing no outstanding violations prior to occupation or release of the building for occupation. Exception: Occupancy of the building may be permitted and approved with outstanding items provided that these items are not in violation of the mandatory building codes.

(A) A successful final inspection means that all construction has been completed, that all violations have been corrected, and that the construction has been found to comply with the mandatory building codes and all construction documents.

(B) The REF builder shall maintain a copy of each inspection report for a minimum of 10 years from the date of successful final inspection and make a copy of the report available to the department upon request.

(C) The REF builder shall not attach the decal or decals until a successful final inspection has been completed.

§70.80. Commission Fees.

(a) The manufacturer's registration fee is $750 annually.

(b) The REF builder's registration fee is $750 annually.

(c) The industrialized builder's registration fee is $325 annually.

(d) The design review agency's registration fee is $300 annually.

(e) The third party inspection agency's registration fee is $150 per firm and $100 per inspector annually.

(f) The third party site inspector registration fee is $100 annually.

(g) The registration fee shall be paid before the certificate of registration is issued and annually thereafter.

(h) The fee for department personnel for certification inspections at a manufacturing facility shall be $40 per hour. Travel and per diem costs shall be reimbursed by the manufacturer in accordance with the current rate as established in the current Appropriations Act. The department shall present a billing statement to the manufacturer at the completion of the inspection that is payable upon receipt.

(i) When the department acts as a design review agency, the fee for such serviced is $40 per hour. The manufacturer for whom the services are performed shall pay the fee before the approval of the designs, plans, specifications, compliance control documents, and installation manuals and before the release of the documents to the manufacturer. Travel and per diem costs shall be reimbursed by the manufacturer in accordance with the current rate as established in the current Appropriations Act.

(j) The fees for issuing decals and insignia are:

(1) modules and site-built REFs (decals): $0.07 per square foot of gross floor area, with a minimum of $25 for each decal; and

(2) modular component (insignia): $0.02 per square foot of gross surface area with a minimum of $0.60 for each insignia or $0.07 per square foot of gross floor area with a minimum of $15 for each insignia.

(k) The fee for department personnel for special inspections shall be $40 per hour. A special inspection is any inspection for industrialized housing and buildings that is not covered by other fees. The department will present a billing statement at the conclusion of the inspection that is payable upon receipt. Travel and per diem costs shall be reimbursed in accordance with the current rate as established in the current Appropriations Act.

(l) The fee for department monitoring of design review agencies and third party inspection agencies outside headquarters shall be $40.00 per monitor hour. Travel and per diem costs shall be reimbursed in accordance with the current rate as established in the current Appropriations Act. The department will present the agency or manufacturer a statement at the conclusion of the monitoring trip, and it is payable upon receipt.

(m) Thee fee for an installment permit shall be $75 for each building containing industrialized housing and buildings modules or modular components. A separate application must be submitted for each building containing industrialized housing and buildings modules or modular components.

(n) The fee for issuing an alteration decal is $50 for each decal.

(o) Revised or duplicate certificate fee: $25 for manufacturers, industrialized builders, and REF builders registration types.

§70.102. Use and Construction of Codes.

(a) Industrialized housing, buildings, and site-built REFs shall be constructed to meet or exceed the mandatory building code standards and requirements referenced in §70.100 and §70.101 in effect at the time of construction. A building that has not been previously occupied or used for its intended purpose shall comply with the provisions of the mandatory building codes referenced in §70.100 and §70.101 for new construction in effect at the time of construction. Industrialized housing and buildings shall be installed in accordance with the mandatory building code standards and requirements referenced in §70.100 and §70.101.

(b) Alterations of industrialized housing and permanent industrialized buildings shall be in accordance with §70.74 and shall comply with the provisions of the codes referenced in §70.100 and §70.101 for new structures.

(c) Industrialized buildings designed to be moved from one commercial site to another commercial site shall be recertified or altered in accordance with the mandatory building code standards and requirements referenced in §70.100 and §70.101 and in accordance with §70.74. Alterations of buildings shall comply with the standards and requirements of the following codes for each type of recertification class.

(1) Recertification class 1 and class 4: Alterations shall comply with the International Existing Building Code as referenced in §70.101. Alterations of buildings that have not been previously occupied or used for their intended purpose shall comply with the provisions of the codes referenced in §70.100 and §70.101 for new construction.

(2) Recertification class 2 and class 3: The existing building as altered, and additional alterations to the building, shall comply with the provisions of the International Existing Building Code as referenced in §70.101.

(d) The codes adopted in §70.100 and §70.101 shall be construed to conform to the intent of Chapter 1202 and these rules and regulations. For example, where reference is made in any of the codes to the building official, the plumbing or mechanical official, or the administrative authority or enforcement official, such reference shall be construed pursuant to Chapter 1202 and the sections in this chapter to mean, where applicable, the council, the local building official, or the department.

§70.103. Alternate Materials and Methods.

(a) Alternate materials or methods of construction other than as authorized by the mandatory codes set forth in §70.100 must be approved by the council.

(b) Manufacturers, REF builders, or industrialized builders shall submit descriptions of alternate methods or materials required to be approved by the council to the executive director for consideration by the council. The submittal shall include either 15 legible hard copies of drawings, specifications, and substantiating evidence for each such alternate method or material or all supporting documentation shall be submitted electronically and be in a format that will allow for electronic disbursement of these materials to the council.

(c) The following types of alternate materials or methods of construction have been approved by the council and do not require the manufacturer, REF builder, or industrialized builder to submit descriptions to the council for approval. Materials or methods of construction shall be used and identified in accordance with the applicable code or product evaluation report or listing.

(1) Alternate materials or methods with a current code evaluation report from ICC ES. An industrialized house or building or

site-built REF with a code evaluation report is not exempt from the requirements of Texas Occupations Code, Chapter 1202.

(2) Alternate materials or methods of construction with a current product evaluation report or listing from a product certification agency accredited by the IAS that shows compliance with the applicable mandatory building codes. An industrialized house or building or site-built REF with a product evaluation report or listing is not exempt from the requirements of Texas Occupations Code, Chapter 1202.

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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William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
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Proposal publication date: September 11, 2009
For further information, please call: (512) 463-7348

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16 TAC §70.61, §70.72

The adopted repeal is the result of a rule review conducted in accordance with Texas Government Code §2001.039. The repeal is adopted under Texas Occupations Code, §51.201(b) and §51.203, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement Chapter 51 and any other law establishing a program regulated by the Department. Also, the repeal is adopted under Texas Occupations Code, Chapter 1202 which authorizes the Texas Commission of Licensing and Regulation, the Department's governing body to adopt rules as necessary to implement this chapter.

The statutory provisions affected by the adopted repeal are those set forth in Texas Occupations Code, Chapters 51 and 1202. No other statutes, articles, or codes are affected by the adoption.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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William H. Kuntz, Jr.
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For further information, please call: (512) 463-7348

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CHAPTER 72. STAFF LEASING SERVICES

The Texas Commission of Licensing and Regulation ("Commission") adopts amendments to Chapter 72, §§72.1, 72.10, 72.20, 72.71, 72.80 and 72.90; adopts the repeal of existing rules at §§72.70, 72.81, and 72.83; and adopts new rules at §§72.21 - 72.23, 72.40, 72.70, and 72.91, regarding the staff leasing services program. These adopted changes will be referred to collectively in this notice as "adopted rules."

There are changes to the amendments of existing §72.20 and §72.80 and new §§72.21 - 72.23 from the proposed text as published in the October 9, 2009, issue of the *Texas Register* (34 TexReg 6969), and these rules are republished.

There are no changes to the amendments of existing §§72.1, 72.10, 72.71, and 72.90; the repeal of existing §§72.70, 72.81, and 72.83; and new §§72.40, 72.70, and 72.91 from the proposed text as published in the October 9, 2009, issue of the *Texas Register* (34 TexReg 6969), and these rules will not be republished. The adopted rules take effect January 1, 2010.

The adopted rules are necessary to implement the changes proposed as a result of the four-year rule review of 16 TAC Chapter 72, which was conducted in accordance with Texas Government Code, §2001.039. The adopted rules reorganize the existing rules and compile the Department's current policies and procedures for licensing staff leasing services companies in the rules, making it easier for applicants and licensees to locate and identify the current licensing requirements. A summary of each rule as reorganized was included in the notice of proposed rules published in the October 9, 2009, issue of the *Texas Register* (34 TexReg 6969).

The adopted rules are also necessary to incorporate the same definition of "net worth" that was repealed from the Texas Labor Code, Chapter 91 effective September 1, 2009, as a result of HB 2249, 81st Legislature, Regular Session (2009). HB 2249 replaced the net worth requirements in Labor Code Chapter 91 with working capital requirements effective December 31, 2011, but the definition of "net worth" was repealed effective September 1, 2009. The definition of "net worth" is still necessary until December 31, 2011, so the rules adopt the same definition of "net worth" that was repealed from the statute.

The proposed rules were published in the *Texas Register* on October 9, 2009. The 30-day public comment period closed on November 9, 2009. The Department received public comments from one interested party, the National Association of Professional Employer Organizations (NAPEO). NAPEO stated that it generally agreed with the proposed rules, but it did have specific comments on two of the proposed rules related to limited licenses. The specific comments are summarized below, followed by the Department's responses.

Provision: The statute and the rules set out the requirements for a staff leasing services company to qualify for a limited license. Proposed §72.22(a)(2) and §72.23(c)(2) state that to qualify for a limited license, either original or renewal, a staff leasing services company must "not assign employees to client companies that are based or domiciled in the state."

Public Comment: NAPEO suggests that this language should be clarified to state that a client company's primary place of business is not in the state. NAPEO is concerned that the proposed language may call into question whether having a limited presence in the state such as a branch office would conflict with the proposed rule. Specifically, NAPEO suggests that staff leasing services companies "not assign employees to client companies [whose] primary business is based or domiciled in the state."

Department Response: The Department declines to make the suggested change. The proposed rule reflects the language in

the statute regarding this qualification. The suggested language by NAPEO changes the scope of this qualification by adding the concept of "primary place of business." Adding language regarding the client company's primary place of business also raises questions about what qualifies as a "primary place of business" and what functions would be performed at a business to have it qualify as the "primary place of business." In addition, the suggested change would require the Department to examine the client company's business operations and structure, and the Department does not regulate the client company, only the staff leasing services company.

Provisions: Proposed §72.22(a) sets out the requirements for a staff leasing services company to qualify for an original limited license. Proposed §72.22(b) sets out the documents that must be submitted for an original limited license. Proposed §72.23(c) sets out the requirements for a staff leasing services company to qualify for a renewal limited license. Proposed §72.23(d) sets out the documents that must be submitted for a renewal limited license.

Public Comment: NAPEO expressed concerns about the limited license qualifications and the documents that must be submitted to the Department for original and renewal limited licenses. NAPEO stated that proposed §72.22(a)(2), (3) and (5) and proposed §72.23(d)(2), (3) and (4) require information that exceeds the standards for limited licensees in most states across the country. Specifically, the qualifications for a limited license state that "a person at all times must: … (2) not assign employees to client companies that are based or domiciled in the state; (3) not maintain an office in this state; … and (5) provide proof of current licensure as a staff leasing services company, in good standing, in another state." In addition, the documents that must be provided to the Department to apply for a limited license include: "… (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 …."

NAPEO stated that limited licenses are granted by other states, and that licensees domiciled in Texas enjoy the benefit of limited licensees in other states. NAPEO suggested staff leasing companies with a limited presence in Texas should be treated the same. NAPEO stated that proposed §72.22(a)(5) and §72.23(c)(5), which require proof that an initial or renewal limited license applicant be licensed and in good standing in another state, provide additional safeguards. NAPEO offered suggested language that would replace proposed §72.22(a) and (b) and proposed §72.23(c) and (d).

Department Response: The Department declines to make the suggested changes. The proposed rules, except for the three provisions discussed below, reflect the current requirements for original and renewal limited licenses. The Department may not waive the qualifications for a limited license that are set out in the statute. In addition, the Department finds that the documents currently being submitted for an original or renewal limited license are still necessary.

The first provision noted above relates to the personal information form. The Department has developed a "No Change Personal Information Form" that may be used by controlling persons at the time of renewal if there has been no change in this information since the original application or the last renewal. This form should simplify part of the application process, and it will be implemented for both full licenses and limited licenses. The proposed rules have been amended to reflect this change.

The second provision noted above relates to the proof of net worth. The current licensing requirements provide that staff leasing service companies with full licenses or limited licenses must maintain proof of net worth; however, these requirements are silent regarding how long the proof of net worth must be maintained. The proposed rules state that the forms of financial security used to demonstrate net worth must be maintained for the entire time the licensee continues to do business in this state, and they 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. These provisions are consistent with recent changes made to other Department programs that require submission or proof of financial security to ensure satisfaction of the licensee's obligations.

The third provision noted above relates to the fifth qualification to be considered for an original or renewal limited license. Proposed §72.22(a)(5) and §72.23(c)(5) require proof that an initial or renewal limited license applicant be licensed and in good standing in another state. This provision was misplaced in the proposed rules under qualifications. Proof of licensure in another state should have been included under the list of documents to be submitted with the original or renewal application, and it should only be submitted if the applicant was licensed in another state.

It is not a current requirement under the Texas statute or rules that an applicant for a limited license in Texas have a license in another state. While other states may allow staff leasing companies to be domiciled and operate in their states, not all states require staff leasing companies to be licensed to do so. The Department does not require applicants to have a license in another state in order to qualify for a limited license in Texas. If the applicant for a limited license in Texas does have a license in another state, the Department requires the applicant to submit proof of the license with its application materials. This requirement is pursuant to Labor Code §91.019(d), which allows the Department to use information obtained from regulatory agencies in other states in evaluating an applicant for a limited license.

Proposed §72.22(a)(5) and §72.23(c)(5) have been deleted, and the requirement regarding proof of licensure in another state has been moved to §72.22(b)(4) and §72.23(d)(4). With these changes, §72.22(a) and §72.23(c) reflect the qualifications for limited licenses set out under Labor Code §91.019(b).

The Department made technical corrections to the headings of §§72.20 - 72.23, and changed the term "licensing fee" to "license fee" in §72.80.

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 adopted 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 rule adoption.

§72.20. License Requirements--Full License.

(a) Any person who performs or offers to perform staff leasing services as defined by the Code, must be licensed with the department.

(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 Texas 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.

(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. License Renewal Requirements--Full License.

(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), or a form indicating there has been no change in the personal information form since the previous license application or renewal from each controlling person;

(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. License Requirements--Limited License.

(a) To qualify for a limited license, a person at all times must:

(1) employ less than 50 assigned employees in this state at any one time;

(2) not assign employees to client companies that are based or domiciled in the state;

(3) not maintain an office in this state; and

(4) not solicit client companies located or domiciled in this 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) proof of current licensure as a staff leasing services company, in good standing, if licensed in another state;

(5) documentation from the Texas 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) 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. License Renewal Requirements--Limited License.

(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 at any one time;

(2) not assign employees to client companies that are based or domiciled in the state;

(3) not maintain an office in this state; and

(4) not solicit client companies located or domiciled in this 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), or a form indicating there has been no change in the personal information form since the previous license application or renewal from each controlling person;

(3) a completed criminal history questionnaire, as applicable;

(4) proof of current licensure as a staff leasing services company, in good standing, if licensed in another state;

(5) proof of net worth as described under §72.40; and

(6) 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.

§72.80. Fees.

(a) Application Fees.

(1) All application fees are non-refundable.

(2) The application fee is a required fee that is separate from the required license fee.

(3) The original application fee is $150.

(4) The renewal application fee is $150.

(5) The limited license original application fee is $150.

(6) The limited license renewal application fee is $150.

(b) License Fees.

(1) The license fee is a required fee that is separate from the required application fee.

(2) The original license 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 license 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 license fee is $750.

(5) The limited license renewal license 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.

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

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16 TAC §§72.70, 72.81, 72.83

The repeals are adopted 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 adopted repeals.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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CHAPTER 73. ELECTRICIANS

The Texas Commission of Licensing and Regulation ("Commission") adopts amendments to Chapter 73, §§73.10, 73.20 - 73.24, 73.26, 73.28, 73.40, 73.65, 73.70, 73.80, and 73.90; adopts the repeal of existing §§73.51 - 73.54, and 73.60; and adopts new §§73.51 - 73.54, 73.60, and 73.91, regarding the electricians program.

The amendments to §73.10 and §73.20 and new §§73.51, 73.52, and 73.54 are being adopted with changes to the proposed text

as published in the September 18, 2009, issue of the *Texas Register* (34 TexReg 6398), and these rules will be republished.

The amendments to §§73.21 - 73.24, 73.26, 73.28, 73.40, 73.65, 73.70, 73.80, and 73.90; the repeal of §§73.51 - 73.54, and 73.60; and new §§73.53, 73.60, and 73.91 are being adopted without change to the proposed text as published in the September 18, 2009, issue of the *Texas Register* (34 TexReg 6398), and these rules will not be republished. The adopted rules take effect January 1, 2010.

House Bill ("HB") 1973, 81st Legislature, Regular Session (2009) amended Texas Occupations Code, Chapter 1305 relating to electricians to include electrical pool equipment installation and pool-related electrical maintenance to the current provisions regulating residential appliance installation. These rule amendments to 16 TAC, Chapter 73 implement the required changes mandated in HB 1973 and changes recommended by staff to correct and clarify existing rules to improve the regulation of the industry. A summary of each rule as reorganized was included in the notice of proposed rules published in the September 18, 2009, issue of the *Texas Register* (34 TexReg 6398).

The proposed rules were published in the *Texas Register* on September 18, 2009. The 30-day public comment period closed on October 19, 2009. The Department received public comments from fourteen (14) interested parties: The specific comments are summarized below, followed by the Department's responses.

Public Comment: Tony Weathers, Project Manager, Hill Electric Company, expressed concern that §73.20 changes the time a successful test result can be counted for licensure from two years to one year. He passed his test earlier and disagrees that this test result will not assist him in obtaining licensure.

Department Response: The rule change resulting in a one year expiration on test results will apply only to those applicants who take the test after the effective date of these rules.

Public Comment: Doug Dinkins, President of APEC Aquatic Professional Education Council, comments that there is no requirement for on the job training for a residential appliance installer registrant, only an exam is required for registration. He requests that the text of §73.20(a)(1) neither impose nor suggest imposing an experience requirement.

Department Response: There is no requirement for a residential appliance installer. As such, this language has been deleted.

Public Comment: Brad Scates, Chief Electrical Inspector, City of Wichita Falls, Texas, submits that under §73.21 be inserted that after a candidate has unsuccessfully attempted the exam for licensure, a 60 day waiting period be imposed before re-examination.

Department Response: We appreciate his comment. This is not a proposed rule change at this time and so is outside the scope of this rule-making.

Provision: Sections 73.51(c), 73.52(c), and 73.54(c) specify that an electrical contractor, electrical sign contractor, or residential appliance installation contractor may subcontract portions of their electrical work to other licensed electricians. The original electrical contractor is responsible for the work performed by the subcontractor and all electrical work must be performed by licensed individuals.

Public Comment: Renea Beasley, Executive Director of the Independent Electrical Contractors of Texas on behalf of the association expresses concern over the inclusion of these provisions for subcontracting. Given that this change is complicated and controversial for it would affect industry business practice, this trade association recommends that these provisions be deleted and more time be given to study this issue to determine if such regulation is appropriate or necessary.

Public Comment: Richard Levy, Attorney for the Texas State Association of Electrical Workers comments that the proposed language would allow an electrical contractor to subcontract electrical work to an entity that is not subject to the requirements of a contractor's license. An electrical contractor is required to provide proof of financial responsibility and maintain workers compensation coverage which are ultimately provisions to protect the public and the worker. By allowing this relationship, it creates a loophole in these protections that could be exploited by an unscrupulous contractor. They urge that the language in §§73.51(c), 73.52(c), and 73.54(c) be changed to reflect that an electrical contractor may subcontract to a "licensed electrical contractor".

Public Comment: Rebecca Mullins, Executive Director of the Southeast Texas Chapter of the National Electrical Contractors Association, feels it would be in the best interest of the members of this organization and the public to change the rules to allow subcontracting to licensed electrical contractors, not licensed individuals.

Public Comment: Reggie Harrington, Executive Director of the National Electrical Contractors Association, Inc., urges that the language be changed to allow subcontracting to licensed electrical contractors, not licensed individuals. Furthermore, the master electrician for the subcontracting contractor accepting to perform the work is responsible for the work being code compliant.

Public Comment: John Lambert, L & O Electric Inc. is opposed to the language of these rules and offers that subcontracting may be allowed only to licensed contractors, not licensed individuals.

Public Comment: Randy Owens, W.K. Jennings Electric, asked that the language be changed to read, "Licensed Electrical Contractors may subcontract other Licensed Electrical contractors to perform electrical work."

Public Comment: Gilbert Ferrales, Training Director of Austin Electrical JATC, opposes the current working and would like it changed to "clear up the mess we have with unlicensed electricians." "We need to insure that the subcontractor has a master on staff that is responsible for the work."

Public Comment: Bill Watson, Sign Manufacturing Corporation, asks if he interprets the rules correctly, that an electrical contractor or sign contractor does not need licensed employees, it can hire subcontractors. He states that if an unlicensed individual or company can offer to perform electrical work without being a licensed contractor, the TDLR is meaningless for unlicensed individuals are not subject to TDLR.

Public Comment: Veronica Arrellano would like the language changed to reflect that subcontracting may be done with licensed electrical contractors, not licensed individuals.

Public Comment: Kenneth Tumlinson, KST Electric, Ltd., does not agree with the current rule language and urges it be changed to reflect that subcontracting may be done with licensed electrical contractors not licensed individuals.

Department Response: In response to the comments, the Department on the recommendation of the Electrical Safely Advisory Board has deleted the proposed language.

Public Comment: Bill Watson, Sign Manufacturing Corporation comments that under §73.52(d) a light manufacturer is no longer exempt from licensure and must have a licensed master employed to perform electrical sign design.

Department Response: An electrical sign manufacturer is exempt from licensure; the rule change does not effect that exemption.

Public Comment: Doug Dinkins, President of APEC Aquatic Professional Education Council, comments that §73.54(f) requiring contact information followed by the "regulated by" TDLR is facially overbroad and excessive for the appliance installation contractor is a limited license and the governing provisions do not purport to regulate this limited license. APEC requests clarification that a residential appliance installer contractor may use an assumed name on vehicles, advertising, proposals, invoices, and contracts.

Department Response: It was the legislative intent to regulate pool-related electrical maintenance and pool-related equipment installation into the pre-existing residential appliance installation license. TDLR does regulate this license. The language is not only consistent, but also appropriate. As for the use of the assumed name, it is current policy, and a widely used practice, to allow the use of an assumed name on all information and vehicles. There have been no problems or need for clarification in the rules of this assumed name use in any earlier electrician license category.

16 TAC §§73.10, 73.20 - 73.24, 73.26, 73.28, 73.40, 73.51 - 73.54, 73.60, 73.65, 73.70, 73.80, 73.90, 73.91

The amendments and new rules are adopted under Texas Occupations Code, §51.201(b) and §51.203, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement Chapter 51 and any other law establishing a program regulated by the Department. Also, the amendments and new rules are adopted under Texas Occupations Code, Chapter 1305 which authorizes the Executive Director of the Department and the Commission to adopt rules as necessary to implement this chapter.

The statutory provisions affected by the adoption are those set forth in Texas Occupations Code, Chapters 51 and 1305. No other statutes, articles, or codes are affected by the adoption.

§73.10. Definitions.

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

(1) Assumed name--A name used by a business as defined in the Business and Commerce Code, Title 4, Chapter 36, Subchapter A, §36.02.

(2) Business affiliation--The business organization to which a master licensee may assign his or her license.

(3) Employee--An individual who performs tasks assigned to him by his employer. The employee is subject to the deduction of social security and federal income taxes from his pay. An employee may be full time, part time, or seasonal.

(4) Employer--One who employs the services of employees, pays their wages, deducts the required social security and federal income taxes from the employee's pay, and directs and controls the employee's performance.

(5) Filed--A document is deemed to have been filed with the department on the date that the document has been received by the department or, if the document has been mailed to the department, the date a postmark is applied to the document by the U.S. Postal Service.

(6) General Supervision--Exercise of oversight by a master electrician on behalf of an electrical contractor, or electrical sign contractor, or by a master sign electrician on behalf of an electrical sign contractor of performance by all classes of electrical licensees of electrical work bearing responsibility for the work's compliance with applicable codes under Texas Occupations Code, Chapter 1305.

(7) On-Site Supervision--Exercise of supervision of electrical work or electrical sign work by a licensed individual other than an electrical apprentice. Continuous supervision of an electrical apprentice is not required, though the on-site supervising licensee is responsible for review and inspection of the electrical apprentice's work to ensure compliance with any applicable codes or standards.

(8) Electrical Contractor--A person, or entity, licensed as an electrical contractor, that is in the business of performing "Electrical Contracting" as defined by Texas Occupations Code, §1305.002(5).

(9) Master Electrician--An individual, licensed as a master electrician, who on behalf of an electrical contractor, electrical sign contractor, or employing governmental entity, performs "Electrical Work" as defined by Texas Occupations Code, §1305.002(11).

(10) Journeyman Electrician--An individual, licensed as a journeyman electrician, who works under the general supervision of a master electrician, on behalf of an electrical contractor, or employing governmental entity, while performing "Electrical Work" as defined by Texas Occupations Code, §1305.002(11).

(11) Electrical Apprentice--An individual, licensed as an apprentice who works under the on-site supervision of a master electrician, journeyman electrician, or residential wireman, on behalf of an electrical contractor or employing governmental entity performing "Electrical Work" as defined by Texas Occupations Code, §1305.002(11).

(12) Electrical Sign Contractor--A person, or entity, licensed as an electrical sign contractor, that is in the business of performing "Electrical Sign Contracting" as defined by Texas Occupations Code, §1305.002(9).

(13) Master Sign Electrician--An individual, licensed as a master sign electrician, who, on behalf of an electrical sign contractor, performs "Electrical Sign Work" as defined in paragraph (18).

(14) Journeyman Sign Electrician--An individual, licensed as a journeyman sign electrician, who works under the general supervision of a master electrician or a master sign electrician, on behalf of an electrical sign contractor, while performing "Electrical Sign Work" as defined in paragraph (18).

(15) Residential Wireman--An individual, licensed as a residential wireman, who works under the general supervision of a master electrician, on behalf of an electrical contractor, or employing governmental entity, while performing electrical work that is limited to electrical installations in single family and multifamily dwellings not exceeding four stories, as defined by Texas Occupations Code, §1305.002(13).

(16) Maintenance Electrician--An individual, licensed as a maintenance electrician, who works under the general supervision of a master electrician, on behalf of an electrical contractor, or employing

governmental entity while performing "Electrical Maintenance Work" as defined in paragraph (17).

(17) Electrical Maintenance Work--The replacement, or repair of existing electrical appurtenances, apparatus, equipment, machinery, or controls used in connection with the use of electrical energy in, on, outside, or attached to a building, residence, structure, property, or premises. All replacements or repairs must be of the same rating and type as the existing installation. No improvements may be made that are necessary to comply with applicable codes under Texas Occupations Code, Chapter 1305. Electrical maintenance work does not include the installation of any new electrical appurtenances, apparatus, equipment, machinery, or controls beyond the scope of any existing electrical installation.

(18) Electrical Sign Work--Any labor or material used in manufacturing, installing, maintaining, extending, connecting or reconnecting an electrical wiring system and its appurtenances, apparatus or equipment used in connection with signs, outline lighting, awnings, signals, light emitting diodes, and the repair of existing outdoor electric discharge lighting, including parking lot pole lighting. This also includes the installation of an electrical service integral to an isolated sign and/or outline lighting installation.

(19) Work Involved in the Manufacture of Electrical Equipment--Work involved in the manufacture of electrical equipment includes on and off-site manufacture, commissioning, testing, calibration, coordination, troubleshooting, evaluation, repair or retrofits with components of the same ampacity, maintenance and servicing of electrical equipment within their enclosures performed by authorized employees, or authorized representatives of electrical equipment manufacturers and limited to the type of products they manufacture.

(20) Electrical Sign Apprentice--An individual, licensed as an electrical sign apprentice who works under the on-site supervision of a master electrician, a master sign electrician, or a journeyman sign electrician, on behalf of an electrical sign contractor performing "Electrical Sign Work" as defined by this chapter.

(21) A Principal Place of Business--For purposes of this chapter, a contractor has a principal place of business in another state or territory or foreign country if the contractor is doing business in Texas without complying with all applicable Texas statutes and the contractor conducts substantial business in another state, territory or country while business conducted by the contractor in Texas is minimal.

(22) On-the-job Training--Training or experience gained under the supervision of an appropriate licensee, as prescribed by Texas Occupations Code Chapter 1305, while performing electrical work as defined by Texas Occupations Code, §1305.002(11).

(23) Residential Appliance Installer--An individual, licensed as a residential appliance installer, who on behalf of a residential appliance installation contractor, performs electrical work that is limited to residential appliance installation including residential pool-related electrical installation and maintenance as defined by Texas Occupations Code, §1305.002(12-b).

(24) Residential Appliance Installation Contractor--A person or entity licensed as a residential appliance installation contractor, that is in the business of residential appliance installation including pool-related electrical installation and maintenance as defined by Texas Occupations Code §1305.002(12-d).

(25) Residential Appliance--Electrical equipment that performs a specific function, and is installed as a unit in a dwelling by direct connection to an existing electrical circuit, such as water heaters, kitchen appliances, or pool-related electrical device. The term does not include general use equipment such as service equipment, other electrical power production sources, or branch circuit overcurrent protection devices not installed in the listed appliance or listed pool-related electrical device.

(26) Offer to perform--To make a written or oral proposal, to contract in writing or orally to perform electrical work or electrical sign work, or to advertise in any form through any medium that a person or business entity is an electrical contractor or electrical sign contractor, or that implies in any way that a person or business entity is available to contract for or perform electrical work or electrical sign work.

(27) Electro Mechanical Integrity--The condition of an electrical product, electrical system, or electrical equipment installed in accordance with its intended purpose and according to standards at least as strict as the standards provided by the National Electrical Code, the manufacturer's specifications, any listing or labeling on the product, and all other applicable codes or ordinances.

§73.20. Licensing Requirements--Applicant and Experience Requirements.

(a) An applicant for a license must submit the required fees with a completed application and the appropriate attachments:

(1) Applicants for Master Electrician, Master Sign Electrician, Journeyman Electrician, Journeyman Sign Electrician, Residential Wireman, and Maintenance Electrician licenses must submit documentation proving the required amount of on-the-job-training.

(2) Applicants for contractor's licenses must submit proof of general liability insurance and either workers' compensation insurance or a certificate of authority to self insure, or a statement that the applicant has elected not to obtain workers' compensation insurance pursuant to Subchapter A, Chapter 406, Labor Code, with the initial and renewal applications.

(b) An applicant must complete all requirements within one year of the date the application is filed.

(c) For purposes of this chapter, 2,000 hours of on the job training shall be the maximum that may be earned within one year. On the job training must be established by letter(s) setting out dates of employment from persons who either employed or supervised the applicant or as required by the application. Letters must include the name and license type of the supervising person.

(d) Each applicant must meet the applicable eligibility requirements as set forth in Texas Occupations Code, §§1305.153-1305.1618.

§73.51. Electrical Contractors' Responsibilities.

(a) An electrical contractor shall:

(1) notify the department when a new master electrician of record is assigned to the contractor and notify the department within thirty business days from the date that the master electrician's employment with the contractor ended;

(2) maintain employee records and records of all work performed on its behalf for a period of four years after completion of the work, and shall make those records available to the department at the contractor's place of business during normal business hours for inspection and copying. If the contractor's principal place of business is located out of the state of Texas, the department may require the contractor to make records available to the department at its offices in Austin, Texas or another location agreed upon by the department and the contractor.

(b) A person or contractor that performs or offers to perform electrical work shall:

(1) provide safe and proper installation and service, and assure the electro-mechanical integrity of all work and installations are to applicable code;

(2) not misrepresent the need for services, services to be provided, or services that have been provided;

(3) not make a fraudulent promise or false statement to influence, persuade, or induce an individual or an entity to contract for services; and

(4) ensure that all of an electrical contractor's electrical work shall be performed by licensed individuals.

(c) The design of an electrical system shall only be done by a licensed master electrician or design professional as authorized by statute. The design shall not be subcontracted to an unlicensed person, firm or corporation.

(d) A licensed electrical contractor shall display its name and license number on both sides of each vehicle owned or operated by the business and used in the conduct of electrical work. Lettering shall be of a contrasting color and at least two inches in height. The license number shall be preceded by the letters "TECL".

(e) All advertising by electrical contracting companies designed to solicit electrical business shall include the electrical contractor's name and license number. This includes business cards on or after July 1, 2010. The following advertising does not require the license number:

(1) nationally placed television advertising, in which a statement indicating that license numbers are available upon request is used in lieu of the electrical contractor license number;

(2) telephone book listings that contain only the name, address, and telephone number;

(3) manufacturers' and distributor's telephone book trade ads identifying an electrical contractor;

(4) telephone solicitations, provided the solicitor states that the contractor complies with licensing requirements of the state. The electrical contractor's number must be provided upon request;

(5) promotional items of nominal value such as ball caps, tee shirts, and other gifts; or

(6) signs located on the contractor's permanent business location.

(f) The electrical contractor's name, address, phone number, and license number shall appear on all proposals, invoices, and written contracts from the contractor. The following information: "Regulated by The Texas Department of Licensing and Regulation, P.O. Box 12157, Austin, Texas 78711, 1-800-803-9202, 512-463-6599; website: www.license.state.tx.us/complaints" shall be listed on all proposals, invoices, and written contracts.

(g) A licensed electrical contractor and its designated master electrician of record is responsible for supervision of all licensees performing work on behalf of the contractor to assure compliance with applicable statutes and rules and in particular, standards of conduct set out in this chapter.

(h) An electrical contractor shall not use a license that is not assigned to that contractor.

§73.52. Electrical Sign Contractors' Responsibilities.

(a) An Electrical Sign Contractor shall:

(1) notify the department when a new master electrician or master sign electrician of record is assigned to the contractor and notify the department within thirty business days from the date that the master electrician's employment with the contractor ended;

(2) maintain employee records and records of all work performed on its behalf for a period of four years after completion of the work, and shall make those records available to the department at the contractor's place of business during normal business hours for inspection and copying. If the contractor's principal place of business is located out of the state of Texas, the department may require the contractor to make records available to the department at its offices in Austin, Texas or another location agreed upon by the department and the contractor.

(b) A person or contractor that performs or offers to perform electrical sign contracting shall:

(1) provide safe and proper installation and service, and assure the electro-mechanical integrity of all work and installations are to code;

(2) not misrepresent the need for services, services to be provided, or services that have been provided;

(3) not make a fraudulent promise or false statement to influence, persuade, or induce an individual or an entity to contract for services; and

(4) ensure that all of an electrical sign contractor's non-exempt electrical work shall be performed by licensed individuals.

(c) The design of an electrical sign shall only be done by a licensed master electrician, master sign electrician, or design professional as authorized by statute. The design shall not be subcontracted to an unlicensed person, firm or corporation.

(d) A licensed electrical sign contractor shall display its name and license number on both sides of each vehicle owned or operated by the business and used in the conduct of electrical work. Lettering shall be of a contrasting color and at least two inches in height. The license number shall be preceded by the letters "TSCL".

(e) All advertising by electrical sign contracting companies designed to solicit electrical business shall include the electrical sign contractor's name and license number. This includes business cards on or after July 1, 2010. The following advertising does not require the license number:

(1) nationally placed television advertising, in which a statement indicating that license numbers are available upon request is used in lieu of the electrical sign contractor license number;

(2) telephone book listings that contain only the name, address, and telephone number;

(3) manufacturers' and distributor's telephone book trade ads identifying an electrical contractor;

(4) telephone solicitations, provided the solicitor states that the contractor complies with licensing requirements of the state. The electrical sign contractor's number must be provided upon request;

(5) promotional items of nominal value such as ball caps, tee shirts, and other gifts; and

(6) signs located on the contractor's permanent business location.

(f) The electrical sign contractor's name, address, phone number, and license number shall appear on all proposals, invoices, and written contracts from the contractor. The following information: "Regulated by The Texas Department of Licensing and Regulation, P.O. Box 12157, Austin, Texas 78711, 1-800-803-9202,

512-463-6599; website: www.license.state.tx.us/complaints" shall be listed on all proposals, invoices, and written contracts.

(g) A licensed electrical sign contractor and its designated master electrician or master sign electrician of record is responsible for supervision of all licensees performing work on behalf of the contractor to assure compliance with applicable statutes and rules and in particular, standards of conduct set out in this chapter.

(h) An electrical sign contractor shall not use a license that is not assigned to that contractor.

§73.54. Residential Appliance Installation Contractors' Responsibilities.

(a) A residential appliance installation contractor shall:

(1) notify the department when a new residential appliance installer of record is assigned to the contractor and notify the department within thirty business days from the date that the residential appliance installer's employment with the contractor ended;

(2) maintain employee records of all work performed on its behalf for a period of four years after completion of the work, and shall make those records available to the department at the contractor's place of business during normal business hours for inspection and copying. If the contractor's principal place of business is located out of the state of Texas, the department may require the contractor to make records available to the department at its offices in Austin, Texas or another location agreed upon by the department and the contractor.

(b) A person or contractor that performs or offers to perform residential appliance installation work shall:

(1) provide safe and proper installation and service, and assure the electro-mechanical integrity of all work and installations are to code;

(2) not misrepresent the need for services, services to be provided, or services that have been provided;

(3) not make a fraudulent promise or false statement to influence, persuade, or induce an individual or an entity to contract for services; and

(4) ensure that all of a residential appliance installation contractor's non-exempt electrical work shall be performed by licensed individuals.

(c) A licensed residential appliance installation contractor shall display its name and license number on both sides of each vehicle owned or operated by the business and used in the conduct of electrical work. Lettering shall be of a contrasting color and at least two inches in height. The license number shall be preceded by the letters "TICL".

(d) All advertising by residential appliance installation contracting companies designed to solicit residential appliance installation business shall include the residential appliance installation contractor's name and license number. This includes business cards on or after July 1, 2010. The following advertising does not require the license number:

(1) nationally placed television advertising, in which a statement indicating that license numbers are available upon request is used in lieu of the residential appliance installation contractor license number;

(2) telephone book listings that contain only the name, address, and telephone number;

(3) manufacturers' and distributor's telephone book trade ads identifying a residential appliance installation contractor;

(4) telephone solicitations, provided the solicitor states that the contractor complies with licensing requirements of the state. The residential appliance installation contractor's number must be provided upon request;

(5) promotional items of nominal value such as ball caps, tee shirts, and other gifts; and

(6) signs located on the contractor's permanent business location.

(e) The residential appliance installation contractor's name, address, phone number, and license number shall appear on all proposals, invoices, and written contracts from the contractor. The following information: "Regulated by The Texas Department of Licensing and Regulation, P.O. Box 12157, Austin, Texas 78711, 1-800-803-9202, 512-463-6599; website: www.license.state.tx.us/complaints" or "Regulated by The Texas Department of Licensing and Regulation, P.O. Box 12157, Austin, Texas 78711, 1-800-803-9202, 512-463-6599; website: www.license.state.tx.us/complaints. TDLR regulation limited to electrical work only." shall be listed on all proposals, invoices, and written contracts.

(f) A licensed residential appliance installation contractor and its designated residential appliance installer of record is responsible for supervision of all licensees performing work on behalf of the contractor to assure compliance with applicable statutes and rules and in particular, standards of conduct set out in this chapter.

(g) A residential appliance installation contractor shall not use a license that is not assigned to that contractor.

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 December 10, 2009.

TRD-200905741
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Effective date: January 1, 2010
Proposal publication date: September 18, 2009
For further information, please call: (512) 463-7348

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16 TAC §§73.51 - 73.54, 73.60

The repeals are adopted under Texas Occupations Code, §51.201(b) and §51.203, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement Chapter 51 and any other law establishing a program regulated by the Department. Also, the repeals are adopted under Texas Occupations Code, Chapter 1305 which authorizes the Executive Director of the Department and the Commission to adopt rules as necessary to implement this chapter.

The statutory provisions affected by the repeals are those set forth in Texas Occupations Code, Chapters 51 and 1305. No other statutes, articles, or codes are affected by the adopted repeals.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 10, 2009.

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William H. Kuntz, Jr.
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For further information, please call: (512) 463-7348

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TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 105. FOUNDATION SCHOOL PROGRAM

SUBCHAPTER B. USE OF STATE FUNDS

19 TAC §105.11

The State Board of Education (SBOE) adopts an amendment to §105.11, concerning the Foundation School Program (FSP). The amendment is adopted with changes to the proposed text as published in the October 9, 2009, issue of the *Texas Register* (34 TexReg 6985). The section prescribes the maximum allowable indirect cost for school district use of FSP funds. The adopted amendment updates 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 for the compensatory education program. HB 3646 also added the TEC, §42.1541, directing the SBOE to by rule increase the indirect cost allotments established for special 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.

As approved for first reading and filing authorization at the September 2009 SBOE meeting, the amendment to 19 TAC §105.11 would have increased 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.

Subsequently, the SBOE Committee of School Finance/Permanent School Fund conducted a work session on the proposed amendment on October 16, 2009, and heard an invited presentation from a representative of the Texas Association of School Business Officials. The SBOE considered the proposed amendment for second reading and final adoption at its November 20, 2009, meeting.

In response to public comments, the SBOE modified the amendment to 19 TAC §105.11 at its November 2009 meeting to adopt an indirect cost rate of 45% for compensatory education, gifted and talented education, bilingual education and special language programs, and special education and an indirect cost rate of 40% for career and technical education.

A technical edit was also made in 19 TAC §105.11 to keep in rule the reference to special language programs. The reference was inadvertently omitted in the proposal.

The adopted amendment has no new procedural and reporting requirements. The adopted amendment has no new locally maintained paperwork requirements.

The Texas Education Agency 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.

In accordance with the TEC, §7.102(f), the SBOE approved this rule action for adoption by a vote of two-thirds of its members to specify an effective date earlier than the beginning of the 2010-2011 school year. The earlier effective date is necessary to implement the TEC, §42.1541, which requires the SBOE to take action that permits the increased indirect cost allotments to apply beginning with the 2009-2010 school year. The effective date is 20 days after filing as adopted.

Following is a summary of public comments and corresponding responses regarding the proposed amendment to 19 TAC §105.11.

Comment. Officials at Comstock Independent School District (ISD), Olfen ISD, Early ISD, Gregory-Portland ISD, Wall ISD, San Angelo ISD, and Fredericksburg ISD recommended that the SBOE adopt a 45% indirect cost rate for the special programs. They stated that the 45% rate would give the districts the flexibility to spend this money in covering regular education cost and other operating cost.

Response. The SBOE agreed with setting the indirect cost rate at 45% for gifted and talented education, bilingual education and special language programs, and special education. The SBOE disagreed with setting the indirect cost rate at 45% for career and technical education programs and set the rate at 40% to allow the career and technical education program to have relatively the same direct cost as in previous years. This action provides schools with indirect cost rates that help maintain the 2008-2009 spending levels for the special programs.

Comment. An official from Olfen ISD recommended that the SBOE consider allowing districts more discretion on the use of compensatory education funds to cover indirect costs. The official commented that state funding formulas moved more dollars from the general fund to special programs, which impact the

school's ability to provide for transportation, utilities, and other costs associated with program delivery.

Response. The SBOE partially agrees with this statement. The state funding formulas have changed the amount of money that is directed to the special programs but the 81st Texas Legislature set the indirect cost rate at 45% for the compensatory education funds, which the SBOE cannot change.

Comment. An official from Galena Park ISD stated that the vast majority of new funding due to HB 3646 must be spent on increased salaries for teachers; therefore, any increases in the minimum expenditures levels for the special programs must come from reductions in expenditures for the general student population. The official stated that this could be viewed as unfunded mandates. The official stated that the recommended 45% indirect cost rate is appropriate but also believed that a 40% indirect cost rate for the career and technical education would be appropriate.

Response. The SBOE agreed with setting the indirect cost rate at 40% for career and technical education programs and 45% for the other special programs. This action provides schools with indirect cost rates that help maintain the 2008-2009 spending levels for the special programs.

Comment. Officials representing the Texas Association of School Administrators, Texas Association of School Boards, Texas School Alliance, and the South Texas Association of Schools encouraged the SBOE to adopt an indirect cost rate of 43% for special education, gifted and talented, and bilingual programs and a 40% rate for career and technology programs. The officials stated that the legislature significantly changed the structure of the Foundation School Program with the adoption of HB 3646, and these changes have increased spending requirements for the special program areas by nearly 50%, despite increasing school district revenues by an average of only about 3%. The group contended that adopting the 43% and 40% indirect cost rates would be a spending neutral approach and adopting lower percentages will increase spending required in these special programs without providing districts with the additional revenue necessary to meet those thresholds.

Response. The SBOE agreed with setting the indirect cost rate at 40% for career and technical education programs. The SBOE disagreed with setting the indirect cost rate at 43% for the other special programs and set the rate at 45% for gifted and talented education, bilingual education and special language programs, and special education. This action provides schools with indirect cost rates that help maintain the 2008-2009 spending levels for the special programs.

Comment. An official from Bryan ISD requested that all special programs within the formula funding system have the same indirect cost rate as established in the legislative session for state compensatory education at 35%. The official stated that with the funding formula currently in place, to set this rate any lower will require funding levels for these programs at a much higher amount than in the past and will require a reduction in spending in regular education to make up the difference.

Response. The SBOE disagreed that the indirect cost rate established in the legislative session for state compensatory education was 35%. The legislature set the indirect cost rate for state compensatory education at 45%.

Comment. An official from Big Spring ISD stated that districts are not cutting funding to the special programs. The school provided a spreadsheet showing the funding issues they are currently having with the current 15% indirect cost for special programs and the increase in the allotments due to HB 3646. The official stated that under the target revenue system, funding to districts has not increased as costs of utilities, fuel, etc., have risen sharply.

Response. The action taken by the SBOE provides schools with indirect cost rates that will help maintain the 2008-2009 spending levels for the special programs.

Comment. An official representing the Texas School Alliance and South Texas Association of Schools supported the adoption of a rule that would set the indirect cost rates for all the special programs at 45%.

Response. The SBOE agreed with setting the indirect cost rate at 45% for gifted and talented education, bilingual education and special language programs, and special education. The SBOE disagreed with setting the indirect cost rate at 45% for the career and technical education program and set the rate at 40% to allow the career and technical education program to have relatively the same direct cost as in previous years. This action provides schools with indirect cost rates that help maintain the 2008-2009 spending levels for the special programs.

Comment. An official representing the Texas Association of School Administrators and Texas Association of School Boards encouraged the SBOE to adopt an indirect cost rate of 43% for special education, gifted and talented, and bilingual programs and a 40% rate for career and technology programs. The official stated that these rates would keep the expenditures for these special programs at the same level as in previous years.

Response. The SBOE agreed with setting the indirect cost rate at 40% for career and technical education programs. The SBOE disagreed with setting the indirect cost rate at 43% for the other special programs and set the rate at 45% for gifted and talented education, bilingual education and special language programs, and special education. This action provides schools with indirect cost rates that help maintain the 2008-2009 spending levels for the special programs.

The amendment is adopted under the TEC, §§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 and special language programs, career and technology education, and gifted and talented education. In addition, the TEC, §42.1541, authorizes the SBOE to by rule increase the indirect cost allotments established for special education, compensatory education, bilingual education and special language programs, and career and technical education programs.

The amendment implements the TEC, §§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% 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 following programs: compensatory education, gifted and talented education, bilingual education and special language programs, and special education. No more than 40% 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 career and technical 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, Financial Accountability System Resource Guide.

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 December 11, 2009.

TRD-200905789
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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TITLE 22. EXAMINING BOARDS

PART 1. TEXAS BOARD OF ARCHITECTURAL EXAMINERS

CHAPTER 5. INTERIOR DESIGNERS

SUBCHAPTER A. SCOPE; DEFINITIONS

22 TAC §5.5

The Texas Board of Architectural Examiners adopts an amendment to §5.5, concerning definitions, with changes to the proposed text as published in the September 4, 2009, issue of the *Texas Register* (34 TexReg 6073). The text of the rule will be republished.

The amendment implements recent legislation which changed the title restriction upon the use of the professional title "interior designer" to "registered interior designer". The Board amended the rule to insert the word "registered" before the words "Interior Designer" where appropriate to further distinguish the Board's registrants from unregistered interior designers in the rules. During the proposal, this amendment was omitted in paragraphs (37) and (38). The amendment has been included in the adoption and therefore the rule is adopted with changes. The amendments also strike and republish certain terms in upper case to clearly cross-reference definitions of those terms in the Board's rules. The amendment also changes the definition of the term "FIDER" to reflect the name change of the Foundation of Interior Design Education Research to the Council for Interior Design Accreditation (CIDA) and to note that FIDER is a predecessor to CIDA. The amendments clarify rules to reflect current legal requirements and accurately identify the organization which accredits interior design education programs.

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, including rules related to the administration of Chapter 1053, Texas Occupations Code, relating to the practice of interior design.

§5.5. Terms Defined Herein.

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

(1) The Act--The Interior Designers' Registration Law.

(2) Actual Signature--A personal signature of the individual whose name is signed or an authorized copy of such signature.

(3) Administrative Procedure Act (APA)--Texas Government Code §§2001.001 et seq.

(4) APA--Administrative Procedure Act.

(5) Applicant--An individual who has submitted an application for registration or reinstatement but has not yet completed the registration or reinstatement process.

(6) Architectural Interior Construction--A building project that involves only the inside elements of a building and, in order to be completed, necessitates the "practice of architecture" as that term is defined in 22 Texas Administrative Code §1.5.

(7) Authorship--The state of having personally created something.

(8) Barrier-Free Design--The design of a facility or the design of an alteration of a facility which complies with the Texas Accessibility Standards, the Americans with Disabilities Act, the Fair Housing Accessibility Guidelines, or similarly accepted standards for accessible design.

(9) Board--Texas Board of Architectural Examiners.

(10) Cancel, Cancellation, or Cancelled--The termination of a Texas interior design registration certificate by operation of law two years after it expires without renewal by the certificate-holder.

(11) Candidate--An Applicant approved by the Board to take the interior design registration examination.

(12) CEPH--Continuing Education Program Hour(s).

(13) Chair--The member of the Board who serves as the Board's presiding officer.

(14) Construction Documents--Drawings; specifications; and addenda, change orders, construction change directives, and other Supplemental Documents prepared for the purpose(s) of Regulatory Approval, permitting, or construction.

(15) Consultant--An individual retained by an Interior Designer who prepares or assists in the preparation of technical design documents issued by the Interior Designer for use in connection with the Interior Designers' Construction Documents.

(16) Contested Case--A proceeding, including a licensing proceeding, in which the legal rights, duties, or privileges of a party are to be determined by a state agency after an opportunity for adjudicative hearings.

(17) Continuing Education Program Hour (CEPH)--At least fifty (50) minutes of time spent in an activity meeting the Board's continuing education requirements.

(18) Delinquent--A registration status signifying that an Interior Designer:

(A) has failed to remit the applicable renewal fee to the Board; and

(B) is no longer authorized to use the title "registered interior designer" in Texas.

(19) Direct Supervision--The amount of oversight by an individual overseeing the work of another whereby the supervisor and the individual being supervised work in close proximity to one another and the supervisor has both control over and detailed professional knowledge of the work prepared under his or her supervision.

(20) E-mail Directory--A listing of e-mail addresses:

(A) used to advertise interior design services; and

(B) posted on the Internet under circumstances where the Interior Designers included in the list have control over the information included in the list.

(21) Emeritus Interior Designer (or Interior Designer Emeritus)--An honorary title that may be used by an Interior Designer who has retired from the practice of Interior Design in Texas pursuant to §1053.156 of the Texas Occupations Code.

(22) Energy-Efficient Design--The design of a project and the specification of materials to minimize the consumption of energy in the use of the project. The term includes energy efficiency strategies by design as well as the incorporation of alternative energy systems.

(23) Feasibility Study--A report of a detailed investigation and analysis conducted to determine the advisability of a proposed interior design project from a technical interior design standpoint.

(24) FIDER--Foundation for Interior Design Education Research. A predecessor to the Council for Interior Design Accreditation (CIDA).

(25) Foundation for Interior Design Education Research (FIDER)--An agency that sets standards for postsecondary interior design education and evaluates college and university interior design programs. A predecessor to the Council for Interior Design Accreditation (CIDA).

(26) Good Standing--

(A) a registration status signifying that an Interior Designer is not delinquent in the payment of any fees owed to the Board or

(B) an application status signifying that an Applicant or Candidate is not delinquent in the payment of any fees owed to the Board, is not the subject of a pending TBAE enforcement proceeding, and has not been the subject of formal disciplinary action by an interior design registration board that would provide a ground for the denial of the application for interior design registration in Texas.

(27) Governmental Jurisdiction--A governmental authority such as a state, territory, or country beyond the boundaries of Texas.

(28) Inactive--A registration status signifying that an Interior Designer may not practice Interior Design in the State of Texas.

(29) Interior Design--The identification, research, or development of creative solutions to problems relating to the function or quality of the interior environment; the performance of services relating to interior spaces, including programming, design analysis, space planning of non-load-bearing interior construction, and application of aesthetic principles, by using specialized knowledge of interior construction, building codes, equipment, materials, or furnishings; or the preparation of interior design plans, specifications, or related documents about the design of non-load-bearing interior spaces.

(30) Interior Designer--An individual who holds a valid Texas interior design registration certificate granted by the Board.

(31) Interior Designers' Registration Law--Article 249e, Vernon's Texas Civil Statutes, and Chapter 1053, Texas Occupations Code.

(32) Interior Design Intern--An individual participating in an internship to complete the experiential requirements for interior design registration by examination in Texas.

(33) Licensed--Registered.

(34) Member Board--An interior design registration board that is part of NCIDQ.

(35) National Council for Interior Design Qualification (NCIDQ)--A nonprofit organization of state and provincial interior design regulatory agencies and national organizations whose membership is made up in total or in part of interior designers.

(36) NCIDQ--National Council for Interior Design Qualification.

(37) Nonregistrant--An individual who is not a registered Interior Designer.

(38) Principal--A registered Interior Designer who is responsible, either alone or with other registered Interior Designers, for an organization's practice of Interior Design.

(39) Registrant--Interior Designer.

(40) Regulatory Approval--The approval of Construction Documents by a Governmental Entity after a review of the Interior Design content of the Construction Documents as a prerequisite to construction or occupation of a building of facility.

(41) Reinstatement--The procedure through which a Surrendered or revoked Texas interior design registration certificate is restored.

(42) Renewal--The procedure through which an Interior Designer pays a periodic fee so that the Interior Designer's registration certificate will continue to be effective.

(43) Responsible Charge--That degree of control over and detailed knowledge of the content of technical submissions during their preparation as is ordinarily exercised by registered interior designers applying the applicable interior design standard of care.

(44) Revocation or Revoked--The termination of a Texas interior design registration certificate by the Board.

(45) Rules and Regulations of the Board--22 Texas Administrative Code §§155.1 et. seq.

(46) Rules of Procedure of SOAH--1 Texas Administrative Code §§155.1 et seq.

(47) Secretary-Treasurer--The member of the Board responsible for signing the official copy of the minutes from each Board meeting and maintaining the record of Board members' attendance at Board meetings.

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

(49) State Office of Administrative Hearings (SOAH)--A Governmental Entity created to serve as an independent forum for the conduct of adjudicative hearings involving the executive branch of Texas government.

(50) Supervision and Control--The amount of oversight by an interior designer overseeing the work of another whereby:

(A) the interior designer and the individual performing the work can document frequent and detailed communication with one

another and the interior designer has both control over and detailed professional knowledge of the work; or

(B) the interior designer is in Responsible Charge of the work and the individual performing the work is employed by the interior designer or by the interior designer's employer.

(51) Supplemental Document--A document that modifies or adds to the technical interior design content of an existing Construction Document.

(52) Surrender--The act of relinquishing a Texas interior design registration certificate along with all privileges associated with the certificate.

(53) Sustainable Design--An integrative approach to the process of design which seeks to avoid depletion of energy, water, and raw material resources; prevent environmental degradation caused by facility and infrastructure development during their implementation and over their life cycle; and create environments that are livable and promote health, safety and well-being. Sustainability is the concept of meeting present needs without compromising the ability of future generations to meet their own needs.

(54) Table of Equivalents for Education and Experience in Interior Design--22 Texas Administrative Code §§5.201 et. seq. (§§5.201 - 5.203 of this chapter).

(55) TBAE--Texas Board of Architectural Examiners.

(56) TDLR--Texas Department of Licensing and Regulation.

(57) Texas Department of Licensing and Regulations (TDLR)--A Texas state agency responsible for the implementation and enforcement of the Texas Architectural Barriers Act.

(58) Texas Guaranteed Student Loan Corporation (TGSLC)--A public, nonprofit corporation that administers the Federal Family Education Loan Program.

(59) TGSLC--Texas Guaranteed Student Loan Corporation.

(60) Vice-Chair--The member of the Board who serves as the assistant presiding officer and, in the absence of the Chair, serves as the Board's presiding officer. If necessary, the Vice-Chair succeeds the Chair until a new Chair is appointed.

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 December 9, 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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SUBCHAPTER G. COMPLIANCE AND ENFORCEMENT

22 TAC §5.131

The Texas Board of Architectural Examiners adopts an amendment to §5.131, concerning compliance and enforcement, with changes to the proposed text as published in the September 4, 2009, issue of the *Texas Register* (34 TexReg 6073). The text of the rule will be republished.

The rule is amended to conform to recent legislative changes to restrictions upon the use of the professional title "interior designer." The Board amended the rule to insert the word "registered" before the words "Interior Designer" where appropriate to further distinguish the Board's registrants from unregistered interior designers in the rules. The amendments also strike and republish certain terms in upper case to clearly cross-reference definitions of those terms in the Board's rules.

No comments were received regarding adoption of the amendments.

The amendment is adopted pursuant to §1051.202, Texas Occupations Code, and §1053.151, Texas Occupations Code, which provide the Texas Board of Architectural Examiners with authority to promulgate rules, including rules related to the administration of Chapter 1053, Texas Occupations Code, regulating the practice of interior design and which restricts usage of the title "Registered Interior Designer" to persons registered with the board as interior designers.

§5.131. General.

In carrying out its responsibility to insure strict enforcement of the Interior Designers' Registration Law (the Act), the Board may investigate circumstances which appear to violate or abridge the requirements of the Act or the rules dealing with the practice of Interior Design and the use of the title "registered interior designer." Violations of the Act or the rules which cannot be readily resolved through settlement shall be disposed of by administrative, civil, or criminal proceedings as authorized by law.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Cathy L. Hendricks, RID, ASID/IIDA
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22 TAC §5.133, §5.134

The Texas Board of Architectural Examiners adopts amendments to §5.133 and §5.134, concerning the professional titles and registration of interior design businesses, with changes to the proposed text as published in the September 4, 2009, issue of the *Texas Register* (34 TexReg 6074). The text of the rules will be republished.

The amendments implement recent legislative changes to restrictions upon the use of the professional title "interior designer." As amended, the statutes restrict the title "registered interior designer." During the proposal, this amendment was omitted in §5.134(b), (d) and (e). The amendment has been included in

the adoption and therefore the rule is adopted with changes. The amendments also implement recent changes in the law by striking prohibitions upon the use of the term "interior design."

No comments were received regarding adoption of the amendments.

The amendments are adopted pursuant to §1051.202 and §1053.151, Texas Occupations Code, which provide the Texas Board of Architectural Examiners with authority to promulgate rules, including rules related to restrictions upon the use of the title "registered interior designer."

§5.133. Titles.

(a) Registered Interior Designers duly registered in Texas are authorized to use the title "registered interior designer" to describe themselves.

(b) A firm, partnership, corporation, or other business association may use the title "registered interior designer" only under the following conditions:

(1) The business employs at least one registered Interior Designer on a full-time basis or associates with at least one registered Interior Designer pursuant to the provisions of §5.132 of this (title relating to Association); and

(2) The registered Interior Designer(s) employed by or associated with the business pursuant to paragraph (1) of this subsection exercise Supervision and Control over all Interior Design services performed by Nonregistrants on behalf of the business.

(c) No entity other than those qualified under subsections (a) and (b) of this section may use the title "registered interior designer" in its name.

(d) A person participating in an internship to complete the experiential requirements for Interior Design registration in Texas may use the title "interior design intern."

§5.134. Business Registration.

(a) A Principal for an Interior Design firm or other business entity that uses the title "registered interior designer" to describe itself must annually register information regarding the firm or business entity with the Board.

(b) A registered Interior Designer or a Principal of a registered Interior Design firm who enters into an agreement to create a business association pursuant to §5.132 of this title (relating to Association) shall annually register the association with the Board.

(c) If a business entity or association dissolves or otherwise becomes unable to lawfully use the title "registered interior designer" to describe itself, the Interior Designer or Principal who last registered the business entity or association shall so notify the Board in writing. Such notification must be postmarked or otherwise provided within thirty (30) days of the date of dissolution or the date the business entity or association became unable to lawfully use the title "registered interior designer." A business entity or association may not continue to use the title "registered interior designer" unless another registered Interior Designer or Principal files information with the Board identifying himself or herself as the Principal for the business entity or association within that thirty (30) day period.

(d) A registered Interior Designer who is a sole proprietor doing business under his/her own name shall be exempt from the requirements of subsections (a) - (c) of this section.

(e) A registered Interior Designer or Principal who is subject to this section shall initially register a business entity or a business association within thirty (30) days after creation of the business entity or the business association. Thereafter, the annual registration renewal of the business entity or business association shall coincide with the registered Interior Designer's or Principal's renewal of registration as a registered Interior Designer.

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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CHAPTER 7. ADMINISTRATION

22 TAC §7.10

The Texas Board of Architectural Examiners adopts an amendment to §7.10(b), concerning the fees charged by the Board without changes to the proposed text as published in the September 4, 2009, issue of the *Texas Register* (34 TexReg 6075) and will not be republished.

The amendment eliminates a specified fee for registration examinations and includes a statement that the fees are set by examination providers under contract with the board. The examination providers have modified fees to apply to each section of the examination and in some cases created graduated fee schedules. As a result, a single specified fee in the board's fee schedule is not accurate. The amendments impose a $5 fee for issuing replacement pocket cards (cards that serve as evidence of registration) to registrants in order to recover agency costs and eliminate an obsolete administrative fee for review of the Landscape Architectural Registration Examination.

There will be an increase in the cost to persons who obtain replacement pocket cards. The Board currently bears the cost of replacing pocket cards. The amendment would transfer that cost to registrants who obtain replacement cards.

No comments were received regarding adoption of the amendments.

The amendment is adopted pursuant to §§1051.651, 1052.054 and 1053.052, Texas Occupations Code Annotated, which provide the Texas Board of Architectural Examiners with authority to set fees reasonable and necessary to cover the costs of administering laws relating to the regulation of architecture, landscape architecture and interior design, respectively.

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
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TITLE 25. HEALTH SERVICES

PART 1. DEPARTMENT OF STATE HEALTH SERVICES

CHAPTER 97. COMMUNICABLE DISEASES
SUBCHAPTER F. SEXUALLY TRANSMITTED DISEASES INCLUDING ACQUIRED IMMUNODEFICIENCY SYNDROME (AIDS) AND HUMAN IMMUNODEFICIENCY VIRUS (HIV)

25 TAC §§97.131 - 97.134

The Executive Commissioner of the Health and Human Services Commission (commission), on behalf of the Department of State Health Services (department), adopts amendments to §§97.131 - 97.134, concerning the reporting of sexually transmitted diseases (STD), including Acquired Immunodeficiency Syndrome (AIDS) and Human Immunodeficiency Virus (HIV). The amendments to §§97.132 - 97.134 are adopted with changes to the proposed text as published in the July 31, 2009, issue of the *Texas Register* (34 TexReg 5001). Section 97.131 is adopted without changes and, therefore, the section will not be republished.

BACKGROUND AND PURPOSE

The amendments update and clarify the disease reporting rules for STD, including HIV and AIDS and will make the STD reporting process more efficient and effective in Texas in accordance with Health and Safety Code, Chapter 81, amended by the 80th Legislature, 2007.

Government Code, §2001.039, requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Sections 97.131 - 97.134 have been reviewed and the department has determined that reasons for adopting the sections continue to exist because rules on this subject are needed. The adopted changes clarify the rules, improve readability and better reflect the rules' statutory authority.

SECTION-BY-SECTION SUMMARY

Section 97.131.

Amendments to §97.131(1) add the acronym for the Centers for Disease Control and Prevention (CDC), update the agency and branch name, and update the mailing address for requesting publications from the department.

Existing §97.131(2) is deleted, and existing §97.131(3) renumbered paragraph (7) with changes, because the STD defined here would instead be defined by inserting a cross-reference to the federal CDC definitions of those diseases. The acronym for Sexually Transmitted Diseases is also added.

New definitions are added in §97.131 as these new terms are used in subsequent sections of rule text. The new definitions are as follows:

(2) Confirmatory Test--A second analytical test that is done to detect disease, when an initial or screening test yields a preliminary positive result, which is independent of the initial test and uses a different technique and chemical principle in order to ensure reliability and accuracy.

(3) FASTA File--An electronic data format used to store nucleotide sequences of the Human Immunodeficiency Virus (HIV).

(4) HIV-Exposed Infant--Any infant born to an HIV-infected woman.

(5) Point of Care Tests--Diagnostic tests performed at or near the site of patient care that increase the likelihood of the patient receiving the results as well as referrals for treatment and support services in a timely manner. These tests are usually performed in emergency rooms, outpatient clinics and physician offices.

(6) Screening Test--An analytical test used to preliminarily detect the presence of disease. Positive screening test results should be followed by a confirmatory test to verify the presence of that disease.

Section 97.132.

Amendments to the introductory paragraph for §97.132 clarify language by using the standard term "report." The amendments also add "HIV-exposed infants" to the list of what triggers reporting because infants born to HIV-infected mothers are suspected to have HIV infection and must be reported according to Health and Safety Code, §81.042(b), which requires reporting of a patient that has or is suspected of having a reportable disease. Amendments also provide a cross-reference to §97.133 (relating to Reporting Information for Sexually Transmitted Diseases) regarding what must be reported, and improve readability by using the term STD instead of listing each reportable disease separately (this tracks changes made in the definitions section of the rules).

Amendments to §97.132(1) better reflect the requirements of Health and Safety Code, §81.042, regarding reporting triggers as well as where the ultimate legal responsibility for reporting lies, and improve readability by using the acronym STD.

Amendments to §97.132(2) better reflect the requirements of Health and Safety Code, §81.042, particularly subsection (e). Amendments also change the word "patient" to "person" because some of the persons reported will not be patients of the reporting person.

Amendments to §97.132(3) add language to include hospital laboratories as an entity required to report cases of STD, to track corresponding language in Health and Safety Code, §81.042(d), and add the acronym for sexually transmitted diseases instead of listing each reportable STD separately. Amendments delete language about the type of tests and test results required to be reported because that information is provided in more detail in §97.133 and a cross-reference to §97.133 is already provided in this section.

Amendments to §97.132(4) replace the terminology "counseling and testing site or a community-based organization" with the term "testing program," to make the language consistent with Health and Safety Code, §85.002, and also add a reference to that section in the rule text. Amendments also clarify the rea-

son for the medical director or other physician to report cases of STD, and use the acronym STD instead of listing each reportable STD separately. Language regarding delegation of reporting duties is deleted so that the rule does not improperly imply that the statutorily-designated persons can legally avoid their reporting responsibilities under the statute.

Amendments to §97.132(5) add language requiring local school authorities to report a child attending school who is suspected of having a STD, based on medical evidence. The amendments also add a cross-reference to Health and Safety Code, §81.003, where the term "school authority" is defined. The changes to this section (along with the existing rule text in the department's rule, §97.7) are necessary to be consistent with the requirements of Health and Safety Code, §81.042(c). Since proposal of these amendments, a change was made to replace the term "HIV-infected" with "HIV-exposed" to be consistent with terminology used elsewhere in the rules.

Section 97.133.

The introductory paragraph for §97.133 is amended to remove an inappropriate qualifier statement, to add language that clarifies the reporting "trigger" to reflect Health and Safety Code, Chapter 81, to use the acronym STD for sexually transmitted disease instead of listing each reportable STD separately, and to delete language about the type of tests and test results required to be reported because this information is provided in §97.133(2) and (3).

Amendments to §97.133(1) improve readability and clarity by replacing language about how to report with a cross-reference to §97.133(2) which contains the most recent information on that subject.

The text in existing §97.133(2) is moved to §97.133(1) as part of the reorganization of this section to improve flow and readability.

Existing subparagraphs in §97.133(1)(A) - (G) are deleted because the STDs listed and the most current forms used to report them is in new language in §97.133(2).

New language for §97.133(2) clearly states that the referenced persons have to report as described in the subsequent list in subparagraphs (A) - (E). The amendments change the reporting forms for adult and adolescent HIV/AIDS and pediatric HIV/AIDS from CDC forms to department-specific forms (the department's Texas HIV/AIDS Adult/Adolescent case report form and the department's Texas HIV/AIDS pediatric case report form), and add the entire name of the department's forms in addition to the number of the form for the reporting forms that are not being changed. The new language separates reporting requirements for physicians and other persons specified in amended §97.132(1), (2), (4), and (5) and laboratories as specified in §97.133(3) into two different subsections to improve clarity in the differences in reporting requirements for physicians and laboratories. The amendments to §97.133(2) also clarify that results from point of care tests must be reported.

Existing language at §97.133(3) is replaced with language requiring persons in charge of a laboratory or any other facility described in §97.132(3) to report results, as described, for each person who has or is suspected of having an STD and/or is an HIV-exposed infant. The existing language in this section is deleted as unnecessary, since §97.134 specifies how reporting should be done. New language in §97.133(3) lists the specific types of tests and test results required to be reported, and adds language that clarifies that positive or reactive STD test results, including screening tests, are required to be reported. The amendment changes the current requirement that only detectable HIV viral loads are reported, making both detectable and non-detectable HIV viral loads required to be reported. The new §97.133(3) also changes the reporting of CD4+T-lymphocytes (CD4s) from counts below 200 cells/microliter or less than 14% to all CD4 counts, regardless of level for adults and adolescents over 12 years of age. The new §97.133(3) revises the requirement to report HIV DNA or RNA virologic test results on all infants to include both positive and negative results for infants from birth to three years of age, instead of the existing requirement to report only positive HIV DNA or RNA virologic test results. Since the proposal of these amendments, a change in terminology is made replacing the term "PCR" with "HIV DNA or RNA virologic tests" to reflect the wording CDC uses in its HIV surveillance definition for infants. Adding a requirement to report negative HIV DNA or RNA virologic test results for infants enables the State to determine perinatal HIV transmission rates for Texas with more accuracy and also decreases the amount of time public health workers spend on contacting health care providers to obtain negative HIV DNA or RNA virologic test results on HIV-exposed infants. Overall, these changes to reporting requirements for HIV test results by laboratories and other listed entities will greatly enhance completeness of reporting for HIV and increase the number of new HIV cases reported, resulting in better data to target prevention interventions and allocate scarce resources. These changes will also result in better monitoring of severity of HIV disease and the quality of HIV care in Texas. These changes will also allow a more accurate determination of the unmet needs for HIV care in Texas. Additionally, the new §97.133(3) language changes the required reporting of confirmatory tests for syphilis from the existing requirement to only report positive (reactive) results to the requirement to report both reactive and non-reactive tests. This will allow public health personnel to spend less time investigating positive screening tests with missing confirmatory test results and decrease calls to physicians and laboratories to provide this information. The new §97.133(3) language also adds the requirement to report nucleotide sequences of HIV from resistance testing, e.g., FASTA files, so that the State can obtain more complete information for its HIV resistance surveillance activities, including monitoring the level and types of HIV medication resistance in Texas.

Section 97.134.

Amendments to §97.134(a) add clarifying language that specifies that case reports are confidential as provided by law, and remove vague language.

Amendments to §97.134(b) delete the word "region" and replace it with "departmental regional office which covers the area" for clarity on who should receive case reports in the absence of a local health department director.

Amendments to §97.134(c) update the agency, branch name and the mailing address for sending reports of STD. A reference to the HIV/STD program website for obtaining additional reporting information is added, and the statement about obtaining postage paid envelopes from the HIV/STD program is deleted because there have been no requests for such envelopes for the past five years and the department is discontinuing that service.

Amendments to §97.134(d) specify data elements required to be reported for cases of STD and HIV infection or AIDS, to be consistent with amendments made to Health and Safety Code, §81.043 and §81.044 during the 80th Legislature, 2007. Text is added that updates the reference to the department's health

service regions, and text is deleted that states forms can be obtained from the department's HIV/STD program and the related address since this entity does not provide reporting forms. Amendments add a reference to the HIV/STD program website for a list of local health departments and the department's health service region offices where reporting forms can be obtained. Since these amendments were proposed, minor grammar and punctuation changes were made to improve readability of the rule text.

Amendments to §97.134(e) require a shorter reporting period for physicians and other referenced persons to submit reports of primary or secondary syphilis by telephone (i.e., within one working day of determining the diagnosis). Language pertaining to other STDs retains the existing requirement that reporting be made within seven calendar days. The amendment for reporting syphilis test results within one working day will allow public health authorities to respond more quickly to reported cases and interrupt the chain of transmission earlier, thereby reducing the spread of the disease. Primary and secondary (P&S) syphilis are the stages of syphilis where the disease is most transmissible. In Texas, cases of P&S syphilis have steadily increased from 398 in 2000 to 1,172 in 2007 indicating a need for more aggressive intervention measures for syphilis, including earlier disease reporting. The amendment for reporting primary and secondary syphilis would also put Texas in compliance with the CDC syphilis surveillance recommendations. Currently Texas is one of only seven states that have a syphilis reporting timeframe of seven calendar days; 29 states have syphilis reporting within one working day.

Amendments to §97.134(f) require any person in charge of a clinical laboratory or other entity as specified by §97.132(3) to submit syphilis test results within three working days of obtaining the test result, which is a change from the previous requirement of weekly submission. Language pertaining to other STDs retains the existing requirement that test results be reported within seven calendar days in §97.134(f). Syphilis will be treated separately for the same reasons previously stated in this preamble regarding changes to §97.134(e). Laboratory reporting of syphilis tests must now be within three working days of obtaining the test result compared to within one working day for physicians and other non-laboratory reporters. This timeframe is based on feedback from stakeholders that were concerned that "within one day" reporting from laboratories could result in a laboratory triggering a disease intervention specialist (DIS) contacting a patient before the physician received the laboratory report. Feedback from laboratory stakeholders was that a "within one day" reporting timeframe would be overly burdensome. A "within three-day" timeframe for reporting syphilis is recommended because it shortens the reporting timeframe but also allows a short time-lag for physicians to receive results before a DIS contacts the patient. Laboratory stakeholders also indicated that this timeframe would not be as overly burdensome as a "within one-day" timeframe. Amendments to §97.134(f) add clarifying language that the requirement for laboratories to report quarterly if they have no positive test results for that calendar quarter is an additional requirement and does not replace other reporting requirements.

Existing language at §97.134(g) is deleted in its entirety because a rule on the subject is not needed. New language is added for subsection (g) which requires health authorities to report each week to the department, using electronic or paper reports, all STD cases, including HIV infection and AIDS, to be consistent with amendments made to Health and Safety Code, §81.043, during the 80th Legislature, 2007. The new language also includes the address for mailing paper reports and an email address to request information on how to file electronic reports.

COMMENTS

The department, on behalf of the commission, has reviewed and prepared responses to the comments received regarding the proposed rule changes during the official comment period. The comments were received from 30 individuals and one member of the Association for Professionals in Infection Control and Epidemiology. Of the comments received, 29 addressed the same issues and two did not. The commenters were not against the rule changes in their entirety, but did make certain recommendations for change as discussed in the summary of comments. The department did not make any changes to the rule text, based on these official comments submitted.

Comment: Concerning §97.133(3)(A), commenters stated that for oncology, solid organ transplant and bone marrow transplant facilities, reporting all CD4 counts (as opposed to those less than 200 or less than 14%) may place a disproportionate burden on resources needed for critical non-public health functions. A commenter argued that patients in these settings have altered CD4 counts with a cause that has already been determined to be non-HIV related, such that confirmatory calls to infection control staff will increase without benefit.

Response: The commission disagrees because infection control practitioners and other healthcare providers are not required to report CD4 counts by these rule amendments--only laboratories are required to report CD4 counts. The department will match the CD4 counts received to viral loads received and only send those cases with both a CD4 and a viral load (or other HIV-specific test) to the local or regional HIV/AIDS surveillance site for case investigation. The department will also track CD4 count reports received from facilities that treat patients for non-HIV related conditions (e.g., oncology and transplant) and these CD4 counts will not be sent out for investigation. Test result matching and tracking will decrease the number of CD4 counts from non-HIV/AIDS cases that will require a phone call to an infection control practitioner, physician or other healthcare provider for investigation. No change was made to the rule as a result of this comment.

Comment: Concerning §97.133(3)(A), commenters stated that reporting all CD4 counts will significantly increase the number of results required to be reported and increase the workload of infection control staff responsible for reporting. There will be a fiscal impact from this rule change as the receiving agency will need additional resources to process incoming reports, according to commenters.

Response: The commission disagrees because under the rule amendments, infection control practitioners are not required to report CD4 counts (see response to previous comment). However, the department acknowledges that there will be an increase in the number of CD4 reports made to the local health authorities and the department from laboratories as a result of this rule change. The department will reduce the number of laboratory reports sent to local surveillance sites for investigation by electronically matching lab reports to the Electronic HIV/AIDS Reporting System (eHARS), and excluding CD4 counts for investigation from non HIV-infected patients by tracking facilities that order CD4 counts on non HIV-infected patients and excluding CD4 counts that do not have a concomitant viral load or other HIV specific test. The benefits of this rule change will outweigh the minimal fiscal impact to the department. There was deter-

mined to be no fiscal impact on small businesses in Texas as none of the laboratories performing CD4 tests in Texas would be considered in that category; therefore, no change was made to the rule as a result of this comment.

Comment: Concerning §97.133(3)(C), commenters argued that the rationale for reporting negative confirmatory syphilis test results is not valid since an Rapid Plasma Reagin (RPR) test without a corresponding positive confirmatory test is not a case of syphilis for healthcare facility reporting purposes. Also, commenters argued that requiring the reporting of negative confirmatory syphilis test results under the premise of finding an occasional relevant result (previously not reported) does not appear to be a good use of healthcare resources and not a productive use of time for infection control staff as they already receive multiple calls for the same reported case because health authorities do not communicate with each other. Commenters argue that this requirement is too burdensome, given other requirements their staff have to meet and will have to meet in the future.

Response: The commission agrees that an RPR test without a corresponding positive confirmatory test is not a case of syphilis for healthcare facility reporting purposes. Healthcare facilities are not required to report confirmatory syphilis test results--only laboratories are required to report this information. However, the department disagrees with commenters regarding the potential impact of reporting negative confirmatory syphilis test results. Reporting negative confirmatory syphilis test results will reduce the amount of time and resources currently used investigating non-cases because public health staff will not need to call for results of non-reactive or negative confirmatory tests and health care providers will receive fewer phone calls inquiring about test results that they did not receive because the results were negative. No change was made to the rule as a result of this comment.

Comment: Concerning §97.132 and §97.133, commenters suggested that the term "suspected" be removed because, unlike airborne and/or droplet transmitted diseases, sexually transmitted diseases are transmitted via blood. Removal of this term will eliminate the obligation to report all confirmatory syphilis reports even if negative or non-reactive, commenters argued.

Response: The commission disagrees. The term "suspect" is used in the rules because a diagnosis of syphilis can only be made by a healthcare provider using all available data including screening and confirmatory test results, clinical history and clinical signs and symptoms. Blood tests alone are not totally diagnostic of syphilis and the term "suspect" is used to allow for reporting of laboratory tests and cases where the healthcare provider may not have enough information to make a diagnosis but has a reason to suspect that this might be a reportable case of syphilis. The reporting of a "suspect case" is a trigger for public health staff to do further investigation of the potential case and determine if it is truly a case of syphilis. If it turns out to be a case of syphilis, then there is an opportunity to provide treatment referrals and intervene in the spread of disease. No change was made to the rules as result of this comment.

Comment: Concerning §97.134(e), a commenter stated that healthcare providers need more time to report test results because double and triple checks must be completed before a sexually transmitted disease is made public.

Response: The commission disagrees because under the amendments, healthcare providers are required to report diagnoses of primary and secondary syphilis by telephone within one working day of determining the diagnosis. Only laboratories are required to report HIV or STD test results. There is a relatively small number of primary and secondary syphilis cases diagnosed each year in Texas and reporting these cases should not put an undue burden on the part of healthcare providers. The department asserts that the benefit of timelier reporting and the opportunity to intervene sooner in disease transmission outweighs the small increase in reporting burden for healthcare providers. STD disease reports are confidential and at no time are results made public. No change was made to the rule as a result of this comment.

Comment: Concerning §97.134(e), a commenter argued that one day reporting of positive syphilis results is of questionable value as department employees do not work weekends or holidays; therefore, confirmatory testing by department laboratories and the contacting of patients is not done every day of the year. The current weekly requirement should be sufficient to allow timely contact of positive patients without any jeopardy to their health, commenter argued.

Response: The commission disagrees because the amended rule specifically states that positive syphilis test results must be reported within three days by laboratories, and that only diagnoses of primary or secondary syphilis must be submitted by telephone within one working day by healthcare providers. A working day does not include weekends or holidays. The current weekly reporting requirement is not sufficient for timely notification to the patient and his/her contacts, which is necessary in order to interrupt the chain of transmission and intervene in the spread of disease. The amended rule for reporting primary and secondary syphilis also puts Texas in alignment with the CDC syphilis surveillance recommendations. Currently, Texas is one of only seven states that have a syphilis reporting timeframe of seven calendar days; 29 states already have syphilis reporting within one working day. No change was made to the rule as a result of this comment.

The following changes have been made to provide consistency of terms and phrases to further clarify the intent of the rules.

Concerning §97.132(5), the term "HIV infected" was replaced with "HIV-exposed" to be consistent with the rules.

Concerning §97.133(3)(B), the phrase "Polymerase Chain Reaction tests (PCR) for HIV (DNA or RNA)" was replaced with "HIV DNA or RNA" virologic tests to reflect the wording CDC uses in its HIV surveillance definition for infants.

Concerning §97.134(d), minor revisions to the information required on reporting forms was included to improve readability of the rule.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the rules, as adopted, have been reviewed by legal counsel and found to be a valid exercise of the agencies' legal authority.

STATUTORY AUTHORITY

The amendments are authorized by the Health and Safety Code, Subtitle D, Chapter 81, Subchapter C, §§81.041 - 81.044, which grants the Texas Board of Health authority to identify each communicable disease or health condition that shall be reported under Chapter 81, authority to maintain and revise as necessary the list of reportable diseases, and authority to require reporting of HIV and AIDS. The proposed amendments are also autho-

rized by the other statutory citations listed in the individual sections herein.

The amendments are also authorized by the Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Texas Health and Safety Code, Chapter 1001. The review of the rules implements Government Code, §2001.039.

§97.132. Who Shall Report Sexually Transmitted Diseases.

The following shall report cases of STD and HIV-exposed infants, as detailed in §97.133 of this title (relating to Reporting Information for Sexually Transmitted Diseases):

(1) A physician or dentist shall report each patient who has or is suspected of having an STD and/or is an HIV-exposed infant. A physician or dentist may designate an employee of the clinic, including a school based clinic or physician's/dentist's office, to serve as the reporting officer. However, it is ultimately the responsibility of the physician or dentist to ensure that the required reporting is submitted.

(2) The following persons shall report each person who has or is suspected of having an STD and/or is an HIV-exposed infant, if a report is not made as required by persons specified in paragraphs (1), and (3) - (5) of this section:

(A) a professional registered nurse;

(B) an administrator or director of a public or private temporary or permanent child-care facility (as defined in Title 40, Texas Administrative Code, Part 19, Chapter 746, Subchapter A, §746.105);

(C) an administrator or director of a nursing facility (as defined in Title 40, Texas Administrative Code, Part 1, Chapter 18, Subchapter A, §18.2);

(D) an administrator or director of a personal care facility (as defined in Title 40, Texas Administrative Code, Part 19, Chapter 705, Subchapter A, §705.1001);

(E) an administrator or director of an adult day-care facility (as defined in Title 40, Texas Administrative Code, Part 1, Chapter 98, Subchapter A, §98.2(3));

(F) an administrator or director of a maternity home (as defined in Texas Health and Safety Code, §249.001(3));

(G) an administrator or director of an adult respite care center (as defined in Texas Health and Safety Code, §242.181(3));

(H) an administrator of a home health agency (as defined in Texas Insurance Code, §1351.001(2));

(I) an administrator or health official of a public or private institution of higher education;

(J) an owner or manager of a restaurant, dairy, or other food handling or processing establishment or outlet;

(K) a superintendent, manager, or health official of a public or private camp, home, or institution;

(L) a parent, guardian, or householder;

(M) a health professional;

(N) an administrator or health official of a penal or correctional institution; or

(O) emergency medical service personnel, a peace officer, or a firefighter.

(3) Any person in charge of a clinical laboratory, hospital laboratory, blood bank, mobile unit, or other facility in which a laboratory examination of a blood specimen, or any specimen derived from a human body, yields microscopic, cultural, serological or any other evidence of an STD shall report according to §97.133 of this title.

(4) The medical director or other physician responsible for the medical oversight of a testing program, as defined in Texas Health and Safety Code, §85.002, shall report each patient who has or is suspected of having an STD and/or is an HIV-exposed infant.

(5) A local school authority, as defined at Texas Health and Safety Code, §81.003, shall report a child attending school who is suspected, based on medical evidence, of having an STD and/or is an HIV-exposed infant.

(6) Failure to report a reportable disease is a Class B misdemeanor under the Texas Health and Safety Code, §81.049.

§97.133. Reporting Information for Sexually Transmitted Diseases.

Reporting entities described in §97.132 of this title (relating to Who Shall Report Sexually Transmitted Diseases) shall report all information required by the department for each person who has or is suspected of having an STD and/or is an HIV-exposed infant and for any specimen derived from a human body that yields microscopic, cultural, serological or any other evidence of STD.

(1) The department has established the reporting procedures required under Texas Health and Safety Code, §81.044, including the designation of specific forms and methods of reporting. Completed written reports, electronic reports, and telephone reports shall be made in accordance with §97.134 of this title (relating to How to Report Sexually Transmitted Diseases).

(2) Physicians and other persons as specified by §97.132(1), (2), (4), and (5) of this title are required to report.

(A) All diagnoses of adult or adolescent HIV infection and AIDS using all of the information found in the most current version of the department's Texas HIV/AIDS Adult/Adolescent case report form (available as specified in §97.134 of this title (relating to How to Report Sexually Transmitted Diseases)) and all diagnoses of pediatric HIV infection and AIDS using all of the information from the most current version of the department's Texas HIV/AIDS pediatric case report form (available as specified in §97.134 of this title).

(B) Information on all HIV positive women giving birth and HIV-exposed infants using all of the elements from the most current version of the department's Enhanced Perinatal HIV Surveillance form adopted by the department (available as specified in §97.134 of this title).

(C) All chancroid, Chlamydia trachomatis, gonorrhea, and syphilis infections using all of the information found in the most current version of the department's Confidential Report of Sexually Transmitted Diseases form (STD-27) for adults and adolescents (available as specified in §97.134 of this title).

(D) All congenital syphilis infections using all of the information found in the most current version of the department's Confidential Report of Sexually Transmitted Diseases form (STD-27).

(E) Positive or reactive results from point of care testing for STDs (including HIV) for adults, adolescents and HIV-exposed infants using all of the information found in the most current version of the department's Confidential Report of Sexually Transmitted Diseases form (STD-27).

(3) Any person in charge of a laboratory or other facility as specified by §97.132(3) of this title is required to report the re-

sults for each person who has or is suspected of having an STD and/or is an HIV-exposed infant by providing all of the information sought in the most current version of the department's Notification of Laboratory Test Findings Indicating Presence of Chlamydia trachomatis, Gonorrhea, Syphilis, Chancroid, HIV Infections or CD4 Counts form (STD-28) (available as specified in §97.134 of this title), including the following:

(A) All positive or reactive STD test results, including screening tests, all HIV viral loads (detectable and non-detectable), and all CD4+T-lymphocyte cell counts and percentages for adults and adolescents over 12 years of age.

(B) HIV DNA or RNA virologic tests on all infants from birth to three years of age, regardless of the test findings (e.g., negative or positive).

(C) All confirmatory tests for syphilis, regardless of result (e.g., reactive or non-reactive).

(D) HIV drug resistance testing that contains the resulting nucleotide sequences of the HIV (e.g., FASTA file).

§97.134. How to Report Sexually Transmitted Diseases.

(a) All case reports received by the health authority or the department are confidential as provided by law.

(b) Reporting forms and/or information from all entities required to report should be sent to the local health department director where the physician's office, hospital, laboratory or medical facility is located or, if there is no such facility, the reports should be forwarded to the regional director in the department's health service region office which covers the area where the physician's office, hospital, laboratory, or medical facility is located.

(c) If any individual or entity is unsure where to report any of the diseases mentioned in this subchapter, the reports shall be placed in a sealed envelope addressed as follows: Texas Department of State Health Services, TB/HIV/STD Epidemiology and Surveillance Branch, MC 1873, P.O. Box 149347, Austin, Texas 78714-9347 and the envelope shall be marked "Confidential." The envelope shall be delivered with the seal unbroken to the TB/HIV/STD Epidemiology and Surveillance Branch office for opening and processing of the contents. Additional reporting information can be obtained from the HIV/STD Program website at http://www.dshs.state.tx.us/hivstd/default.shtm.

(d) Reports of STD and/or HIV-exposed infants shall contain all of the information found on the reporting forms specified in §97.133(2) of this title (relating to Reporting Information for Sexually Transmitted Diseases). Forms can be obtained from local health departments and department health service regions; forms shall be provided without charge to individuals required to report. A list of local health departments and department health service region offices that can provide reporting forms is available at http://www.dshs.state.tx.us/hivstd/healthcare/reporting/shtm. Information required on the reporting form shall include (but is not limited to) the following:

(1) the patient's name, address, age, sex, race, and occupation; the date of onset of the disease or condition; the probable source of infection and the name of the attending physician or dentist; and

(2) reports of HIV infection or AIDS shall also contain the patient's ethnicity, national origin, and city and county of residence.

(e) Physicians and other persons as specified by §97.132(1), (2), (4), and (5) of this title must submit reports of primary or secondary syphilis by telephone within one working day of determining the diagnosis. All other reports of STD including AIDS and HIV from physicians and other persons as specified by §97.132 of this title must be submitted within seven calendar days of the determination of the existence of a reportable condition.

(f) Any person in charge of a clinical laboratory or other entity as specified by §97.132(3) of this title shall submit syphilis test results within three working days of obtaining the test result and shall submit all other test results within seven calendar days. In addition to required reporting, if, during any calendar quarter, tests for chancroid, Chlamydia trachomatis infection, gonorrhea, HIV infection and syphilis are performed and all test results are negative, the person in charge of reporting for the laboratory shall submit a statement to this effect on or before January 5, April 5, July 5, and October 5 following that calendar quarter.

(g) A health authority shall report each week to the department all cases reported to the authority during the previous week of STD, including HIV infection and AIDS, using electronic or paper reports. Information on how to submit electronic reports can be obtained from the TB/HIV/STD Epidemiology and Surveillance Branch through an email request to HIVSTDreporting@dshs.state.tx.us. Paper reports should be mailed to the Texas Department of State Health Services, TB/HIV/STD Epidemiology and Surveillance Branch, MC 1873, P.O. Box 149347, Austin, TX, 78714-9347.

(h) A local health department director or regional director shall forward to the department at least weekly all reports of cases received by him/her. Transmittal may be by mail, courier or electronic transmission.

(i) If reporting by electronic transmission, including facsimile transmission by telephone, the same degree of protection of the information against unauthorized disclosure shall be provided as those of reporting by mail or courier transmittal. The department shall, before authorizing such transmittal, establish guidelines for establishing and conducting such transmission.

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 December 9, 2009.

TRD-200905713
Lisa Hernandez
General Counsel
Department of State Health Services
Effective date: January 1, 2010
Proposal publication date: July 31, 2009
For further information, please call: (512) 458-7111 x6972

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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 39. PUBLIC NOTICE

SUBCHAPTER J. PUBLIC NOTICE OF WATER QUALITY APPLICATIONS AND WATER QUALITY MANAGEMENT PLANS

30 TAC §39.551

The Texas Commission on Environmental Quality (commission, agency, or TCEQ) adopts the amendment to §39.551 *without changes* as published in the July 24, 2009, issue of the *Texas Register* (34 TexReg 4827) and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE

This rulemaking amends §39.551(c)(2) and adds §39.551(c)(2)(A) and (B) to state that if the notice of receipt of application and intent to obtain a permit (NORI) is mailed more than two years before the date that the notice of application and preliminary decision (NAPD) is scheduled to be mailed, then the applicant must prepare an updated landowner list and map, and file them with the commission. The rule also allows the executive director to require an updated landowner's map and mailing addresses for the NAPD for any water quality matter in which the executive director determines that circumstances have changed to warrant this new information. The commission is adopting this change to ensure that when the NAPD is mailed, it is mailed to the most current list of potentially affected persons.

Corresponding rulemaking is published in this issue of the *Texas Register* and includes changes to 30 TAC Chapter 281, Applications Processing, and Chapter 295, Water Rights, Procedural.

This rule will not apply to any applicant for a water quality permit if the NAPD has been mailed at the time that the rules become effective.

SECTION DISCUSSION

The commission adopts administrative changes throughout the rulemaking to reflect the agency's current practices and to conform to Texas Register and agency guidelines. These changes include updating agency references, updating cross-references, and correcting typographical, spelling, and grammatical errors.

The adopted amendment to §39.551 requires applicants to supply an updated landowner map and mailing addresses to the chief clerk if it has been more than two years since the NORI was mailed to the landowner list. This requirement has been added to increase the accuracy of the mailing list for the NAPD if significant time has elapsed between the NORI and the NAPD. The updated list will allow new potentially affected landowners to participate in the permitting process who otherwise might not have been aware of the pending permit application. Section 39.551(c)(2) is divided into two subparagraphs. Subparagraph (A) contains the language in the original §39.551(c)(2). Subparagraph (B) contains the language of the new requirement.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission evaluated the adopted amendment and performed an analysis of whether the adopted amendment requires a regulatory impact analysis under Texas Government Code, §2001.0225. The adopted amendment is not a "major environmental rule" under Texas Government Code, §2001.0225 because the specific intent of the rulemaking is not to protect the environment or reduce risks to human health from environmental exposure, and it does not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The purpose of this rulemaking is to require updated landowner lists and maps for a NAPD that is mailed more than two years after the NORI for water quality applications and to allow the executive director to require updated lists and maps for the NAPD for any water quality matter in which the executive director determines that circumstances have changed to warrant this new information. The small costs associated with these updated lists and maps would 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. Therefore, no regulatory impact analysis is required under Texas Government Code, §2001.0225 for this rulemaking.

The commission invited public comment regarding the draft regulatory impact analysis determination during the public comment period. No comments were received.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the adopted amendment and performed an analysis of whether the adopted amendment constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of the adopted amendment is to provide for adequate notice to potentially affected persons for water quality permits. The adopted amendment would substantially advance this stated purpose by requiring applicants to update their landowner lists and maps if the NAPD is mailed more than two years after the NORI and allowing the executive director to require updated lists and maps for the NAPD for any water quality matter in which the executive director determines that circumstances have changed to warrant this new information. Promulgation and enforcement of the adopted amendment would be neither a statutory nor a constitutional taking of private real property. Specifically, the subject adopted regulations do not affect a landowner's rights in private real property because this rulemaking does not burden (constitutionally) nor restrict or limit the owner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulations. In other words, this rulemaking is procedural and does not impact real property. There are no other reasonable or practicable alternatives to this rulemaking.

The commission invited public comment regarding the takings impact assessment during the public comment period. No comments were received.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the adopted rulemaking and found that the adoption 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 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 is procedural in nature and will have no substantive effect on commission actions subject to the CMP and is, therefore, consistent with CMP goals and policies.

The commission invited public comment regarding the consistency with the coastal management program during the public comment period. No comments were received.

PUBLIC COMMENT

The commission held a public hearing in Austin on August 19, 2009 at 10:00 a.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The comment period closed on August 24, 2009. The commission received comments from Lloyd Gosselink, Attorneys at Law on behalf of a coalition of its clients, including cities, regional wa-

ter districts, and river authorities (Coalition) and from Lowerre, Frederick, Perales, Allmon & Rockwell, Attorneys at Law on behalf of the Sierra Club, Environmental Defense Fund, and Lowerre Frederick, Perales, Allmon & Rockwell (Commenters). The Coalition was in support of this rule change. The Commenters oppose the rule unless additional notice requirements are included.

RESPONSE TO COMMENTS

The Coalition and the Commenters express approval of the goal of the proposed rule changes to ensure better notice of applications to potentially affected persons.

The commission appreciates the comment.

The Coalition agrees with the TCEQ that two years is the appropriate time for requiring an updated mailing list for the NAPD. Review of water quality applications may be delayed for two years or more due to the complexity of the application.

The commission appreciates the comment.

The Commenters urge the TCEQ to reduce the time for the applicant to be required to update the mailing list for the NAPD from two years to one year. Delays of more than a year in processing applications should be rare and are usually the result of the applicant failing to provide the proper information, changing the project, or not needing to pursue the application quickly. A one-year time frame may encourage applicants to work more diligently with TCEQ staff.

The commission respectfully disagrees with the comment because a two-year time frame for the requirement of updating the landowner map is more reasonable than a one-year time frame. It is not unusual for a one-year delay in processing applications to occur for reasons beyond the control of the applicant, such as those mentioned by the Coalition and other reasons, such as issues with the United States Environmental Protection Agency for water quality applications. Therefore, the commission respectfully declines to make the change.

The Commenters request that the commission implement additional safeguards by rule or policy requiring the executive director to post notice of an application for a new water right or amendment on the internet.

The commission appreciates the comment but respectfully declines to make this change because it is beyond the scope of this rulemaking. The commission may consider this comment for future rulemakings.

The Commenters also note that in the air and waste areas the commission posts signs at the site of the facility providing information. Such practices are effective and efficient ways to provide notice to affected landowners who can provide the TCEQ with information.

The commission appreciates the comment but respectfully declines to make this change because it is beyond the scope of this rulemaking. The commission may consider this comment for future rulemakings.

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code, §5.102, concerning General Powers, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules as necessary to carry out its power and duties under the Texas Water Code. The amendment is also adopted under Texas Water Code, §5.553, which provides notice requirements for water quality permits; Texas Water Code, §26.028, which provides for commission action on a water quality permit application after notice; and Texas Water Code, §26.121, which provides that certain discharges of waste are prohibited unless authorized by the commission.

The adopted amendment implements Texas Water Code, §§5.102, 5.103, 5.105, 5.553, 26.028, and 26.121.

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 December 11, 2009.

TRD-200905759
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Effective date: December 31, 2009
Proposal publication date: July 24, 2009
For further information, please call: (512) 239-0177

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CHAPTER 281. APPLICATIONS PROCESSING
SUBCHAPTER A. APPLICATIONS PROCESSING

30 TAC §281.17

The Texas Commission on Environmental Quality (commission, agency, or TCEQ) adopts the amendment to §281.17 *without changes* as published in the July 24, 2009 issue of the *Texas Register* (34 TexReg 4831) and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE

This rulemaking amends §281.17(a) and (b) to provide that the executive director will file a water rights application with the chief clerk once the application has been declared administratively complete, but notice of the application will not be sent at that time. This change is necessary because of a corresponding rulemaking in which the commission is changing the time that notice of a water rights application is mailed from the time that the application is declared administratively complete to the time that the technical review is complete and the memoranda and recommendations are filed with the chief clerk. This change to §281.17 is necessary because the issuance of the notice is being moved to later in the process, and also because the application must still be declared administratively complete and filed with the chief clerk. This is particularly important because that date is usually the priority date for a water rights permit, if issued.

Corresponding rulemaking is published in this issue of the *Texas Register* and includes changes to 30 TAC Chapter 39, Public Notice and Chapter 295, Water Rights, Procedural.

SECTION DISCUSSION

The commission adopts administrative changes throughout the adopted rulemaking to reflect the agency's current practices and to conform to Texas Register and agency guidelines. These changes include updating agency references, updating cross-references, and correcting typographical, spelling, and grammatical errors.

The adopted amendment to §281.17(a) removes the requirements that the executive director prepare a technical summary of a water use permit application and that the chief clerk issue notice of the application at the time of filing the application. Removing these requirements will make §281.17(a) consistent with adopted changes to §295.151 and §295.158. The adopted amendments to Chapter 295 change the time in the application process at which notice will be issued, and make the results of the executive director's technical review available to the public at the time of notice. The adopted amendments to Chapter 295 also allow notice to be mailed to the most current mailing list of potentially affected persons and aid public participation by providing notice to persons potentially affected closer to the time that the application could be acted upon.

The adopted amendment to §281.17(b) removes the requirements that the executive director prepare a technical summary of a temporary water use permit application and that the chief clerk issue notice of the application at the time of filing the application. Removing these requirements will make §281.17(b) consistent with adopted changes to §295.151 and §295.158. The adopted amendments to Chapter 295 change the time in the application process at which notice will be issued, and make the results of the executive director's technical review available to the public at the time of notice. The adopted amendments to Chapter 295 also allow notice to be mailed to the most current mailing list of potentially affected persons and aid public participation by providing notice to persons potentially affected closer to the time that the application could be acted upon.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission evaluated the adopted rule and performed an analysis of whether the adopted rule requires a regulatory impact analysis under Texas Government Code, §2001.0225. The adopted amendment is not a "major environmental rule" under Texas Government Code, §2001.0225 because the specific intent of the rulemaking is not to protect the environment or reduce risks to human health from environmental exposure, and it does not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The purpose of this rulemaking together with a corresponding rulemaking in Chapter 295 is to change the date of notice for a water rights application from the date the application is administratively complete to the date of the completion of technical review. Therefore, no regulatory impact analysis is required under Texas Government Code, §2001.0225 for this rulemaking.

The commission invited public comment regarding the draft regulatory impact analysis determination during the public comment period. No comments were received.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the adopted rule and performed an analysis of whether the adopted rule constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of the adopted amendment, along with a corresponding rulemaking in Chapter 295, is to change the date for providing notice for water rights applications to a later time in the application review process so that notice will be provided to those potentially affected persons existing at a time closer to commission action on an application. The adopted amendment, along with a corresponding rulemaking in Chapter 295, would substantially advance this stated purpose by keeping the date of filing an application with the chief clerk at administrative completeness, but changing the date of notice of the application from after administrative completeness to after technical review of the application is complete. Promulgation and enforcement of the adopted rule would be neither a statutory nor a constitutional taking of private real property. Specifically, the subject adopted regulations do not affect a landowner's rights in private real property because this rulemaking does not burden (constitutionally) nor restrict or limit the owner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulations. In other words, the rule is procedural and does not impact real property. There are no other reasonable or practicable alternatives to this rulemaking.

The commission invited public comment regarding the takings impact assessment during the public comment period. No comments were received.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the adopted rulemaking and found that the adoption 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 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 is procedural in nature and will have no substantive effect on commission actions subject to the CMP and is, therefore, consistent with CMP goals and policies.

The commission invited public comment regarding the consistency with the coastal management program during the public comment period. No comments were received.

PUBLIC COMMENT

The commission held a public hearing in Austin on August 19, 2009 at 10:00 a.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The comment period closed on August 24, 2009. The commission received comments from Lloyd Gosselink, Attorneys at Law on behalf of a coalition of its clients, including cities, regional water districts, and river authorities (Coalition) and from Lowerre, Frederick, Perales, Allmon & Rockwell, Attorneys at Law on behalf of Sierra Club, Environmental Defense Fund, and Lowerre Frederick, Perales, Allmon & Rockwell (Commenters).

The Coalition expressed general approval of the rule. The Commenters oppose the rule unless additional notice requirements are included.

RESPONSE TO COMMENTS

The Coalition expresses general approval of the rule changes to ensure that adequate notice is provided at the appropriate time for potentially affected persons.

The commission appreciates the comment.

The Commenters are concerned about there being no early notice, and object to the changes in Chapter 295 unless the rules require: 1) that the executive director or the applicant prepare a short summary of the application as filed, possibly in a form available to interested persons, which could at least be the internet; and 2) some early notice directly to key potentially affected interests. There could be a limited notice such as to the county judge for the site of the diversion point or use, to groundwater conservation districts with jurisdiction over these locations, to Texas

Parks and Wildlife Department, and to anyone who requested for this water right application or for water rights in the relevant county or counties.

All water right applications are posted to the TCEQ Web site and updated every two weeks. In addition, a mechanism to sign up for notification of updates to the pending applications is in place, and this provides early notice that an application has been received and the ability to request information on the application. Also, when notice is filed with the Office of the Chief Clerk it is posted on the chief clerk's Web site.

The suggestion to require early notice as well as notice after the technical review is complete was made by members of the Water Rights Amendment Notice Advisory Group, which met in 2007, but no consensus of the group was achieved. Additionally, the commission declined to adopt the dual notice requirement when it considered the Water Rights Amendment Notice Advisory Group's recommendations at the January 18, 2008 work session. Water rights notices can be very costly and can require a substantial amount of resources to write and mail. Therefore, it would often be an inefficient use of state resources to require dual mailed notice in light of the additional opportunities for notice discussed above. The commission will continue to consider the issue. The commission has made no changes in response to this comment.

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code, §5.102, concerning General Powers; §5.103, concerning Rules; and §5.105, concerning General Policy, which authorize the commission to adopt rules as necessary to carry out its power and duties under the Texas Water Code. The amendment is also adopted under Texas Water Code, §11.121, which provides that a person cannot store or divert state water without obtaining a permit from the commission; Texas Water Code, §11.129, which provides for commission review of a water rights application; and Texas Water Code, §11.132, which provides requirements for notice for water rights permits.

The adopted amendment implements Texas Water Code, §§5.102, 5.103, 5.105, 11.121, 11.129, and 11.132.

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 December 11, 2009.

TRD-200905760
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Effective date: December 31, 2009
Proposal publication date: July 24, 2009
For further information, please call: (512) 239-0177

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CHAPTER 295. WATER RIGHTS, PROCEDURAL

SUBCHAPTER C. NOTICE REQUIREMENTS FOR WATER RIGHT APPLICATIONS

30 TAC §295.151, §295.158

The Texas Commission on Environmental Quality (commission, agency, or TCEQ) adopts the amendments to §295.151 and §295.158.

Section 295.151 is adopted *with changes* to the proposed text as published in the July 24, 2009, issue of the *Texas Register* (34 TexReg 4834). Section 295.158 is adopted *without changes* to the proposed text and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

This rulemaking changes the time that notice of an application for a new or amended water right is mailed and published. Texas Water Code, Chapter 11 does not provide the timing of the notice of application other than that it must be at least 30 days prior to commission consideration of the application. Currently, the notice of the application is provided after the executive director finds the application is administratively complete and files the application with the chief clerk. The adopted amendments change that time to after the executive director has completed its technical review of the application and filed its memoranda and recommendations with the chief clerk. This change in timing of the notice allows notice to be mailed to the most current mailing list of potentially affected persons and aids public participation by providing notice to persons potentially affected closer to the time that the application could be acted upon.

Corresponding rulemaking is published in this issue of the *Texas Register* and includes changes to 30 TAC Chapter 39, Public Notice, and Chapter 281, Applications Processing.

This rulemaking will not apply to any application for a water right permit if notice has been issued for that application prior to the time that these rules become effective.

SECTION BY SECTION DISCUSSION

The amendment to §295.151 is adopted with changes to the proposed text. Since proposal, the commission added §295.151(b)(12), which provides that the notice include the name and address of the agency, and the telephone number of an agency contact from whom interested persons may obtain future information. The subsequent paragraph in subsection (b) is renumbered accordingly to accommodate this addition.

The adopted amendment to §295.151(a) requires notice of an application for a permit to use state water after the technical review is complete and the technical memoranda are filed with the chief clerk, rather than after the executive director has declared the application administratively complete and filed it with the chief clerk. The adopted amendment will change the time in the application process at which notice will be issued. It will make the results of the executive director's technical review available to the public at the time of notice. It will also allow notice to be mailed to the most current mailing list of potentially affected persons and will aid public participation by providing notice to persons potentially affected closer to the time that the application could be acted upon.

Section 295.151(b) is a list of items required to be included in the notice. The adopted change to the heading of the list will edit the language to clarify the list's purpose.

The adopted amendment to §295.151(b)(3) adds reference to the rule, being §281.17(a) or (b), under which the application is filed with the chief clerk.

The adopted amendment to §295.151(b)(4) requires the notice to state that the technical review of the application is complete rather than stating that the application is administratively complete. This change makes the requirement consistent with the adopted change to §295.151(a).

Adopted §295.151(b)(9) requires the executive director's recommendation on the application to be added to the notice. This requirement will give potentially affected persons more information about the application.

Language previously existing in §295.151(b)(9), requiring the notice to specify the time and location where the commission will consider the application, is deleted. The time of commission action is unknown at the time of notice, and is made known to potentially affected parties through a separate notice required by other rules.

Adopted §295.151(b)(10) requires the notice to state that an affected person may request a hearing as set out in 30 TAC Chapter 55, Subchapter G. This change is helpful to public participation as it clarifies the options for affected persons.

Section 295.151(b)(10) is renumbered to §295.151(b)(11) to accommodate the addition of new requirements in adopted §295.151(b)(10).

Adopted §295.151(b)(11) requires that the notice give a general description of the location and any land to be irrigated. This requirement is being moved from §295.151(b)(10).

Section 295.151(b)(11) is renumbered to §295.151(b)(13) to accommodate the addition of new requirements in adopted §295.151(b)(10) and adopted §295.151(12).

Adopted §295.151(b)(12) provides that the notice include the name and address of the agency, and the telephone number of an agency contact from whom interested persons may obtain future information. This is an addition to the rulemaking since proposal.

Adopted §295.151(b)(13) requires that the notice give any additional information that the commission considers necessary. This requirement is being moved from the existing §295.151(b)(11).

The commission adopts an administrative change to §295.158(a)(1) to correct a spelling error.

The adopted amendment to §295.158(c)(1) requires that the commission consider whether notice of an application to amend an existing permit, certified filing, or certificate of adjudication is required upon completion of the technical review of the application and filing of the technical memoranda rather than upon filing of the application. This rule amendment will change the time in the amendment application process at which notice, if required, will be issued. It will also allow notice to be mailed to the most current mailing list of potentially affected persons and will aid public participation by providing notice to persons potentially affected closer to the time that the application could be acted upon.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission evaluated these adopted rules and performed an analysis of whether these adopted rules require a regulatory impact analysis under Texas Government Code, §2001.0225. These amendments are not a "major environmental rule" under Texas Government Code, §2001.0225 because the specific intent of the rulemaking is not to protect the environment or reduce risks to human health from environmental exposure, and the rulemaking does not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. These rules are procedural in nature. Therefore, no regulatory impact analysis is required under Texas Government Code, §2001.0225 for this rulemaking.

The commission invited public comment regarding the draft regulatory impact analysis determination during the public comment period. No comments were received.

TAKINGS IMPACT ASSESSMENT

The commission evaluated these adopted rules and performed an analysis of whether these adopted rules constitute a taking under Texas Government Code, Chapter 2007. The specific purpose of these adopted rules is to change the timing of notice of an application for a new or amended water right from after the application is administratively complete to after the completion of technical review of the application. This change is to ensure greater public notice of these applications by having the most current list of potentially affected persons when notice is issued. The adopted rules would substantially advance this stated purpose by amending the notice rules for water rights to specify that notice is after technical review. Promulgation and enforcement of these adopted rules would be neither a statutory nor a constitutional taking of private real property. Specifically, the subject adopted regulations do not affect a landowner's rights in private real property because this rulemaking does not burden (constitutionally) nor restrict or limit the owner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulations. In other words, these rules are procedural only and do not impact property rights in any way. There are no other reasonable or practicable alternatives to this rulemaking.

The commission invited public comment regarding the takings impact assessment during the public comment period. No comments were received.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the adopted rulemaking and found that the adoption 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 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 is procedural in nature and will have no substantive effect on commission actions subject to the CMP and is, therefore, consistent with CMP goals and policies.

The commission invited public comment regarding the consistency with the coastal management program during the public comment period. No comments were received.

PUBLIC COMMENT

The commission held a public hearing in Austin on August 19, 2009 at 10:00 a.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The comment period closed on August 24, 2009. The commission received comments from Lloyd Gosselink, Attorneys at Law on behalf of a coalition of its clients, including cities, regional water district, and river authorities (Coalition) and from Lowerre, Fred-

erick, Perales, Allmon & Rockwell, Attorneys at Law on behalf of Sierra Club, Environmental Defense Fund, and Lowerre Frederick, Perales, Allmon & Rockwell (Commenters).

The Coalition generally supports the rulemaking, and the Commenters oppose the rule unless additional notice requirements are included.

RESPONSE TO COMMENTS

The Coalition expresses general approval of the rule changes to ensure that adequate notice is provided at the appropriate time for potentially affected persons.

The commission appreciates the comment.

The Commenters request that the commission implement additional safeguards by rule or policy requiring the executive director to post notice of an application for a new water right or amendment on the internet.

The commission appreciates the comment but respectfully declines to make this change because it is beyond the scope of this rulemaking. The commission may consider this comment for future rulemakings.

The Commenters also note that in the air and waste areas the commission posts signs at the site of the facility providing information. Such practices are effective and efficient ways to provide notice to affected landowners who can provide the TCEQ with information.

The commission appreciates the comment but respectfully declines to make this change because it is beyond the scope of this rulemaking. The commission may consider this comment for future rulemakings.

The Coalition comments that moving notice to after technical review will allow potentially affected persons to know more definitely whether they may be affected based on the executive director's technical review and recommendation on the permit. This may lead to a reduction in unnecessary hearing requests and a more current list of potentially affected persons.

The commission appreciates the comment.

The Coalition comments that moving the notice until after technical review will allow the executive director to review and respond to public comments after technical review, resulting in a more informed and meaningful response to comments.

The commission appreciates the comment.

The Coalition requests that proposed §295.151 be revised to require that the notice provide the name and address of the agency, and the telephone number of an agency contact from who interested persons may obtain future information.

The commission agrees and has made this change.

The Commenters are concerned about there being no early notice, and object to the changes in Chapter 295 unless the rules require: 1) that the executive director or the applicant prepare a short summary of the application as filed, possibly in a form available to interested persons, which could at least be the internet; and 2) some early notice directly to key potentially affected interests. There could be a limited notice such as to the county judge for the site of the diversion point or use, to groundwater conservation districts with jurisdiction over these locations, to Texas Parks and Wildlife Department, and to anyone who requested for this water right application or for water rights in the relevant county or counties.

All water right applications are posted to the TCEQ's web site and updated every two weeks. In addition, a mechanism to sign up for notification of updates to the pending applications is in place, and this provides early notice that an application has been received and the ability to request information on the application. Also, when notice is filed with the Office of the Chief Clerk it is posted on the chief clerk's web site.

The suggestion to require early notice as well as notice after the technical review is complete was made by members of the Water Rights Amendment Notice Advisory Group, which met in 2007, but no consensus of the group was achieved. Additionally, the commission declined to adopt the dual notice requirement when it considered the Water Rights Amendment Notice Advisory Group's recommendations at the January 18, 2008 work session. Water rights notices can be very costly and can require a substantial amount of resources to write and mail. Therefore, it would often be an inefficient use of state resources to require dual mailed notice in light of the additional opportunities for notice discussed above. The commission will continue to consider the issue. The commission has made no changes in response to this comment.

STATUTORY AUTHORITY

The amendments are adopted under Texas Water Code, §5.102, concerning General Powers, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules as necessary to carry out its power and duties under the Texas Water Code. The amendments are also adopted under Texas Water Code, §11.129, which provides for commission review of a water rights application, and Texas Water Code, §11.132, which provides for notice of water rights applications.

The adopted amendments implement Texas Water Code, §§5.102, 5.103, 5.105, 11.129, and 11.132.

§295.151. Notice of Application and Commission Action.

(a) At the time that the technical review of an application for a permit to use state water has been completed and the technical memoranda have been filed by the executive director with the chief clerk of the commission, the commission shall give notice by mail to those persons specified in §295.153 of this title (relating to Notice By Mail). At such time, the chief clerk shall furnish a copy of the notice to the applicant, and the applicant shall cause such notice to be published, pursuant to §295.152 of this title (relating to Notice by Publication).

(b) The notice must:

(1) state the name and address of the applicant;

(2) state the date on which the application was received by the commission;

(3) state the date the application was filed by the executive director with the chief clerk as required by §281.17(a) or (b) of this title (relating to Notice of Receipt of Application and Declaration of Administrative Completeness);

(4) state that the executive director has determined that the technical review of the application is complete;

(5) state the application number;

(6) state the type of permit the applicant is seeking;

(7) state the purpose and extent of the proposed appropriation of water;

(8) identify the source of supply and the place where the water is to be stored or taken or diverted from the source of supply;

(9) state the executive director's recommendation regarding the application;

(10) state that an affected person may request a hearing as set out in Chapter 55, Subchapter G of this title (relating to Requests for Contested Case Hearing and Public Comment on Certain Applications);

(11) give a general description of the location and area of any land to be irrigated;

(12) include the name and address of the agency, and the telephone number of an agency contact from whom interested persons may obtain future information; and

(13) give any additional information the commission considers necessary.

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 December 11, 2009.

TRD-200905761
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Effective date: December 31, 2009
Proposal publication date: July 24, 2009
For further information, please call: (512) 239-0177

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CHAPTER 297. WATER RIGHTS, SUBSTANTIVE
SUBCHAPTER C. USE EXEMPT FROM PERMITTING

The Texas Commission on Environmental Quality (TCEQ or commission) adopts the amendment to §297.27 and the repeal of §297.30.

The amendment to §297.27 and the repeal of §297.30 are adopted *without changes* as published in the August 28, 2009, issue of the *Texas Register* (34 TexReg 5887) and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

In 2009, the 81st Legislature passed Senate Bill (SB) 1711, relating to the exempt use of reservoirs for sediment control or to satisfy certain environmental and safety requirements at surface mining operations. SB 1711 amends Texas Water Code (TWC), §11.142(d), by providing an exemption from the commission's water rights permitting process for state water used to satisfy environmental and safety regulations for fire or dust suppression as applicable to a surface coal mining operation. The commission's rules related to water rights are in Chapter 297, Water Rights, Substantive.

SECTION BY SECTION DISCUSSION

§297.27, Permit Exemptions for Use of State Water for Irrigation of Certain Historic Cemeteries and for Sedimentation Control Structures within Surface Coal Mining Operations

The commission adopts the amendment to §297.27 to add exemptions from the water rights permitting process for state water used from sediment control ponds to satisfy environmental and safety regulations for fire and dust suppression as applicable to a surface coal mining operation. Adopted §297.27(b)(1) authorizes the use of water stored in exempt sediment control reservoirs within a surface coal mining operation for sediment control purposes without obtaining a water rights permit. Adopted §297.27(b)(2) authorizes the use of water stored in exempt sediment control reservoirs within a surface coal mining operation for fire or dust suppression without obtaining a water rights permit. These amendments are required by TWC, §11.142(d), as amended by SB 1711, 81st Legislative Session, 2009.

§297.30, Permit Exemptions for Use of State Water for Irrigation of Certain Historic Cemeteries and for Sedimentation Control Structures within Surface Coal Mining Operations

The commission adopts the repeal of §297.30, because it is duplicative of the text contained in §297.27.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the adopted rules in light of the regulatory analysis requirements of Texas Government Code, §2001.0225 and determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of "major environmental rule" as defined in the 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 specific intent of the adopted amendment is to amend §297.27(b) of the commission's rules to be consistent with TWC, §11.142(d), as amended during the 81st Legislative Session. The statute was amended to exempt reservoirs used as part of a surface coal mining operation from water use permitting requirements if the water is used for compliance with laws, rules, or regulations relating to fire or dust suppression. The purpose of this statutory amendment was to remove the regulatory impediment to compliance with fire or dust suppression laws, rules, and regulations. The adopted rules are administrative in nature and will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The commission concludes that the adopted rulemaking does not meet the definition of a major environmental rule.

In addition to the fact that the adopted rulemaking does not meet the definition of a major environmental rule, it is not subject to Texas Government Code, §2001.0225 because it does not meet any of the four applicability requirements listed in §2001.0225(a). Texas Government Code, §2001.0225(a) applies only to a state agency's adoption of a major environmental rule that: 1) exceeds a standard set by federal law, unless the rule is specifically required by state law; 2) exceeds an express requirement of state law, unless the rule is specifically required by federal law; 3) exceeds a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) was

adopted solely under the general powers of the agency instead of under a specific state law.

There are no federal standards governing the right to impound and use surface water in the State of Texas. Second, the adopted rulemaking is required by SB 1711 and does not exceed the requirements of SB 1711. Third, the adopted rulemaking does not 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. Finally, the rules will be adopted under the express authority of SB 1711, which requires the commission to adopt any rules required to implement the act. Therefore, the rules are not adopted solely under the commission's general powers.

The commission invited public comment regarding the draft regulatory impact analysis determination during the public comment period. No comments were received on the draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the adopted rules to Chapter 297 and performed an assessment of whether the rules would constitute a taking under Chapter 2007 of the Texas Government Code. The primary purpose of the adopted rules is to implement an amendment to the TWC exempting the use of water from a sediment control reservoir as part of a surface coal mining operation from state water rights permitting requirements if the water is used for compliance with laws, rules, or regulations relating to fire or dust suppression. The adopted rules would substantially advance this purpose by amending §297.27(b) to add this exempt use, and making non-substantive changes to update an obsolete reference to Vernon's Texas Civil Statutes and repeal §297.30, a duplicate rule.

Promulgation and enforcement of the adopted rules would be neither a statutory nor a constitutional taking of private real property. Specifically, the adopted rules do not affect a landowner's rights in private real property because this rulemaking does not burden (constitutionally), nor restrict or limit the owner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulations. The adopted amendment removes a requirement to obtain a permit for a use of water from certain exempt reservoirs. Removal of this regulatory requirement by adding the exempt use does not burden, restrict, or limit the owner's right to property, or reduce its value.

In addition, because the adopted regulations are less stringent than existing rules, they do not burden, restrict, or limit an owner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulations. Therefore, these rules will not constitute takings under the Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the adopted rulemaking and found the proposal is a rulemaking identified in the Coastal Coordination Act Implementation Rule, 31 TAC §505.11(b)(4), relating to rules subject to the Coastal Management Program, and will, therefore, require that goals and policies of the Texas Coastal Management Program (CMP) be considered during the rulemaking process.

The commission 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 is consistent with CMP goals and policies because the rulemaking is unlikely to be of environmental significance to the coastal natural resource areas.

The commission invited public comment regarding the consistency with the coastal management program during the public comment period. No comments were received regarding the consistency of this rulemaking with the coastal management program.

PUBLIC COMMENT

The commission held a public hearing on September 22, 2009 in Austin, Texas. The comment period closed on September 28, 2009. Two individuals attended the public hearing but did not present an oral statement for the record on the proposed rulemaking. The commission received comments from Lloyd Gosselink, Attorneys at Law on behalf of its surface mining clients (Clients) and from the Texas Mining and Reclamation Association (TMRA), an industry trade association representing approximately 100 member companies and individuals involved in Texas mining and reclamation.

The Clients and TMRA state that they support the proposed rules.

RESPONSE TO COMMENTS

The Clients offer support for the rules and thank the staff for their work in preparing and implementing them.

The commission acknowledges the Clients' support for the adoption of these rules.

TMRA stated that it is fully supportive of the rulemaking and appreciate the agency's efforts to process the rulemaking expeditiously.

The commission acknowledges TMRA's support for the adoption of these rules.

30 TAC §297.27

STATUTORY AUTHORITY

The amendment is adopted under TWC, §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction; §5.103, which establishes the commission's general authority to adopt rules; §5.105, which establishes the commission's authority to set policy by rule; and Senate Bill 1711, 81st Legislature, 2009.

The adopted amendment implements TWC, §11.142.

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 December 11, 2009.

TRD-200905753
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
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Proposal publication date: August 28, 2009
For further information, please call: (512) 239-6090

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30 TAC §297.30

STATUTORY AUTHORITY

The repeal is adopted under TWC, §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction; §5.103, which establishes the commission's general authority to adopt rules; §5.105, which establishes the commission's authority to set policy by rule; and Senate Bill 1711, 81st Legislature, 2009.

The adopted repeal implements TWC, §11.142.

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 December 11, 2009.

TRD-200905754
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Effective date: December 31, 2009
Proposal publication date: August 28, 2009
For further information, please call: (512) 239-6090

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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 General Land Office (Land Office or GLO) adopts amendments to §15.42, relating to Funding Projects From the Coastal Erosion Response Account, without changes to the proposed text as published in the October 9, 2009, issue of the *Texas Register* (34 TexReg 7029).

BACKGROUND.

The amendments are adopted 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 2387 (Acts 2009, 81st Legislature, Chapter 1302, §1, effective September 1, 2009) amended §33.603(b), Texas Natural Resources Code, to add a new §33.603(b)(12) to allow the use of CEPRA funds for buyouts of property on a public beach. New subsection (b)(13) 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, Texas Natural Resources Code, by amending subsection (h) 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 subsection (b)(11) for removal of debris, as well as removal and relocation of structures from the public beach pursuant to subsection (b)(12) and for projects that include the purchase of property necessary for an erosion response project pursuant to subsection (b)(13). House Bill 2387 also amended §33.603, Texas Natural Resources Code, by amending subsection (f) 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 adopted to implement CEPRA as amended by House Bill 2387.

SECTION BY SECTION FUNCTIONAL ANALYSIS.

The amendment to §15.42 adds a new subsection (e) that allows the Commissioner to undertake projects without a cost share requirement pursuant to Texas Natural Resources Code, §33.603(f) as amended by House Bill 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 House Bill 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 amendment to §15.42(f), formerly subsection (e), provides that the Land Commissioner may determine the qualified project partner's portion of the shared project costs for a project undertaken for the removal of debris pursuant to §33.603(b)(11), as well as removal and relocation of structures from the public beach pursuant to §33.603(b)(12) and for projects that include the purchase of property necessary for an erosion response project pursuant to §33.603(b)(13) of Texas Natural Resources Code as amended by House Bill 2387.

REASONED JUSTIFICATION.

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 House Bill 2387 as implemented by these amendments will also facilitate new erosion response projects, including erosion response structures, dune restoration projects, and beach nourishment projects. In addition, the erosion response projects facilitated by the amendments provide benefits to the public, including: 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.

ENVIRONMENTAL REGULATORY ANALYSIS.

The Land Office has evaluated the adopted rulemaking action in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the action is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the statute. "Major environmental rule" means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The adopted 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 adopted 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 adopted rulemaking is not subject to the 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.

RESPONSE TO PUBLIC COMMENTS.

No comments were received from the public during the comment period regarding the adopted rulemaking.

STATUTORY AUTHORITY.

The amendments are adopted 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 Chapter 33, Subchapter H, Texas Natural Resources Code, concerning coastal erosion.

CROSS REFERENCE TO STATUTE.

Texas Natural Resources Code, §§33.601 - 33.605 are affected by the adopted amendments.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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

TRD-200905791
Trace Finley
Deputy Commissioner, Policy and Governmental Affairs
General Land Office
Effective date: December 31, 2009
Proposal publication date: October 9, 2009
For further information, please call: (512) 475-1859

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PART 2. TEXAS PARKS AND WILDLIFE DEPARTMENT

CHAPTER 57. FISHERIES
SUBCHAPTER A. HARMFUL OR POTENTIALLY HARMFUL FISH, SHELLFISH, AND AQUATIC PLANTS

The Texas Parks and Wildlife Commission adopts the repeal of §57.136, an amendment to §57.113, and new §57.136 and §57.137, concerning Harmful or Potentially Harmful Fish, Shellfish, and Aquatic Plants, without changes to the proposed text as published in the July 24, 2009, issue of the *Texas Register* (34 TexReg 4838).

The repeal, amendment, and new sections are necessary to establish special provisions for the culture and sale of water spinach.

Under Parks and Wildlife Code, §66.007, no person may import, possess, sell, or place into water of this state exotic harmful or potentially harmful fish, shellfish, or aquatic plants except as authorized by rule or permit issued by the Texas Parks and Wildlife Department (the department).

Water spinach *(Ipomoea aquatica)* is an exotic aquatic plant native to southeast Asia, where it is a popular vegetable crop that has been cultivated for centuries. It is a fast-growing plant that thrives in warm, moist environments. Water spinach is a noxious species in areas where it has escaped containment. Owing to its prolific growth rate, water spinach is a concern because it can infest lakes, ponds and river shorelines, displacing native plants that are important for fish and wildlife. Because water spinach can block drainage structures, it can create ideal breeding environments for mosquitoes.

Water spinach has been classified as a noxious plant by the federal government, and is prohibited in some states. Possession of water spinach was prohibited in Texas until 2005, when the department discovered that southeast Asian immigrants in the Houston area had been growing and selling it undetected for over two decades. The department initiated survey efforts in an effort to determine if water spinach was growing in the wild in the Houston area and concluded that it was not. On that basis, the department in 2005 and again in 2007 relaxed the prohibition to allow the possession of water spinach for personal consumption without a permit and to allow a person with an exotic species permit to "possess, propagate, transport or sell water spinach." The department continued to refine its risk analysis to determine the potential environmental hazards associated with allowing culture and sale.

The department's risk analysis was completed earlier this year and concluded that water spinach is a low-risk species that can be cultured and sold with little potential for environmental hazard in Texas, provided it is strictly regulated.

The rules implement a regulatory regime that requires persons who grow water spinach for any purpose to acquire an exotic species permit issued by the department (in addition to any other permits required by other governmental entities). The rules also establish facilities standards, require facility inspections, impose recordkeeping and reporting requirements, and prescribe processing and packaging standards, including standards for transportation. The intent of this rulemaking is to allow the culture and sale of water spinach without placing onerous administra-

tive and regulatory burdens on people involved in water spinach commerce and consumers and to provide a mechanism for the department to identify and monitor the points of origin of water spinach. The rule is intended to provide the department with the information necessary to react in a timely and effective fashion to protect native ecosystems in the event that water spinach is detected in the wild. To this end, the rules require only those persons who grow water spinach to obtain an exotic species permit. Persons who purchase water spinach for a commercial purpose are required only to maintain invoices and sales receipts. Persons who purchase water spinach for personal consumption (e.g., diners, grocery store customers, etc.) are not required to obtain a permit or maintain records. The rules as adopted are applicable in addition to any other provisions of the department's existing applicable rules governing possession of harmful and potentially harmful exotic aquatic plants.

The amendment to §57.113, concerning Exceptions, eliminates references to water spinach in subsections (d) and (m), which is necessary to prevent conflicts with new §57.136, which addresses all regulatory provisions specific to water spinach.

New §57.136, concerning Special Provisions--Water Spinach, establishes provisions unique to the issuance of exotic species permits for the culture of water spinach. All other provisions of the subchapter continue to apply, except where expressly noted.

New §57.136(a) sets forth general provisions related to the culture of water spinach.

New §57.136(a)(1) restricts the application of the section to the culture, possession, transport, sale, re-sale, and transfer of water spinach, which is necessary because the department does not intend for the section to apply to any other species of harmful or potentially harmful fish, shellfish, or aquatic plant.

New §57.136(a)(2) requires any person who grows water spinach for a commercial purpose to obtain an exotic species permit from the department. The new section also defines "commercial purpose" as "the act of growing, possessing, or transporting water spinach in exchange for money or anything of value or offering to grow, possess, or transport water spinach in exchange for money or anything of value." The definition is necessary to create a standard for determining the conditions under which an exotic species permit must be obtained. The proposed new paragraph also creates two exceptions under which persons are not required to obtain an exotic species permit.

The first exception, set forth under proposed new §57.136(a)(3), authorizes the possession, purchase, and re-sale of water spinach obtained from a permitted source in Texas or a lawful out-of-state source, provided the water spinach is processed and packaged in accordance with all applicable food processing and handling laws; exotic species invoices and sales receipts are maintained for two years; any water spinach sold or transferred is sold or transferred to a consumer (defined as a person obtaining water spinach for personal consumption); and any water spinach not sold, transferred, or consumed is disposed of in such a way as to prevent release into the environment. As mentioned previously, the department's intent is to provide protection to the environment while minimizing regulatory burdens on people involved in water spinach commerce and consumers. For persons who obtain water spinach from a permitted grower or lawful out-of-state source for a commercial purpose, the department believes it is sufficient to require only that applicable food processing and handling laws be followed, that sales receipts and invoices be retained for a period of two years, and that excess or unwanted water spinach be properly disposed of. The need to follow legal requirements for food safety is self-evident and is intended to emphasize that the provisions of this rulemaking are not intended to replace or supersede food safety requirements. The requirement to maintain invoices and sales receipts is necessary to provide a way for the department to follow a chain of possession to determine that water spinach being offered for sale in the state comes from known, regulated sources. The requirement to safely dispose of unused or unsold water spinach is necessary to ensure that water spinach is not carelessly discarded, which could lead to establishment of populations in the wild.

The second exception, set forth in new §57.136(a)(4), allows any person to possess water spinach for personal consumption without having to obtain an exotic species permit. The provision is necessary to allow restaurant and grocery store patrons to purchase and possess water spinach as end users.

New §57.136(a)(5) requires a person who seeks to obtain an exotic species permit for the culture of water spinach to provide a Texas driver's license or identification number and a Social Security number to the department as part of the permit application process. The provision is necessary to establish the legal identity of all persons who culture water spinach so the department can prosecute violators and prevent convicted offenders from obtaining permits under the provisions of new §57.136(g). The department is also required by state and federal law to collect social security numbers from all persons to whom the department issues recreational or commercial permits.

New §57.136(a)(6) prohibits the use of water spinach as fodder or forage for animals. The provision is necessary to prevent the establishment of water spinach in the wild. The rules as adopted impose standards that require water spinach to be confined within physical structures or within closed containers, which is necessary because of its potential to grow in the wild if it escapes. Therefore, the feeding of water spinach to animals, particularly in low-lying areas and other areas where water is abundant and occasionally prone to flooding, is obviously a practice that should be prohibited.

New §57.136(b) allows persons who hold a valid exotic species permit for the culture of water spinach to designate additional persons to engage in permitted activities under the person's permit. The provision is necessary because a culture operation may involve more than one person. The department does not wish to create a costly administrative structure for itself, nor does it wish to require persons who are employed by permittees to be subject to provisions with which the permittee must comply and that are sufficient for the department's purposes. However, the permittee will be responsible for the compliance of his or her subpermittees.

New §57.136(c) establishes facility requirements specific to facilities where water spinach is cultured. The department has determined that although the potential for water spinach to become established in the wild is slight, it is nonetheless reasonable and prudent to establish specific standards to prevent escapement.

New §57.136(c)(1) requires water spinach to be cultured only in enclosed greenhouses. The provision is intended to isolate production within a physical structure and maintain a sterile zone around the structure, which is necessary to ensure that water spinach is under control at all times.

New §57.136(c)(2) requires all water spinach plants on a permitted property to be kept free of seeds and flowers at all times. The provision is intended to prevent the natural reproduction of water spinach, because seeds could be easily transported or scattered by accident, which increases the potential for establishment in the wild.

New §57.136(c)(3) requires all propagation of water spinach to be by cuttings only. As noted in the discussion of new §57.136(2), seeds present a potential risk for establishment in the wild. However, water spinach also reproduces by fragmentation (existing stems can be rooted and will grow readily), so the rule prohibits propagation by seed and requires propagation only by cuttings.

New §57.136(c)(4) requires water spinach to be cultured only in moist soil. Water spinach can and does grow as a floating plant. The highest risk potential for establishment in the wild is via aqueous transmission. By requiring water spinach to be cultured only in moist soil, the department's intent is to minimize risk of escape as a result of flood events or in areas where there is abundant surface water.

New §57.136(c)(5) requires that all areas where water spinach is cultured, handled, packed, processed, stored, shipped, or disposed of to be enclosed within a minimum 10-ft buffer zone void of all vegetation. The provision isolates water spinach within a sterile zone during all stages of handling and shipping, which is necessary to ensure that water spinach is under control at all times.

New §57.136(c)(6) requires that all handling, packaging, and disposal or water spinach be done at the facility and in a manner to prevent dispersal. The new provision is necessary to minimize the potential for water spinach to escape to the wild.

New §57.136(c)(7) requires all equipment used to cultivate water spinach to be cleaned of all vegetation prior to removal from a facility. Because water spinach can propagate vegetatively, it is important that equipment that comes into contact with water spinach be cleaned before being taken elsewhere in order to minimize the potential for escape to the wild.

New §57.136(d) sets forth requirements for the transport and packaging of water spinach.

New §57.136(d)(1) defines a "package" of water spinach as "a closed or sealed container having a volume of no greater than three cubic feet, accompanied by all required invoices and documentation," and requires that a package contain only water spinach. The department has determined that a maximum package size is necessary to facilitate inspection and verification. The three-cubic-feet standard was selected because it represents a volume that can be readily and easily measured and inspected. The requirement that a package contain only water spinach is necessary because the intent of this rulemaking is to restrict facilities to monoculture production. Allowing facilities to culture and package other types of plants or foodstuffs increases the risk of escape and decreases the department's ability to monitor activities to ensure that water spinach is being handled, processed, and packaged in such a fashion as to minimize escapement. The requirement that each package of water spinach be accompanied by all documentation and invoices is necessary to maintain a chain of custody for law enforcement purposes. Since only the grower is required to obtain a permit, it is necessary for documentation and invoices to remain with water spinach as it proceeds through commerce, giving the department the ability to track water spinach back to a point of origin and verify that it was lawfully grown, processed, and shipped. Absence of documentation and invoices therefore constitutes evidence that water spinach is unlawfully possessed.

New §57.136(d)(2) specifies that each package of water spinach be clearly identified, in English, as water spinach. The new provision is necessary to avoid problems with identification of the contents of packages at various points in the chain of commerce. The requirement that the label be in English is necessary because water spinach is known by many different names in various cultures, including many cultures that have ideogrammatic rather than phonetic languages.

New §57.136(d)(3) requires all water spinach that is removed from a facility for any reason to be accompanied by a transport invoice and prescribes the information to be contained on the invoice. The invoice requirement is necessary because only the grower of water spinach is required to obtain a permit. Therefore, the department must have a way to determine that water spinach encountered outside of permitted facilities is lawfully possessed and lawfully grown. By requiring all water spinach removed from a facility to be accompanied by a transport invoice, the department can compare invoice information to the quarterly reports required from the growers to determine whether the water spinach was lawfully cultured.

New §57.136(e) prescribes reporting and recordkeeping requirements for persons culturing water spinach under an exotic species permit issued by the department.

New §57.136(e)(1) requires permittees to maintain an accurate daily record of all sales and transfers of water spinach. The new provision is necessary to ensure that all activities involving the sale or movement of water spinach are recorded in real time. By requiring daily recordkeeping, the department intends to avoid situations in which verification of the origin of water spinach encountered in places other than a permitted facility hinge on memory or hearsay.

New §57.136(e)(2) requires transport invoices to be retained by both the shipper and receiver of water spinach for a period of two years from the date of delivery. The new provision is necessary to facilitate investigations when they are necessary. The two-year period was selected because that is the statute of limitations for an offense under the subchapter.

New §57.136(e)(3) requires all documents and records required by the section to be furnished upon request during normal business hours to a department employee acting within the scope of official duties. The new provision is necessary because the department must be able to review records and documents to enforce the provisions of the section, to conduct investigations when necessary, and to verify that permittees are in compliance with the provisions of the subchapter.

New §57.136(f) requires a permittee to be financially responsible for the costs of detecting, controlling, and eradicating water spinach that escapes from the permittee's facility. The new provision is necessary because the department believes that since water spinach has the potential to become an environmental nuisance, a person who has been entrusted with the privilege of culturing and handling water spinach under a permit should be financially liable for remediating an escapement from a facility.

New §57.136(g) provides that a final conviction of a violation of the section is grounds for the department to deny further permit issuance for a period of five years from the date of the convictions. The new provision is necessary because the department

believes that a person who has demonstrated disregard for rules designed to protect the natural resources of this state should be prevented, for a reasonable amount of time, from obtaining the privilege of a permit, which is also intended to function as a deterrent to unscrupulous activities and carelessness.

New §57.136(h) stipulates that no person is relieved of the responsibility of complying with other applicable provisions of federal, state, or local laws. The new provision is necessary to clearly state that a permit issued under the subchapter is applicable only to activities governed by the Parks and Wildlife Code.

The repeal of current §57.136, concerning Penalties, relocates the provisions of that section to new §57.137, which is necessary in order to create room for new §57.136.

New §57.137, concerning Penalties, reiterates the statutory penalties for a violation of the subchapter.

The amendment and new sections will function by creating a regulatory mechanism to ensure that the culture, storage, processing, transportation, and sale of water spinach are done in an environmentally responsible manner.

The department received four comments opposing adoption of the proposed rules. One commenter offered a specific rationale for opposition, stating opposition to any attempt to prohibit the possession or sale of water spinach. The department agrees with the comment and responds that the proposed rules did not contemplate a prohibition on the possession or sale of water spinach. No changes were made as a result of the comment.

The department received 1,603 comments supporting adoption of the proposed rules, including one petition with 178 signatures and another petition with 1,402 signatures.

No groups or associations commented in favor of or opposition to adoption of the proposed rules.

31 TAC §§57.113, 57.136, 57.137

The amendment and new rules are adopted under the authority of Parks and Wildlife Code, §66.007, which prohibits the importation, possession, sale, or placement into water of this state exotic harmful or potentially harmful fish, shellfish, or aquatic plants except as authorized by rule or permit issued by the department and requires the department to make rules to carry out the provisions of that section.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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

TRD-200905647
Ann Bright
General Counsel
Texas Parks and Wildlife Department
Effective date: December 27, 2009
Proposal publication date: July 24, 2009
For further information, please call: (512) 389-4775

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31 TAC §57.136

The repeal is adopted under the authority of Parks and Wildlife Code, §66.007, which prohibits the importation, possession, sale, or placement into water of this state exotic harmful or potentially harmful fish, shellfish, or aquatic plants except as authorized by rule or permit issued by the department and requires the department to make rules to carry out the provisions of that section.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TRD-200905646
Ann Bright
General Counsel
Texas Parks and Wildlife Department
Effective date: December 27, 2009
Proposal publication date: July 24, 2009
For further information, please call: (512) 389-4775

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TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 3. TAX ADMINISTRATION

SUBCHAPTER S. MOTOR FUEL TAX

34 TAC §3.438

The Comptroller of Public Accounts adopts an amendment to §3.438, concerning signed statements for purchasing dyed diesel fuel tax free, without changes to the proposed text as published in the October 16, 2009, issue of the *Texas Register* (34 TexReg 7190). This amendment incorporates legislative changes in Senate Bill 1495, 81st Legislature, 2009, which amended Tax Code, Chapter 162. Senate Bill 1495 repeals the 7,400-gallon per delivery limitation of dyed diesel fuel. Subsection (c)(2), (3), and (4) is being amended to eliminate the 7,400-gallon single delivery limitation and provide that the monthly limitation applies whether in a single transaction or multiple transactions.

No comments were received regarding adoption of the amendment.

The amendment is adopted under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of Tax Code, Title 2.

The amendment implements Tax Code, §162.206.

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 December 14, 2009.

TRD-200905802

Ashley Harden
General Counsel
Comptroller of Public Accounts
Effective date: January 3, 2010
Proposal publication date: October 16, 2009
For further information, please call: (512) 475-0387

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34 TAC §3.439

The Comptroller of Public Accounts adopts an amendment to §3.439, concerning motor fuel transportation documents, without changes to the proposed text as published in the October 16, 2009, issue of the *Texas Register* (34 TexReg 7191). This amendment incorporates legislative changes in Senate Bill 1495, 81st Legislature, 2009, which amended Tax Code, Chapter 162. Senate Bill 1495 requires that the shipping document be retained by the seller, transporter and purchaser. Subsection (e) is being amended to require the seller and the transporter to retain a copy of the cargo manifest or shipping document for four years.

No comments were received regarding adoption of the amendment.

The amendment is adopted under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of Tax Code, Title 2.

The amendment implements Tax Code, §162.016.

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 December 14, 2009.

TRD-200905803
Ashley Harden
General Counsel
Comptroller of Public Accounts
Effective date: January 3, 2010
Proposal publication date: October 16, 2009
For further information, please call: (512) 475-0387

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SUBCHAPTER V. FRANCHISE TAX

34 TAC §3.582

The Comptroller of Public Accounts adopts an amendment to §3.582, concerning margin: passive entities, with changes to the proposed text as published in the October 30, 2009, issue of the *Texas Register* (34 TexReg 7557).

The definition of federal gross income in subsection (b)(3) that references Internal Revenue Code, §61(a) is deleted and new language is added to define federal gross income as the income that is reported on an entity's federal income tax return, to the extent the amount reported complies with federal income tax law. The amended definition more accurately reflects our current policy.

Subsection (g) is expanded to clarify the reporting requirements for passive entities. New paragraph (1) is added to clarify that only a passive entity that has notified the comptroller or secretary of state that it is doing business in Texas must file an information report the first year that it qualifies as passive and is not required to file a subsequent report, as long as the entity continues to qualify as passive. New paragraph (2) is added to clarify that a passive entity that has not notified the comptroller or the secretary of state that it is doing business in Texas will not be required to register with or file a franchise tax report with the comptroller's office. New paragraph (3) is added to clarify that any passive entity that no longer qualifies as passive must file a franchise tax report for the period in which the entity does not qualify as passive, and any subsequent periods, until the entity once again files as a passive entity. New paragraph (4) states that an entity that receives notification from the comptroller asking if the entity is taxable must reply to the comptroller within 30 days of the notice.

We received comments from various groups. Following is a summary of the comments received and the responses.

The Texas Society of Certified Public Accountants (TSCPA), Crow Holdings and other practitioners recommended that we withdraw language added to subsection (c)(2)(B) and (d)(1) that did not allow rental income that flows from a partnership to a partner to be considered passive. They stated that the statute on its face provides that net distributive income from a partnership or limited liability company is passive income and the statute does not state any circumstances in which all or part of the net distributive income should retain its character as nonpassive when it flows to the partner. The comptroller has withdrawn the amendment and the related amendment to subsection (a).

The State Bar of Texas, Section of Taxation (SBOT) and the TSCPA recommended that the language added in subsection (e) regarding conducting an active trade or business be withdrawn as the added language contradicts Tax Code, §171.0003(a-1) which designates certain sources of income as passive, regardless of how the income was earned. Although the comptroller believes that the legislature did not intend for income from active operations to be included in passive income, she agreed that the current language of the statute does not provide this differentiation and has withdrawn the amendment and the related amendment to subsection (a).

This amendment is adopted under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

The amendment implements Tax Code, §171.0003.

§3.582. Margin: Passive Entities.

(a) Effective Date. The provisions of this section apply to franchise tax reports originally due on or after January 1, 2008.

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

(1) Active trade or business--For the purposes of this section only:

(A) an entity conducts an active trade or business if the activities include active operations that form a part of the process of earning income or profit, and the entity performs active management and operational functions;

(B) activities performed by the entity include activities performed by persons outside the entity, including independent contractors, to the extent that the persons perform services on behalf of the entity and those services constitute all or part of the entity's trade or business; or

(C) an entity conducts an active trade or business if assets, including royalties, patents, trademarks, and other intangible assets, held by the entity are used in the active trade or business of one or more related entities.

(2) Business trust--An entity as defined by Internal Revenue Code, Treasury Regulation, §301.7701-4(b).

(3) Federal gross income--Income that is reported on the entity's federal income tax return, to the extent the amount reported complies with federal income tax law.

(4) General partnership--A partnership as described in Revised Partnership Act, Article 6132b-1.01 et. seq., or Business Organizations Code, Title 4, Chapter 152, or an equivalent statute in another jurisdiction.

(5) Limited liability partnership--A partnership registered pursuant to Revised Partnership Act, Article 6132b-3.08, or Business Organizations Code, Title 4, Chapters 152 and 153, Subchapter H, or an equivalent statute in another jurisdiction.

(6) Limited partnership--A partnership formed pursuant to Revised Partnership Act, Article 6132a-1, or Business Organizations Code, Title 4, Chapter 153, or an equivalent statute in another jurisdiction.

(7) Net capital gains--Net capital gains as defined under the Internal Revenue Code.

(8) Net gains--Net gains as defined under the Internal Revenue Code.

(9) Non-controlling interest--For the purposes of this section only, an interest that is less than or equal to 50% that is held by an investor, either directly or indirectly, in an investee.

(10) Security--

(A) an instrument defined by Internal Revenue Code, §475(c)(2), where the holder of the instrument has a non-controlling interest in the issuer/investee;

(B) an instrument described by Internal Revenue Code, §475(e)(2)(B), (C), (D);

(C) an interest in a partnership where the investor has a non-controlling interest in the investee;

(D) an interest in a limited liability company where the investor has a non-controlling interest in the investee; or

(E) a beneficial interest in a trust where the investor has a non-controlling interest in the investee.

(c) Qualification as a passive entity:

(1) to qualify as a passive entity, the entity must be one of the following for the entire period on which the tax is based:

(A) general partnership;

(B) limited partnership;

(C) limited liability partnership; or

(D) trust, other than a business trust; and

(2) at least 90% of an entity's federal gross income for the period on which margin is based must consist of the following sources of income:

(A) dividends, interest, foreign currency exchange gain, periodic and nonperiodic payments with respect to notional principal contracts, option premiums, cash settlements or termination payments with respect to a financial instrument, and income from a limited liability company;

(B) distributive shares of partnership income to the extent that those distributive shares of income are greater than zero;

(C) net capital gains from the sale of real property, net gains from the sale of commodities traded on a commodities exchange, and net gains from the sale of securities; and

(D) royalties from mineral properties, bonuses from mineral properties, delay rental income from mineral properties and income from other nonoperating mineral interests including nonoperating working interests not described in subsection (d)(2) of this section.

(d) The income described by subsection (c)(2) of this section, does not include:

(1) rent; or

(2) income received by a nonoperator from mineral properties under a joint operating agreement if the nonoperator is a member of an affiliated group and another member of that group is the operator under the same joint operating agreement.

(e) Conducting an active trade or business. To be considered a passive entity, an entity may not receive more than 10% of its federal gross income for the period on which margin is based from conducting an active trade or business. Income described by subsection (c)(2) of this section, may not be treated as income from conducting an active trade or business.

(f) Activities that do not constitute an active trade or business:

(1) ownership of a royalty interest or a nonoperating working interest in mineral rights;

(2) payment of compensation to employees or independent contractors for financial or legal services reasonably necessary for the operation of the entity; and

(3) holding a seat on the board of directors of an entity does not, by itself, constitute conduct of an active trade or business.

(g) Reporting requirement for a passive entity. If an entity meets all of the qualifications of a passive entity for the reporting period, the entity will owe no tax; however, the entity may be required to file an information report subject to the following paragraphs:

(1) A partnership or trust that is registered with the comptroller's office or with the secretary of state's office must file an information report as a passive entity for the first report that it qualifies as passive. An entity that has filed as passive on a previous report will not be required to file subsequent franchise tax reports, as long as the entity continues to qualify as passive.

(2) A partnership or trust that qualifies as a passive entity for the period upon which the franchise tax report is based, and is not registered with the comptroller's office or with the secretary of state's office, will not be required to register with or file a franchise tax report with the comptroller's office.

(3) Any passive entity, whether or not it is registered with the comptroller's office or with the secretary of state's office, that no

longer qualifies as passive, must register with the comptroller's office and file a franchise tax report for the period in which the entity does not qualify as passive, and any subsequent periods, until the entity once again files with the comptroller's office as a passive entity.

(4) If a passive entity receives notification in writing from the comptroller asking if the entity is taxable, the entity must reply to the comptroller within 30 days of the notice.

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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Ashley Harden
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Comptroller of Public Accounts
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For further information, please call: (512) 475-0387

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34 TAC §3.583

The Comptroller of Public Accounts adopts an amendment to §3.583, concerning margin: exemptions, with changes to the proposed text as published in the October 30, 2009, issue of the *Texas Register* (34 TexReg 7559).

Language is added in subsection (a) to indicate that, where noted, the provisions of this section apply to reports other than those originally due on or after January 1, 2008.

Language is added to subsection (d)(5) to broaden printed publication to include electronic media.

Subsections (f)(1) and (i)(1)(a) are corrected to remove the Internal Revenue Code (IRC) 501(c)(9) entity from the list of nonprofit entities that are exempt from franchise tax if a current exemption letter from the Internal Revenue Service is furnished to the comptroller. The comptroller's office discovered that an IRC 501(c)(9) entity was included in this list in error.

Subsection (l) is added to implement House Bill 1474, 81st Legislature, 2009. Effective for reports originally due on or after October 1, 2009, a bingo unit formed under Occupations Code, Chapter 2001, Subchapter I-1, is exempt from the tax imposed under Tax Code, Chapter 171.

No comments were received regarding adoption of the amendment.

This amendment is adopted under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

The amendment implements Occupations Code, §2001.4335.

§3.583. Margin: Exemptions.

(a) Effective date. This section applies to franchise tax reports originally due on or after January 1, 2008, except as otherwise noted.

(b) Application for exemption. An entity that has not previously established an exemption from franchise tax with the comptroller must apply for an exemption. An entity that is not a corporation, but whose activities would qualify it for a specific exemption under Tax Code, Chapter 171, Subchapter B, if it were a corporation, may qualify for the exemption from the tax in the same manner and under the same conditions as a corporation. See Tax Code, §171.088. For provisional exemptions for certain entities, see subsection (i) of this section; for trade show exemptions, see subsection (j) of this section.

(1) An entity that believes it is exempt from payment of franchise tax must furnish to the comptroller sufficient evidence to establish its exempt status. The entity claiming the exemption bears the burden to establish its entitlement to exempt status and any doubts will result in a denial of the application for exemption.

(2) Except as otherwise provided in subsections (f), (i), and (j) of this section, each entity must submit to the comptroller:

(A) a request for exemption in writing, which may require using forms developed by the comptroller for requesting exemptions, indicating the particular provision of Tax Code, Chapter 171, under which exemption is claimed;

(B) a detailed statement of the entity's past and current activities, if any, and its future plan of activities, both in relation to the manner in which the entity adopts to implement the purposes clause in its certificate of formation or application for registration;

(C) an entity formed or created under Texas law whose articles of organization or formation is on file with the Texas Secretary of State need not submit copies of those documents with its request for exemption. A Texas entity that is not required to file organizational documents with the Texas Secretary of State must furnish a signed and dated copy of its organizational documents with its exemption request. If a non-Texas entity is required to file articles of organization or formation with its home jurisdiction Secretary of State, or other designated agency or officer, the entity must provide file-stamped copies of those filed organizational or formation documents. If a non-Texas entity is not required to file its articles of organization with the Secretary of State or other authority of its home jurisdiction, it must furnish a signed and dated copy of its organizational or formation documents with its exemption request; and

(D) any additional information the comptroller may require to make a determination whether the entity is eligible for a franchise tax exemption.

(c) Actions by comptroller. Upon receipt of an application for exemption, the comptroller's representative will review the application and send the applicant a notification either granting the exemption or denying the exemption, or requesting additional information.

(1) If the exemption is granted, the exemption will be effective from the first date the entity was eligible for exemption. If the entity paid any franchise taxes prior to the comptroller's notification granting the exemption for a privilege period after the effective date of the exemption, the entity may request a refund, subject to the applicable statute of limitations. If the effective date of the exemption occurs after the beginning of a privilege period, the entity must pay through the end of such privilege period. An entity that has been subject to the tax and becomes eligible for exemption is liable for Tax Code, §171.0011, additional tax.

(2) If the exemption is denied or revoked, the entity may contest the denial or revocation by filing all reports due as required by the comptroller; and

(A) paying all amounts of tax, penalty, and interest due and requesting a refund hearing pursuant to the provisions of Tax Code, Chapter 111;

(B) paying all amounts of tax, penalty, and interest due, accompanying the payment with a written protest, and filing suit for the recovery of amounts paid pursuant to the provisions of Tax Code, Chapter 112; or

(C) requesting a redetermination hearing pursuant to Tax Code, §111.009, if the comptroller issues a deficiency determination.

(d) Qualification for exemption.

(1) Entities subject to insurance premium taxes. All insurance, surety, guaranty, fidelity and title insurance companies, title insurance agents, and other insurance organizations that are subject to the annual gross premiums tax levied by Insurance Code, Chapters 221 - 224, are exempt from payment of the franchise tax, regardless of whether any gross premiums taxes are actually paid in any given year. A non-admitted insurance company or organization that is required to pay a gross premium receipts tax during a tax year is exempted from the franchise tax for the same tax year. The exemption in this paragraph covers the periods upon which the franchise tax is based, provided the gross premium receipts tax is required to be paid on premiums received or written, as applicable, during the same period. For example, an insurance organization's gross premium receipts tax is due and payable on March 1, 2009, for premiums received during calendar year 2008. The entity would be exempt from franchise tax for the 2009 annual report covering the January 1, 2009 - December 31, 2009, privilege period, for margin attributable to calendar year 2008. An entity is subject to the franchise tax, however, for a tax year in any portion of which it is in violation of an order issued by the Texas Department of Insurance under Insurance Code, §2254.003(b) that is final after appeal or that is no longer subject to appeal.

(2) Those entities organized for the exclusive purpose of promoting the public interest of any county, city, town, or other area within the state, must show that promotion of the public interest is the exclusive purpose of the entity and not merely an incidental result. An entity will not be considered to be promoting the public interest if it engages in activities to promote or protect the private, business, or professional interests of its members or patronage.

(3) A nonprofit entity seeking franchise tax exemption as a religious organization must be an organized group of people regularly meeting for the primary purpose of holding, conducting, and sponsoring religious worship services according to the rites of their sect. The entity must be able to provide evidence of an established congregation showing that there is an organized group of people regularly attending these services. An entity that supports and encourages religion as an incidental part of its overall purpose, or one whose general purpose is furthering religious work or instilling its membership with a religious understanding, will not qualify for exemption under this provision. No part of the net earnings of the organization may inure to the benefit of any private party or individual other than as reasonable compensation for services rendered to the organization. Some examples of entities that do not meet the requirements for exemption under this definition are conventions or associations of churches, evangelistic associations, churches with membership consisting of family members only, missionary organizations, and groups that meet for the purpose of holding prayer meetings, Bible study or revivals. Although these organizations do not qualify for exemption under this category of exemption as religious organizations, they may qualify for the exemption under Tax Code, §171.063, if they obtain an exemption from the Internal Revenue Service (IRS) under Internal Revenue Code (IRC), §501(c).

(4) A nonprofit entity seeking a franchise tax exemption as organized for purely public charity must devote all or substantially all of its activities to the alleviation of poverty, disease, pain, and suffering by providing food, clothing, drugs, treatment, shelter, or psychological counseling directly to indigent or similarly deserving members of society with its funds derived primarily from sources other than fees or charges for its services. If an entity engages in any substantial activity other than the activities that are described in this paragraph, it will not be considered as having been organized for purely public charity, and therefore, will not qualify for exemption under this provision. No part of the net earnings of the organization may inure to the benefit of any private party or individual other than as reasonable compensation for services rendered to the organization. Some examples of organizations that do not meet the requirements for exemption under this definition are fraternal organizations, lodges, fraternities, sororities, service clubs, veterans groups, mutual benefit or social groups, professional groups, trade or business groups, trade associations, medical associations, chambers of commerce, and similar organizations. Even though not organized for profit and performing services that are often charitable in nature, these types of organizations do not meet the requirements for exemption under this provision. Although these organizations do not qualify for exemption under this category of exemption as charitable organizations, they may qualify for the exemption under Tax Code, §171.063, if they obtain an exemption from the IRS under IRC, §501(c).

(5) A nonprofit entity seeking a franchise tax exemption as an educational organization must show that its activities are devoted solely to systematic instruction, particularly in the commonly accepted arts, sciences, and vocations, and has a regularly scheduled curriculum, using the commonly accepted methods of teaching, a faculty of qualified instructors, and an enrolled student body or students in attendance at a place where the educational activities are regularly conducted. An entity that has activities consisting solely of presenting public discussion groups, forums, panels, lectures, or other similar programs, may qualify for exemption under this provision, if the presentations provide instruction in the commonly accepted arts, sciences, and vocations. The entity will not be considered for exemption under this provision if the systematic instruction or educational classes are incidental to some other facet of the organization's activities. No part of the net earnings of the organization may inure to the benefit of any private party or individual other than as reasonable compensation for services rendered to the organization. Some examples of organizations that do not meet the requirements for exemption under this definition are professional associations, business leagues, information resource groups, research organizations, support groups, home schools, and organizations that merely disseminate information via tangible or electronic media. Although these organizations do not qualify for exemption under this category of exemption as educational organizations, they may qualify for the exemption under Tax Code, §171.063, if they obtain an exemption from the IRS under IRC, §501(c).

(6) A nonprofit entity requesting franchise tax exemption as a homeowners' association must prove that it meets all requirements to qualify for the exemption. The entity must show that it is organized and operated to obtain, manage, construct, and maintain the property in or of a residential condominium or residential real estate development. The entity also must prove that the condominium project, or, for a real estate development, the related property, is legally restricted for use as residences. Furthermore, the entity must establish that the collective resident owners of individual lots, residences or units control at least 51% of the votes of the entity and that voting control, however acquired, is not held by: a single individual or family; one or more developers, declarants, banks, investors, or other similar parties. For example, an association is formed for a residential condominium consisting of 12 units with each unit being entitled to one vote. Each of five individuals separately owns and occupies one unit, a total of five units. A sixth individual owns two units, living in one unit and leasing the

other. A seventh individual owns and leases the remaining five units. None of the owners are related. In determining whether the collective resident owners control at least 51% of the votes of the organization, the sixth owner is a resident owner regarding the one unit in which the owner lives and an investor regarding the other. The collective resident owners, therefore, have a total of six votes. Consequently, since the collective resident owners only have 50% of the votes of the entity, the association does not meet the requirement that the resident owners must control at least 51% of the votes of the organization. Accordingly, the entity does not qualify for the franchise tax exemption as a homeowners' association.

(e) Revocation, withdrawal, or loss of exemptions.

(1) An entity that no longer qualifies for the franchise tax exemption is required to notify the comptroller in writing of its change in status. Except as provided in paragraph (2) of this subsection, if at any time the comptroller has reason to believe that an exempt entity no longer qualifies for exemption, the comptroller's representative will notify the entity that its exempt status is under review. The comptroller's representative may request additional information necessary to ascertain the continued validity of the entity's exempt status. If the comptroller determines that an entity is no longer entitled to its exemption, notification to that effect will be sent to the entity. The effective date of revocation is the date the entity no longer qualified for the exemption. The day immediately following the date of withdrawal, loss, or revocation shall be the beginning date for determining the entity's privilege period and for all other purposes related to franchise tax.

(2) For nonprofit entities granted an exemption under Tax Code, §171.063, the revocation, withdrawal, or loss of the federal income tax exemption automatically terminates the franchise tax exemption. A nonprofit entity that no longer qualifies for the federal income tax exemption which was the basis for obtaining the franchise tax exemption must notify the comptroller in writing within 30 days of its change in status and must provide a copy of the notice of such revocation, withdrawal, or loss. The effective date of withdrawal or loss is the date of withdrawal or loss of the federal tax exemption. The effective date of a revocation is the date the IRS serves written notice of the revocation to the non-profit entity or the date the IRS serves written notice of revocation to the comptroller, whichever is earlier. The day immediately following the date of withdrawal, loss, or revocation shall be the entity's beginning date for determining its privilege periods and for all other purposes of the franchise tax.

(3) An electric cooperative entity previously exempted from franchise tax under Tax Code, §171.079, that subsequently participates in a joint powers agency thereby loses its franchise tax exemption. The commencing date of participation in the joint powers agency shall be considered the entity's beginning date for purposes of determining the entity's privilege periods and for all other purposes of the franchise tax. The electric cooperative must notify the comptroller in writing that it is a participant in a joint powers agency within 30 days after the commencing date of its participation.

(f) Federal exemption. An entity meeting the requirements of any paragraph of this subsection establishes its exempt status by furnishing to the comptroller a copy of a current exemption letter from the IRS.

(1) A nonprofit entity that has been exempted from federal income tax under the provisions of IRC, §501(c)(3) - (8), (10), (19); or

(2) any entity that has been exempted from federal income tax under the provisions of IRC, §501(c)(2) or (25), if the entity or entities for which it holds title to property are either exempt from or not subject to the franchise tax; and

(3) any entity that has been exempted from federal income tax under IRC, §501(c)(16).

(g) Solar energy device. For purposes of Tax Code, §171.056, the term "solar energy device" includes, but is not limited to:

(1) devices used in the conversion of solar thermal energy into electrical or mechanical power;

(2) devices used in the photovoltaic (solar cell) generation of electricity;

(3) systems used in the heating of water and the heating and cooling of structures by use of solar collectors to gather the sun's energy; and

(4) heat pumps used as an integral part of a system designed to make the best combined use of solar energy and conventional heating.

(h) Exemption for recycling operation. An entity engaged solely in the business of recycling sludge as defined by Health and Safety Code, Chapter 361, Solid Waste Disposal Act, §361.003, is exempt from franchise tax.

(i) Provisional exemptions.

(1) If established with the comptroller, the following entities may be granted a temporary exemption from franchise tax:

(A) a nonprofit entity that has applied for exemption from federal income tax under IRC, §501(c)(3) - (8), (10), (19); or

(B) an entity that has applied for exemption from federal income tax under IRC, §501(c)(2) or (25), if the entity or entities for which it holds title to property is either exempt from or not subject to the franchise tax; and

(C) an entity that has applied for exemption from federal income tax under IRC, §501(c)(16).

(2) To obtain a temporary franchise tax exemption with the comptroller, an entity that has applied for but has not yet received a letter of exemption from the IRS must timely file with the comptroller:

(A) a copy of the application for recognition of exemption that has been filed with the IRS; and

(B) a copy of:

(i) a written notice from the IRS stating that the application for recognition of exemption has been received; or

(ii) a receipt as proof that the application has been sent to the IRS by means of the United States Postal Service, other carrier, or hand delivery to the IRS.

(3) Paragraphs (2)(A) and (2)(B)(ii) of this subsection, apply only if the organization has filed its application for recognition of exemption during the 14th or 15th month after its beginning date. Beginning date means:

(A) for an entity organized under the laws of this state, the date on which the entity's certificate of formation or other similar document takes effect; and

(B) for a foreign entity, the date on which the entity begins doing business in this state.

(4) If the information required in paragraphs (2)(A) and (B)(i) of this subsection is provided in a timely manner, a 90-day provisional franchise tax exemption will be granted.

(5) An entity qualifying under paragraphs (2)(A) and (B)(ii) of this subsection, will be granted a 90-day provisional exemp-

tion with the condition that a copy of the notice required in paragraph (2)(B)(i) of this subsection be provided to the comptroller within 30 days from the date of the letter notifying the entity of the provisional exemption. If the IRS notification is not provided within the 30-day period, the provisional exemption will be canceled. An entity whose provisional exemption is canceled will be subject to all tax, penalty, and interest that has accrued since the entity's beginning date.

(6) The information necessary for obtaining a temporary franchise tax exemption will be considered to be provided to the comptroller in a timely manner if:

(A) the application for recognition of exemption is provided to the IRS within their timely filing guidelines; and

(B) the information required in paragraphs (2)(A) and (B)(i) or (B)(ii) of this subsection, is postmarked within 15 months after the day that is the last day of a calendar month and that is nearest to the entity's beginning date.

(7) Before the expiration of the 90-day provisional exemption, the entity must provide the comptroller a copy of the letter from the IRS showing that the decision on the federal exemption is still pending or stating that the federal exemption is either granted or denied.

(8) If the comptroller is notified as required in paragraph (7) of this subsection, that the decision on the federal exemption is still pending, an extension of the provisional exemption may be considered.

(9) If the information in paragraph (7) of this subsection, is not provided as required, the provisional exemption may be canceled. If the provisional exemption is canceled, the entity will be responsible for all franchise tax reports and payments that have become due since its beginning date, and penalty and interest will be based on the original due date of each report.

(10) An entity that provides the comptroller a copy of the letter from the IRS stating that the federal exemption has been granted will be considered for franchise tax exemption under subsection (f) of this section.

(11) If the federal exemption is denied by the IRS, the entity is responsible for all franchise tax reports and payments that have become due since its beginning date and interest will be based on the original due date of each report. Late filing and payment penalties will be waived for any reports and payments postmarked within 90 days after the date of the final denial of the federal exemption. The penalty waiver process will begin when the entity submits a written request for penalty waiver and a copy of the letter denying the federal exemption when filing reports and payment.

(j) Trade show exemption. See Tax Code, §171.084, for the requirements for exemption for certain foreign entities that participate in trade shows in Texas.

(1) Notification to comptroller. Entities need not apply for an exemption under Tax Code, §171.084.

(A) If a foreign entity has obtained a registration or has already notified the comptroller that it is doing business in Texas, the entity must notify the comptroller in writing by the due date of the first report for which the entity is exempt that the report and payment are not due because the entity is exempt under Tax Code, §171.084. After such notification, the entity must notify the comptroller in writing only when the organization no longer qualifies for exemption.

(B) If a foreign entity has not obtained a registration or otherwise qualified to do business in the state, if applicable, and if the entity has not notified the comptroller that it is doing business in Texas, the entity must notify the comptroller in writing only when the entity no longer qualifies for exemption under Tax Code, §171.084. There is no need to apply for exemption as long as the entity qualifies for the exemption.

(2) Solicitation periods. If the solicitation of orders is conducted during more than five periods during the business period upon which tax is based as set out in Tax Code, §171.1532, the entity does not qualify for exemption.

(A) An entity with its fiscal year ending December 31, 2008, that filed a 2008 annual report, will not have to file and pay a 2009 annual report if it did not solicit orders for more than five periods during 2008.

(B) Assume a foreign entity participated in its first trade show in Texas on April 1, 2008. It also participated in trade shows in 2009 on January 1, March 1, May 1, June 1, August 1, and October 1. The entity's fiscal year ends are December 31, 2008, and 2009. The entity would be exempt for its initial report and payment (covering the privilege periods from April 1, 2008 - December 31, 2009) because it only solicited for one period from April 1, 2008 - December 31, 2008 (i.e., the business upon which the initial report is based). The entity would be required to file a 2010 annual report and pay tax, however, because it solicited for six periods from January 1, 2009 - December 31, 2009 (i.e., the period upon which the 2010 annual report is based).

(3) One hundred twenty hours. A solicitation period may not exceed 120 consecutive hours. If the solicitation of orders is conducted during a single period of more than 120 consecutive hours, the entity does not qualify for exemption. For example, an entity that meets the other requirements of Tax Code, §171.084, will meet the 120 hours requirement if the solicitation occurs Monday - Friday, but will not meet the 120 hours requirement if the solicitation occurs Monday - Saturday. If none of the solicitation limits prescribed in this subsection are exceeded, an entity may qualify for the exemption even if it leases space at a wholesale center for the entire period upon which the tax is based.

(k) An entity organized under 12 U.S.C. §2071, or an agricultural credit association regulated by the Farm Credit Administration is exempt from franchise tax.

(l) Bingo unit exemption. For reports originally due on or after October 1, 2009, a bingo unit formed under Occupations Code, Chapter 2001, Subchapter I-1, is exempt from franchise tax. "Unit" means two or more licensed authorized organizations that conduct bingo at the same location joining together to share revenues, authorized expenses, and inventory related to bingo operation.

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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Ashley Harden
General Counsel
Comptroller of Public Accounts
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34 TAC §3.584

The Comptroller of Public Accounts adopts an amendment to §3.584, concerning margin: reports and payments, without changes to the proposed text as published in the October 30, 2009, issue of the *Texas Register* (34 TexReg 7563).

Language is added in subsection (a) to indicate that, where noted, the provisions of this section apply to reports other than those originally due on or after January 1, 2008.

Subsection (c)(1) is amended to reflect a change in policy regarding the initial report due date for entities that become subject to the Texas franchise tax on or after October 4, 2009. For these entities, an annual report is the first franchise tax report that a taxable entity will file.

Language is added to subsection (d)(3)(B) to clarify that, for determining if the retail tax rate applies, a product is not considered to be produced if modifications made to the acquired product do not increase the sales price of the product by more than 10%.

Subsection (d)(4) on annualized total revenue is amended to delete the figure $300,000 from the no tax due threshold. House Bill 4765, 81st Legislature, 2009, increases the no tax due threshold to $1 million for reports due on or after January 1, 2010 and to $600,000 for reports due on or after January 1, 2012. Annualized total revenue examples in subsection (d)(4)(A) and (B) are updated to reflect the increase in the no tax due threshold.

Subsection (d)(5) is amended to implement House Bill 4765, 81st Legislature, 2009, which increases the no tax due threshold to $1 million for reports due on or after January 1, 2010 and to $600,000 for reports due on or after January 1, 2012. Subsection (d)(5) is also amended to allow combined groups to file a no tax due information report.

Subsection (d)(6) is amended to adjust the discounts due to the increase in the no tax due threshold and to correct punctuation.

Subsection (d)(8)(A) is amended to clarify that neither the upper tier entity nor the lower tier entity in a tiered partnership arrangement qualifies for no tax due, discounts and the E-Z Computation if, before the attribution of any total revenue by a lower tier entity to upper tier entities, the lower tier entity does not meet the criteria. Subsection (d)(8)(B) is amended to include additional information requested on the Tiered Partnership Report. Titles have also been added to both subparagraphs.

First annual report has been added to the list of reports in subsection (i)(1) and (i)(2) that must include an information report.

No comments were received regarding adoption of the amendment.

This amendment is adopted under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

The amendment implements Tax Code, §§171.0021, 171.101, 171.1015, 171.1016, 171.202, and 171.203.

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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Ashley Harden
General Counsel
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34 TAC §3.587

The Comptroller of Public Accounts adopts an amendment to §3.587, concerning margin: total revenue, without changes to the proposed text as published in the October 30, 2009, issue of the *Texas Register* (34 TexReg 7568).

Language is added in subsection (a) to indicate that, where noted, the provisions of this section apply to reports other than those originally due on or after January 1, 2008.

Language is deleted from subsection (b)(1)(C) to allow uncompensated care charges to include charges for services covered by the programs described in subsection (e)(10)(A)(i) - (iii) of this section, services performed for a contracted rate from a private health care plan or services performed for an agreed upon rate from an individual, but only if the partial payments received do not cover the cost of the care provided. New language is added to clarify that uncompensated care charges do not include any portion of a charge that the health care provider has no right to collect under a private health care plan, under an agreement with an individual for a specific amount or under the charge limitations imposed by the programs described in subsection (e)(10)(A)(i) - (iii).

Language is added to subsection (b)(6), the definition of a management company, to more accurately reflect our current policy.

Subsection (c)(5) is amended by adding subparagraphs (A) and (B) to clarify that net distributive income that is subtracted from total revenue may not be included in the determination of compensation. Subsection (c)(8)(C) is amended to clarify that neither the upper tier entity nor the lower tier entity filing under the tiered partnership provision qualifies for no tax due, discounts and the E-Z Computation if, before the attribution of any total revenue by a lower tier entity to upper tier entities, the lower tier does not meet the criteria. Subsection (c)(8)(G) is added to prohibit, for reports originally due on or after January 1, 2010, the election of the tiered partnership provision if, before the attribution of total revenue, the lower tier entity owes no tax.

Subsection (d)(2)(A)(iv) is amended to include the amounts reportable on Line 19 of Internal Revenue Service Form 8825 (the net gain/loss from the disposition of property from rental real estate activities) in the calculation of total revenue for an S corporation, to accurately reflect our current policy.

Subsection (e)(14) is added to implement Senate Bill 636 that allows an exclusion from total revenue for payments made by a qualified destination management company in connection with the provision of destination management services, effective for reports originally due on or after January 1, 2010.

We received comments from various groups and individuals. Following is a summary of the comments received and the responses.

A practitioner recommended that the amendment of the definition of uncompensated care charges in subsection (b)(1)(C) should provide further refinements to the definitions of standard

charges and total charges, specifying that contractual discounts should not be included in these amounts. The comptroller declined to make this change as the comment is unrelated to the proposed amendment but will address the recommendation in a ruling request.

The Texas Society of Certified Public Accountants and United Services Automobile Association recommended the withdrawal of the amendment to the definition of a management company in subsection (b)(6) that requires a management company to conduct all of the operations of the managed entity or a distinct revenue-producing component of the entity stating that this is an improper restriction unsupported by the statute. The comptroller declined to withdraw the amendment. The amended definition is consistent with the franchise tax statute as Tax Code, §171.1011(i) also provides that a payment made under an ordinary contract for the provision of services in the regular course of business may not be excluded from revenue. The definition is also consistent with Generally Accepted Accounting Principles and the Internal Revenue Code.

Snell, Levin & Co., L.L.P. commented that although subsection (d)(2)(A)(iv) is amended to include the amount reportable on Line 19 of the Internal Revenue Service (IRS) Form 8825 in the calculation of total revenue for an S corporation, a similar amendment is not made in subsection (d) for a partnership, which also reports gains or losses from the sale of rental activity assets on Line 19 of IRS Form 8825. The comptroller declined to make the amendment because the statute does not support such an amendment to the calculation of total revenue for a partnership and must be addressed through a statutory change.

This amendment is adopted under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

The amendment implements Tax Code, §171.1011 and §171.1015.

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 December 11, 2009.

TRD-200905748
Ashley Harden
General Counsel
Comptroller of Public Accounts
Effective date: December 31, 2009
Proposal publication date: October 30, 2009
For further information, please call: (512) 475-0387

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34 TAC §3.589

The Comptroller of Public Accounts adopts an amendment to §3.589, concerning margin: compensation, without changes to the proposed text as published in the October 30, 2009, issue of the *Texas Register* (34 TexReg 7573).

Language is added in subsection (a) to indicate that, where noted, the provisions of this section apply to reports other than those originally due on or after January 1, 2008.

Language is added to subsection (b)(3), the definition of a management company, to more accurately reflect our current policy.

Subsections (b)(9)(B) and (d)(2) are amended to clarify that net distributive income that is subtracted from total revenue may not be included in the determination of compensation.

Subsection (c)(1) is amended to implement Tax Code, §171.006, that requires an adjustment, in even-numbered years, to the maximum per-person wage and cash compensation deduction based on the consumer price index. The maximum per-person deduction is increased from $300,000 to $320,000, effective for reports due on or after January 1, 2010.

Subsection (d)(1) is amended to clarify that any payments made, not just payments made to independent contractors, that are reportable on an Internal Revenue Service Form 1099 may not be included in the determination of compensation.

We received comments from various groups. Following is a summary of the comments received and the response.

The Texas Society of Certified Public Accountants (TSCPA) and United Services Automobile Association recommended the withdrawal of the amendment to the definition of a management company in subsection (b)(3) that requires a management company to conduct all of the operations of the managed entity or a distinct revenue-producing component of the entity stating that this is an improper restriction unsupported by the statute. The comptroller declined to withdraw the amendment. The amended definition is consistent with the franchise tax statute as Tax Code, §171.1011(i) also provides that a payment made under an ordinary contract for the provision of services in the regular course of business may not be excluded from revenue. The definition is also consistent with Generally Accepted Accounting Principles and the Internal Revenue Code.

This amendment is adopted under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

The amendment implements Tax Code, §§171.006, 171.101, 171.1011(j) and 171.1013.

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 December 11, 2009.

TRD-200905749
Ashley Harden
General Counsel
Comptroller of Public Accounts
Effective date: December 31, 2009
Proposal publication date: October 30, 2009
For further information, please call: (512) 475-0387

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34 TAC §3.590

The Comptroller of Public Accounts adopts an amendment to §3.590, concerning margin: combined reporting, without changes to the proposed text as published in the October 30, 2009, issue of the *Texas Register* (34 TexReg 7576).

Subsection (d)(1)(A) is amended to delete the figure $300,000 from the no tax due limit. House Bill 4765, 81st Legislature, 2009, increases the no tax due threshold to $1 million for reports due on or after January 1, 2010 and to $600,000 for reports due on or after January 1, 2012.

Subsection (d)(3) is amended to delete the figure $300,000 as the wages and cash compensation limitation. This paragraph now refers to §3.589(c)(1) of this title (relating to Margin: Compensation) for the limitation amounts as Tax Code, §171.006 requires an adjustment, in even-numbered years, to the maximum per-person wage and cash compensation deduction based on the consumer price index.

Subsection (f)(2) is amended to clarify how to report for a member of a combined group that has a different accounting period.

Subsection (j) is amended to clarify that a combined group will determine its eligibility for the 0.5% tax rate, discounts and E-Z Computation based on the total revenue of the combined group as a whole after eliminations.

Subsection (k)(1) and (2) are amended to reflect the comptroller's new policy, effective for entities that become subject to the franchise tax on or after October 4, 2009, that allows a taxable entity to file an annual report as its first franchise tax report.

Subsection (k)(3)(A) is amended to clarify that a final report must be filed if every member of a combined group ceases doing business in Texas.

No comments were received regarding adoption of the amendment.

This amendment is adopted under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

The amendment implements Tax Code, §§171.0011, 171.002, 171.0021, 171.1014, 171.1016, 171.152, 171.1532, 171.201, and 171.202.

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 December 11, 2009.

TRD-200905750
Ashley Harden
General Counsel
Comptroller of Public Accounts
Effective date: December 31, 2009
Proposal publication date: October 30, 2009
For further information, please call: (512) 475-0387

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34 TAC §3.591

The Comptroller of Public Accounts adopts an amendment to §3.591, concerning margin: apportionment, without changes to the proposed text as published in the October 30, 2009, issue of the *Texas Register* (34 TexReg 7581).

Language is added in subsection (a) to indicate that, where noted, the provisions of this section apply to reports other than those originally due on or after January 1, 2008.

Subsection (e)(16) is amended to implement House Bill 4611, 81st Legislature, 2009. Effective for reports originally due on or after January 1, 2010, if a lending institution categorizes a loan or security as "Securities Available for Sale" or "Trading Securities" under Financial Accounting Standard No. 115, the gross proceeds of the sale of that loan or security are considered gross receipts. Subsection (e)(19) is amended to clarify that the sourcing of a passive entity's net distributive loss is the principal place of business of the passive entity. The reference to paragraph (30) in subsection (e)(20) has been corrected to reference paragraph (29).

No comments were received regarding adoption of the amendment.

This amendment is adopted under Tax Code, §111.002, 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.

The amendment implements Tax Code, §§171.103, 171.1055, 171.106, and 171.1121.

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 December 11, 2009.

TRD-200905751
Ashley Harden
General Counsel
Comptroller of Public Accounts
Effective date: December 31, 2009
Proposal publication date: October 30, 2009
For further information, please call: (512) 475-0387

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34 TAC §3.593

The Comptroller of Public Accounts adopts an amendment to §3.593, concerning margin: franchise tax credits, without changes to the proposed text as published in the October 30, 2009, issue of the *Texas Register* (34 TexReg 7585). This section is adopted to implement House Bill 469, 81st Legislature, 2009.

Language is added in subsection (a) to indicate that, where noted, the provisions of this section apply to reports other than those originally due on or after January 1, 2008.

Subsection (b) is amended to add the definition of a clean energy project.

Subsection (i) is added to implement House Bill 469, 81st Legislature, 2009, which provides a franchise tax credit to entities implementing a clean energy project.

No comments were received regarding adoption of the amendment.

This amendment is adopted under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

The amendment implements Government Code, Chapter 490, Subchapter H.

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 December 11, 2009.

TRD-200905752
Ashley Harden
General Counsel
Comptroller of Public Accounts
Effective date: December 31, 2009
Proposal publication date: October 30, 2009
For further information, please call: (512) 475-0387

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CHAPTER 9. PROPERTY TAX ADMINISTRATION

SUBCHAPTER C. APPRAISAL DISTRICT ADMINISTRATION

34 TAC §9.415

The Comptroller of Public Accounts adopts an amendment to §9.415, concerning applications for property tax exemptions, with changes to the proposed text as published in the October 30, 2009, issue of the *Texas Register* (34 TexReg 7587). The comptroller is not required by statute to prescribe the forms previously adopted by reference by this rule and this amendment deletes reference to the forms.

The rule is being amended to delete the adoption by reference of model forms included in the rule. The amendment to the rule is adopted to remove provisions concerning model forms that are not required by law to be prescribed by the Comptroller of Public Accounts.

The comptroller received a comment from the Harris County Appraisal District commenting that the proposed amendment seemed inconsistent with Tax Code, §5.07 and §11.43 and suggesting that mandatory forms make an important contribution to consistency in administering exemptions across the state. The comptroller agrees with this comment and has incorporated the recommendation and made edits to subsection (c).

The amendment is adopted under Tax Code, §111.002 and §111.0022, which provide the comptroller with the authority to adopt rules for the administration and enforcement of the Tax Code and programs or functions assigned to the comptroller by law.

The amendment does not affect any statute, article, or section of the Tax Code.

§9.415. Applications for Property Tax Exemptions.

(a) With the application for exemption for residence homesteads, the appraisal office shall:

(1) provide a list of taxing units served by the appraisal district, together with all residential homestead exemptions each offers; or

(2) provide the appraisal district's name and appraisal district's phone number on the form, with an instruction that the property owner may call the appraisal district to determine what homestead exemptions are offered by the property owner's taxing units.

(b) If the chief appraiser learns of the death of a person qualified for over-65 or disabled homestead exemptions (Tax Code, §11.13) and it appears that the person's spouse has acquired ownership of the homestead, the chief appraiser should require the surviving spouse to file a new homestead exemption application. Based on the information provided in the new application, the chief appraiser shall determine whether the surviving spouse qualifies for homestead exemptions, including over-65 or disabled exemptions, and whether the surviving spouse may retain the tax ceiling for school tax purposes established on the homestead by the decedent.

(c) The comptroller may prescribe forms for use in the administration of the ad valorem tax exemptions. The prescribed forms will not be adopted by rule unless required by statute. If a form is prescribed for a particular purpose, the content of a form used by the appraisal district must comply with the most recently prescribed form as of the date specified.

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 December 14, 2009.

TRD-200905804
Ashley Harden
General Counsel
Comptroller of Public Accounts
Effective date: January 3, 2010
Proposal publication date: October 30, 2009
For further information, please call: (512) 475-0387

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SUBCHAPTER H. TAX RECORD REQUIREMENTS

34 TAC §9.3044

The Comptroller of Public Accounts adopts an amendment to §9.3044, concerning appointment of agents for property taxes, without changes to the proposed text as published in the October 30, 2009, issue of the *Texas Register* (34 TexReg 7589). Tax Code, §1.111(h) requires the comptroller to prescribe forms for the designation of agents for property taxes.

The rule is being amended to adopt by reference amended form 50-162, for appointment of agent for property taxes and amended form 50-241, for appointment of agent for single-family residential property tax matters. The amendment to the forms is to implement a provision of House Bill 1203, 81st Legislature, 2009, effective June 26, 2009, which states that a form designating an agent cannot be signed by the person being designated as the agent. Reference to forms 50-162-1 and 50-241-1 is amended throughout the rule to correct the form numbers to reflect 50-162 and 50-241.

No comments were received regarding adoption of the amendment.

The amendment is adopted under Tax Code, §1.111(h), which authorizes the comptroller to prescribe forms concerning the representation of a property owner by an agent under Tax Code, §1.111.

The amendment implements Tax Code, §1.111, House Bill 1203 adopted in 2009 by the 81st Legislature.

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 December 14, 2009.

TRD-200905829
Ashley Harden
General Counsel
Comptroller of Public Accounts
Effective date: January 3, 2010
Proposal publication date: October 30, 2009
For further information, please call: (512) 475-0387

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PART 5. TEXAS COUNTY AND DISTRICT RETIREMENT SYSTEM

CHAPTER 107. MISCELLANEOUS RULES

34 TAC §107.17

The Texas County and District Retirement System adopted new §107.17 concerning the annual allocation of net investment income or loss prescribed in Government Code, §845.315. This section is adopted without changes to the proposed text as published in the October 30, 2009 issue of the *Texas Register* (34 TexReg 7590). The adopted section authorized the board of trustees to adopt rules to determine the methodology to be used in the annual allocation of a portion of the system's net investment income or loss for each calendar year to the accounts of certain participating subdivisions.

No comments were received regarding the adoption of this section.

The rule 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, §845.315(a)(5) which gives the board of trustees authority to allocate the net investment income or loss for the year.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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

TRD-200905638
W. James Nabholz, III
General Counsel
Texas County and District Retirement System
Effective date: December 27, 2009
Proposal publication date: October 30, 2009
For further information, please call: (512) 637-3355

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 6. TEXAS DEPARTMENT OF CRIMINAL JUSTICE

CHAPTER 155. REPORTS AND INFORMATION GATHERING
SUBCHAPTER D. VENDOR PROTEST PROCEDURES

37 TAC §155.41

The Texas Board of Criminal Justice adopts new §155.41, concerning Procedures for Resolving Vendor Protests, without changes to the proposed text as published in the September 4, 2009, issue of the *Texas Register* (34 TexReg 6099).

The purpose of the new rule is to provide a protest procedure to be used by an actual or prospective bidder, offeror, or contractor who is aggrieved in connection with the solicitation, evaluation, or award of a contract by the Texas Department of Criminal Justice (TDCJ).

No comments were received.

The new rule is adopted under Texas Government Code §2155.076.

Cross Reference to Statutes: Texas Government Code §492.013.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 14, 2009.

TRD-200905800
Melinda Hoyle Bozarth
General Counsel
Texas Department of Criminal Justice
Effective date: January 3, 2010
Proposal publication date: September 4, 2009
For further information, please call: (936) 437-6003

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CHAPTER 159. SPECIAL PROGRAMS

37 TAC §159.3

The Texas Board of Criminal Justice adopts the repeal of §159.3, concerning Continuity of Care System for Offenders with Mental Impairments/Memorandum of Understanding, without changes to the proposal as published in the October 23, 2009, issue of the *Texas Register* (34 TexReg 7307).

The purpose of the repeal is to provide flexibility to the Texas Department of Criminal Justice (TDCJ) in negotiating the memorandum of understanding with the Texas Department of State Health Services, the Texas Department of Public Safety, and 122 community supervision and corrections departments.

No comments were received.

The repeal is adopted under Texas Health and Safety Code, §614.013.

Cross Reference to Statutes: Texas Government Code §492.013.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 14, 2009.

TRD-200905801
Melinda Hoyle Bozarth
General Counsel
Texas Department of Criminal Justice
Effective date: January 3, 2010
Proposal publication date: October 23, 2009
For further information, please call: (936) 437-6003

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PART 7. TEXAS COMMISSION ON LAW ENFORCEMENT OFFICER STANDARDS AND EDUCATION

CHAPTER 211. ADMINISTRATION

37 TAC §211.3

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) adopts an amendment to §211.3, concerning Public Information, without changes to the proposed text as published in the September 25, 2009, issue of the *Texas Register* (34 TexReg 6618) and will not be republished.

The amendment adds language to 37 TAC §211.3, Public Information. Subsection (c)(4) is added to include the Commission's jurisdictional complaint process. Subsection (d) is amended to reflect the effective date of the changes.

No comments were received regarding adoption of this amendment.

The amendment is adopted under Texas Occupations Code §1701.202, Complaints.

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 December 9, 2009.

TRD-200905692
Timothy A. Braaten
Executive Director
Texas Commission on Law Enforcement Officer Standards and Education
Effective date: January 14, 2010
Proposal publication date: September 25, 2009
For further information, please call: (512) 936-7713

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37 TAC §211.16

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) adopts new §211.16, concerning Establishment of an Appointing Entity, without changes to the proposed text as published in the September 25, 2009, issue of the *Texas Register* (34 TexReg 6619) and will not be republished.

New 37 TAC §211.16(a) identifies the effective date for law enforcement agency applications. Subsection (b) identifies the specific information required for a law enforcement agency reporting number. Subsection (c) identifies the requirements for correctional facilities. Subsection (d) identifies the requirements for consolidated emergency telecommunications centers. Subsection (e) identifies the requirements for probation or parole departments. Subsection (f) reflects the effective date.

No comments were received regarding adoption of this new section.

The new section is adopted under Texas Occupations Code §1701.163, Information Provided by Commissioning Entities.

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 December 9, 2009.

TRD-200905709
Timothy A. Braaten
Executive Director
Texas Commission on Law Enforcement Officer Standards and Education
Effective date: January 14, 2010
Proposal publication date: September 25, 2009
For further information, please call: (512) 936-7713

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37 TAC §211.19

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) adopts an amendment to §211.19, concerning Forms and Applications, without changes to the proposed text as published in the September 25, 2009, issue of the *Texas Register* (34 TexReg 6620) and will not be republished.

The amendment adds language to 37 TAC §211.19, Forms and Applications. Subsection (a) is added to incorporate electronic submission of documents. The remaining subsections have been re-lettered. Subsection (h) is amended to reflect the effective date.

No comments were received regarding adoption of this amendment.

The amendment is adopted under Texas Occupations Code §1701.153, Electronic Submission of Forms, Data, and Documents.

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 December 9, 2009.

TRD-200905693

Timothy A. Braaten

Executive Director

Texas Commission on Law Enforcement Officer Standards and Education

Effective date: January 14, 2010

Proposal publication date: September 25, 2009

For further information, please call: (512) 936-7713

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37 TAC §211.26

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) adopts new §211.26, concerning Law Enforcement Agency Audits, without changes to the proposed text as published in the September 25, 2009, issue of the *Texas Register* (34 TexReg 6620) and will not be republished.

New 37 TAC §211.26(a) requires the Commission to audit all law enforcement agencies at least once every five years. Subsection (b) identifies the documents to be reviewed during an audit. Subsection (c) identifies parties that will be notified of the audit results. Subsection (d) addresses the correction of deficiencies. Subsection (e) identifies the commission to allow an administrative penalty and/or disciplinary action. Subsection (f) reflects the effective date.

No comments were received regarding adoption of this new section.

The new section is adopted under Texas Occupations Code §1701.162, Records and Audit Requirements.

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 December 9, 2009.

TRD-200905694

Timothy A. Braaten

Executive Director

Texas Commission on Law Enforcement Officer Standards and Education

Effective date: January 14, 2010

Proposal publication date: September 25, 2009

For further information, please call: (512) 936-7713

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37 TAC §211.27

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) adopts the repeal of §211.27, concerning Reporting Responsibilities of Individuals, without changes to the proposal as published in the September 25, 2009, issue of the *Texas Register* (34 TexReg 6621) and will not be republished.

The section adopted for repeal addressed the reporting requirements of individuals. The section is repealed and a new section is adopted that identifies the reporting requirements for individuals already licensed and those awaiting licensure.

No comments were received regarding adoption of the repeal.

The repeal is adopted under Texas Occupations Code, §1701.3075, Qualified Applicant Awaiting Appointment.

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 December 10, 2009.

TRD-200905735

Timothy A. Braaten

Executive Director

Texas Commission on Law Enforcement Officer Standards and Education

Effective date: January 14, 2010

Proposal publication date: September 25, 2009

For further information, please call: (512) 936-7713

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37 TAC §211.27

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) adopts new §211.27, concerning Reporting Responsibilities of Individuals, without changes to the proposed text as published in the September 25, 2009, issue of the *Texas Register* (34 TexReg 6622) and will not be republished.

The new section identifies the reporting requirements for individuals already licensed and those awaiting licensure. These requirements include: name and address changes; arrests, charges or indictments; final disposition of criminal actions; military separations; and the effective date of the section. This section is necessary to incorporate the changes to Texas Occupations Code, §1701.307, from House Bill 2799.

No comments were received regarding adoption of this new section.

The new section is adopted under Texas Occupations Code, §1701.3075, Qualified Applicant Awaiting Appointment.

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 December 10, 2009.

TRD-200905736

Timothy A. Braaten

Executive Director

Texas Commission on Law Enforcement Officer Standards and Education

Effective date: January 14, 2010

Proposal publication date: September 25, 2009

For further information, please call: (512) 936-7713

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37 TAC §211.29

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) adopts an amendment to §211.29, concerning Responsibilities of Agency Chief Administrators, without changes to the proposed text as published in the September 25, 2009, issue of the *Texas Register* (34 TexReg 6622) and will not be republished.

The amendment adds language to 37 TAC §211.29, Responsibilities of Agency Chief Administrators. Subsection (b) adds the reporting requirements of incident-based data collected for racial profiling. The following subsections were re-lettered due to the addition. Subsection (m) is amended to reflect the effective date.

No comments were received regarding adoption of this amendment.

The amendment is adopted under Texas Occupations Code §1701.164, Collection of Certain Incident-Based Data Submitted by Law Enforcement Agencies.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 9, 2009.

TRD-200905695
Timothy A. Braaten
Executive Director
Texas Commission on Law Enforcement Officer Standards and Education
Effective date: January 14, 2010
Proposal publication date: September 25, 2009
For further information, please call: (512) 936-7713

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CHAPTER 215. TRAINING AND EDUCATIONAL PROVIDERS AND RELATED MATTERS

37 TAC §215.13

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) adopts an amendment to §215.13, concerning Risk Assessment, without changes to the proposed text as published in the September 25, 2009, issue of the *Texas Register* (34 TexReg 6623) and will not be republished.

The amendment adds language to 37 TAC §215.13, Risk Assessment. Subsection (a) is amended to reflect the terminology change. Subsection (a)(1) - (12) is amended for renumbering. Subsection (b) is amended to reflect the terminology change. Subsection (b)(1) - (10) is amended for renumbering. Subsection (c) is amended to reflect the terminology change. Subsection (c)(1) - (11) is amended for renumbering. Subsection (d) is amended for grammatical change. Subsection (e) is added to include a timeline and procedure for tracking a training provider's progress toward compliance. Subsection (g) is amended to reflect the terminology change. Subsection (h) is amended to reflect the effective date.

No comments were received regarding adoption of this amendment.

The amendment is adopted under Texas Occupations Code §1701.254, Risk Assessment and Inspections.

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 December 9, 2009.

TRD-200905696
Timothy A. Braaten
Executive Director
Texas Commission on Law Enforcement Officer Standards and Education
Effective date: January 14, 2010
Proposal publication date: September 25, 2009
For further information, please call: (512) 936-7713

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CHAPTER 217. LICENSING REQUIREMENTS

37 TAC §217.7

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) adopts an amendment to §217.7, concerning Reporting the Appointment and Termination of a Licensee, without changes to the proposed text as published in the September 25, 2009, issue of the *Texas Register* (34 TexReg 6625) and will not be republished.

The amendment adds language to 37 TAC §217.7, Reporting the Appointment and Termination of a Licensee. Subsection (a) is amended to allow for the electronic submission of requests. Subsection (b) is added to identify the verification requirements. The following subsections were re-lettered as a result. Subsection (f)(4) is amended for a grammatical change. Subsection (j) is amended to reflect the effective date.

No comments were received regarding adoption of this amendment.

The amendment is adopted under Texas Occupations Code §1701.451, Preemployment Request for Employment Termination Report and Submission of Background Check Confirmation Form.

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 December 9, 2009.

TRD-200905697
Timothy A. Braaten
Executive Director
Texas Commission on Law Enforcement Officer Standards and Education
Effective date: January 14, 2010
Proposal publication date: September 25, 2009
For further information, please call: (512) 936-7713

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37 TAC §217.8

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) adopts an amendment to §217.8, concerning Contesting an Employment Termination Report, without changes to the proposed text as published in the September 25, 2009, issue of the *Texas Register* (34 TexReg 6626) and will not be republished.

The amendment adds language to 37 TAC §217.8, Contesting an Employment Termination Report. Subsection (a) is amended to clarify a reference to another rule. Subsection (d) is amended to reflect a procedural change. Subsection (e) is amended to identify the commission is not a party to these contested cases. Subsection (j) is amended to reflect the effective date.

No comments were received regarding adoption of this amendment.

The amendment is adopted under Texas Occupations Code §1701.4525, Request for Correction of Report; Administrative Penalty; Hearing; Appeal.

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 December 9, 2009.

TRD-200905698

Timothy A. Braaten

Executive Director

Texas Commission on Law Enforcement Officer Standards and Education

Effective date: January 14, 2010

Proposal publication date: September 25, 2009

For further information, please call: (512) 936-7713

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37 TAC §217.11

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) adopts the repeal of §217.11, concerning Legislatively Required Continuing Education for Licensees, without changes to the proposal as published in the September 25, 2009, issue of the *Texas Register* (34 TexReg 6627).

The section adopted for repeal addressed the continuing education requirements of licensees. The section is repealed and a new section is adopted that identifies the continuing education requirements for individuals licensed as peace officers, county jailers, and reserves.

No comments were received regarding the adoption of this repeal.

The repeal is adopted under Texas Occupations Code, Chapter 1701, §1701.351, Continuing Education Required for Peace Officers.

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 December 10, 2009.

TRD-200905721

Timothy A. Braaten

Executive Director

Texas Commission on Law Enforcement Officer Standards and Education

Effective date: January 14, 2010

Proposal publication date: September 25, 2009

For further information, please call: (512) 936-7713

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37 TAC §217.11

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) adopts new §217.11, concerning Legislatively Required Continuing Education for Licensees, with changes to the proposed text as published in the September 25, 2009, issue of the *Texas Register* (34 TexReg 6627) and will be republished.

The new 37 TAC §217.11, Legislatively Required Continuing Education for Licensees, identifies the continuing education requirements for individuals licensed as peace officers, county jailers, and reserves. These requirements include: changes to the laws of this state and of the United States pertaining to peace officers; civil rights, racial sensitivity, and cultural diversity; de-escalation and crisis intervention techniques to facilitate interaction with persons with mental impairments; and unless determined by the agency head to be inconsistent with the officer's assigned duties: the recognition and documentation of cases that involve child abuse or neglect, family violence, and sexual assault; issues concerning sex offender characteristics, and the effective date of this section.

No comments were received regarding adoption of this new section.

The new section is adopted under Texas Occupations Code §1701.351, Continuing Education Required for Peace Officers.

§217.11. Legislatively Required Continuing Education for Licensees.

(a) Individuals appointed as peace officers shall complete at least 40 hours of continuing education training and must complete a training and education program that covers recent changes to the laws of this state and of the United States pertaining to peace officers every 24-month unit of a training cycle.

(b) Each agency that appoints or employs peace officers, reserve law enforcement officers, jailers, or public security officers shall provide each peace officer, reserve law enforcement officer, jailer, or public security officer whom it appoints or employs with a continuing education program at least once every 48-month training cycle. Part of this training program consists of topics selected by the agency. This rule does not limit the number of hours of continuing education an agency may provide.

(c) Part of the legislatively required peace officer training in every 48-month training cycle must include the curricula and learning objectives developed by the commission, to include:

(1) for an officer holding a basic proficiency certificate or less, not more than 20 hours of education and training that contain curricula incorporating the learning objectives developed by the commission regarding:

(A) civil rights, racial sensitivity, and cultural diversity;

(B) de-escalation and crisis intervention techniques to facilitate interaction with persons with mental impairments; and

(C) unless determined by the agency head to be inconsistent with the officer's assigned duties:

(i) the recognition and documentation of cases that involve child abuse or neglect, family violence, and sexual assault; and

(ii) issues concerning sex offender characteristics; and

(2) supervision issues for each peace officer appointed to their first supervisory position, this training must be completed within 24 months following the date of appointment as a supervisor.

(d) Individuals licensed as reserve law enforcement officers, jailers, or public security officers shall meet the training requirements for civil rights, racial sensitivity, and cultural diversity in every 48-month training cycle.

(e) A peace officer first licensed on or after January 1, 2011, must complete a basic training program on the trafficking of persons within one year of licensure.

(f) For appointed or elected constables:

(1) An individual appointed or elected to that individual's first position as constable must complete at least 40 hours of initial training for new constables in accordance with §1701.3545(c), Texas Occupations Code.

(2) Each constable must complete at least 40 hours of continuing education in accordance with §1701.3545(b), Texas Occupations Code, each 48-month cycle.

(g) Each deputy constable shall also complete a 20 hour course of training in civil process during each current training cycle.

(h) In accordance with §96.641, Texas Education Code, individuals appointed as "chief" or "police chief" of a police department:

(1) A newly appointed or elected police chief shall complete the initial training program for new chiefs not later than the second anniversary of that individual's appointment or election as chief.

(2) Each police chief must receive at least 40 hours of continuing education provided by the Bill Blackwood Law Enforcement Management Institute each 24-month unit.

(i) The commission shall provide adequate notice to agencies and licensees of impending non-compliance with the legislatively required continuing education.

(j) The chief administrator of an agency that has licensees who are in non-compliance shall, within 30 days of receipt of notice of non-compliance, submit a report to the commission explaining the reasons for such non-compliance.

(k) The commission may take disciplinary action against a licensee for failure to complete the legislatively required continuing education program at least once every training unit.

(l) The commission may take disciplinary action against a licensee for failure to complete the appropriate training within a training cycle.

(m) Individuals licensed as peace officers shall complete the legislatively required continuing education program required under this section beginning in the first complete 24-month unit immediately following the date of licensing.

(n) Individuals licensed as county jailers shall complete the legislatively required continuing education program required under this section beginning in the first complete 48-month cycle immediately following the date of licensing.

(o) All peace officers must meet all continuing education requirements except where exempt by law.

(p) The effective date of this section is January 14, 2010.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 9, 2009.

TRD-200905699
Timothy A. Braaten
Executive Director
Texas Commission on Law Enforcement Officer Standards and Education
Effective date: January 14, 2010
Proposal publication date: September 25, 2009
For further information, please call: (512) 936-7713

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37 TAC §217.21

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) adopts an amendment to §217.21, concerning Firearms Proficiency Requirements, without changes to the proposed text as published in the September 25, 2009, issue of the *Texas Register* (34 TexReg 6629) and will not be republished.

The amendment adds language to 37 TAC §217.21, Firearms Proficiency Requirements. Subsection (a) is amended to require an agency that employs or appoints one officer to qualify at least once per year. Subsection (c)(3) is amended for clarification. Subsection (f) is amended to reflect the effective date.

No comments were received regarding adoption of this amendment.

The amendment is adopted under Texas Occupations Code §1701.355, Continuing Demonstration of Weapons Proficiency.

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 December 9, 2009.

TRD-200905686
Timothy A. Braaten
Executive Director
Texas Commission on Law Enforcement Officer Standards and Education
Effective date: January 14, 2010
Proposal publication date: September 25, 2009
For further information, please call: (512) 936-7713

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CHAPTER 221. PROFICIENCY CERTIFICATES AND OTHER POST-BASIC LICENSES

37 TAC §221.1

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) adopts an amendment to

§221.1, concerning Proficiency Certificate Requirements, without changes to the proposed text as published in the September 25, 2009, issue of the *Texas Register* (34 TexReg 6630) and will not be republished.

The amendment adds language to 37 TAC §221.1, Proficiency Certificate Requirements. Subsection (a) is added to clarify proficiency certificates issued by the commission. Subsection (b) is amended to include the Firearms Proficiency for Juvenile Probation officers. Subsection (c) is amended to identify the items that cause an application to be refused. Subsection (d) is amended to allow for cancellation of unqualified certificates. Subsection (e) is amended to allow for cancellation of false applications. Subsection (f) is amended to specify that academic degrees must be from an accredited college or university. Subsection (g) is amended to reflect the effective date.

No comments were received regarding adoption of this amendment.

The amendment is adopted under Texas Occupations Code §1701.258, Firearms Training Program for Juvenile Probation Officers and §1701.402, Proficiency Certificates.

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 December 9, 2009.

TRD-200905708
Timothy A. Braaten
Executive Director
Texas Commission on Law Enforcement Officer Standards and Education
Effective date: January 14, 2010
Proposal publication date: September 25, 2009
For further information, please call: (512) 936-7713

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37 TAC §221.3

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) adopts an amendment to §221.3, concerning Peace Officer Proficiency, without changes to the proposed text as published in the September 25, 2009, issue of the *Texas Register* (34 TexReg 6631) and will not be republished.

The amendment adds language to 37 TAC §221.3, Peace Officer Proficiency. Subsection (a)(2) is amended to incorporate the course requirements for Basic Peace Officer certificates. Subsection (b)(2) is amended for a grammatical change. Subsection (b)(3) is amended to incorporate the course requirements for Intermediate Peace Officer certificates. Subsection (c)(2) is amended to incorporate the course requirements for Advanced Peace Officer certificates. Subsection (c)(3) is amended for a grammatical change. Subsection (e) is amended to reflect the effective date.

No comments were received regarding adoption of this amendment.

The amendment is adopted under Texas Occupations Code §1701.402, Proficiency Certificates.

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 December 9, 2009.

TRD-200905700
Timothy A. Braaten
Executive Director
Texas Commission on Law Enforcement Officer Standards and Education
Effective date: January 14, 2010
Proposal publication date: September 25, 2009
For further information, please call: (512) 936-7713

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37 TAC §221.11

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) adopts an amendment to §221.11, concerning Mental Health Officer Proficiency, without changes to the proposed text as published in the September 25, 2009, issue of the *Texas Register* (34 TexReg 6632) and will not be republished.

The amendment adds language to 37 TAC §221.11, Mental Health Officer Proficiency. Subsection (a) is amended to include eligibility to individuals licensed as county jailers. Subsection (a)(7) is amended to reflect the correct title of the required training course. Subsection (b) is amended to reflect the effective date of the changes.

No comments were received regarding adoption of this amendment.

The amendment is adopted under Texas Occupations Code §1701.404, Certification of Officers for Mental Health Assignments.

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 December 9, 2009.

TRD-200905691
Timothy A. Braaten
Executive Director
Texas Commission on Law Enforcement Officer Standards and Education
Effective date: January 14, 2010
Proposal publication date: September 25, 2009
For further information, please call: (512) 936-7713

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37 TAC §221.35

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) adopts new §221.35, concerning Firearms Proficiency for Juvenile Probation Officers, without changes to the proposed text as published in the September 25, 2009, issue of the *Texas Register* (34 TexReg 6633) and will not be republished.

New 37 TAC §221.35(a) identifies the requirements for obtaining this proficiency certificate. Subsection (b) identifies the weapons proficiency requirements for juvenile probation officers. Subsection (c) identifies the expiration date for certificates issued under this section and stipulates requirements for renewal of the certificate for juvenile probation officers. Subsection (d) reflects the effective date.

No comments were received regarding adoption of this new section.

The new section is adopted under Texas Occupations Code §1701.258, Firearms Training Program for Juvenile Probation Officers.

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 December 9, 2009.

TRD-200905710

Timothy A. Braaten

Executive Director

Texas Commission on Law Enforcement Officer Standards and Education

Effective date: January 14, 2010

Proposal publication date: September 25, 2009

For further information, please call: (512) 936-7713

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CHAPTER 223. ENFORCEMENT

37 TAC §223.1

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) adopts an amendment to §223.1, concerning License Action and Notification, without changes to the proposed text as published in the September 25, 2009, issue of the *Texas Register* (34 TexReg 6634) and will not be republished.

The amendment adds language to 37 TAC §223.1, License Action and Notification. Subsection (a) is amended to identify violations by a licensee that the commission may take action on. Subsection (d) is amended to reflect the effective date.

No comments were received regarding adoption of this amendment.

The amendment is adopted under Texas Occupations Code §1701.501, Disciplinary Action.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 9, 2009.

TRD-200905701

Timothy A. Braaten

Executive Director

Texas Commission on Law Enforcement Officer Standards and Education

Effective date: January 14, 2010

Proposal publication date: September 25, 2009

For further information, please call: (512) 936-7713

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37 TAC §223.2

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) adopts new §223.2, concerning Administrative Penalties, without changes to the proposed text as published in the September 25, 2009, issue of the *Texas Register* (34 TexReg 6634) and will not be republished.

New 37 TAC §223.2(a) identifies that law enforcement or governmental agencies are subject to an administrative penalty. Subsection (b) identifies notification requirements of an administrative penalty. Subsection (c) identifies the criteria used to determine administrative penalties. Subsection (d) reflects the effective date.

No comments were received regarding adoption of this new section.

The new section is adopted under Texas Occupations Code §1701.507, Administrative Penalties.

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 December 9, 2009.

TRD-200905702

Timothy A. Braaten

Executive Director

Texas Commission on Law Enforcement Officer Standards and Education

Effective date: January 14, 2010

Proposal publication date: September 25, 2009

For further information, please call: (512) 936-7713

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37 TAC §223.15

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) adopts an amendment to §223.15, concerning Suspension of License, without changes to the proposed text as published in the September 25, 2009, issue of the *Texas Register* (34 TexReg 6635) and will not be republished.

The amendment adds language to 37 TAC §223.15, Suspension of License. Subsection (a)(3) is amended to identify convictions that would cause the commission to take action against a licensee. Subsection (a)(4) is amended to identify court ordered community supervision situations that would cause the commission to take action against a licensee. Subsection (q) is amended to reflect the effective date.

No comments were received regarding adoption of this amendment.

The amendment is adopted under Texas Occupations Code §1701.1524, Rules Relating to Consequences of Criminal Conviction or Deferred Adjudication.

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 December 9, 2009.

TRD-200905703
Timothy A. Braaten
Executive Director
Texas Commission on Law Enforcement Officer Standards and Education
Effective date: January 14, 2010
Proposal publication date: September 25, 2009
For further information, please call: (512) 936-7713

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PART 9. TEXAS COMMISSION ON JAIL STANDARDS

CHAPTER 269. RECORDS AND PROCEDURES

SUBCHAPTER A. GENERAL

37 TAC §269.1

The Texas Commission on Jail Standards adopts amendments to §269.1, concerning Deaths in Custody Reports, without changes to the proposed text as published in the October 2, 2009, issue of the *Texas Register* (34 TexReg 6841).

This amendment is being adopted to comply with changes enacted by the 81st Legislature.

This rule provides requirements for the notification and submission of Deaths in Custody Reports to the Commission.

No comments were received regarding the proposal.

The amendment is adopted under Government Code, Chapter 511 which provides the Texas Commission on Jail Standards with the authority to adopt reasonable rules and procedures establishing standards for the construction, equipment, maintenance and operation of county jails.

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 December 10, 2009.

TRD-200905722
Brandon S. Wood
Assistant Director
Texas Commission on Jail Standards
Effective date: December 30, 2009
Proposal publication date: October 2, 2009
For further information, please call: (512) 463-8236

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CHAPTER 271. CLASSIFICATION AND SEPARATION OF INMATES

37 TAC §271.1

The Texas Commission on Jail Standards adopts amendments to §271.1, concerning Objective Classification Plan, without changes to the proposed text as published in the October 2, 2009, issue of the *Texas Register* (34 TexReg 6841).

This amendment is being adopted to comply with changes enacted by the 81st Legislature.

This rule provides requirements for the assessment of inmates to determine proper housing assignments.

No comments were received regarding the proposal.

The amendment is adopted under Government Code, Chapter 511 which provides the Texas Commission on Jail Standards with the authority to adopt reasonable rules and procedures establishing standards for the construction, equipment, maintenance and operation of county jails.

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 December 10, 2009.

TRD-200905723
Brandon S. Wood
Assistant Director
Texas Commission on Jail Standards
Effective date: December 30, 2009
Proposal publication date: October 2, 2009
For further information, please call: (512) 463-8236

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CHAPTER 273. HEALTH SERVICES

37 TAC §273.2

The Texas Commission on Jail Standards adopts amendments to §273.2, concerning Health Services Plan, without changes to the proposed text as published in the October 2, 2009, issue of the *Texas Register* (34 TexReg 6842).

This amendment is being adopted to comply with changes enacted by the 81st Legislature.

This rule provides requirements for inmate medical, mental and dental services.

No comments were received regarding the proposal.

The amendment is adopted under Government Code, Chapter 511 which provides the Texas Commission on Jail Standards with the authority to adopt reasonable rules and procedures establishing standards for the construction, equipment, maintenance and operation of county jails.

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 December 10, 2009.

TRD-200905724
Brandon S. Wood
Assistant Director
Texas Commission on Jail Standards
Effective date: December 30, 2009
Proposal publication date: October 2, 2009
For further information, please call: (512) 463-8236

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37 TAC §273.4

The Texas Commission on Jail Standards adopts amendments to §273.4, concerning Health Records, with changes to the proposed text as published in the October 2, 2009, issue of the *Texas Register* (34 TexReg 6842). Subsection (d) updates the name of the agency from "Texas Department of Health (TDH)" to "Department of State Health Services (DSHS)."

This amendment is being adopted to comply with changes enacted by the 81st Legislature.

This rule provides requirements for inmate health records.

No comments were received regarding the proposal.

The amendment is adopted under Government Code, Chapter 511 which provides the Texas Commission on Jail Standards with the authority to adopt reasonable rules and procedures establishing standards for the construction, equipment, maintenance and operation of county jails.

§273.4. Health Records.

(a) The health services plan shall include procedures for the maintenance of a separate health record on each inmate. The record shall include a health screening procedure administered by health personnel or by a trained booking officer upon the admission of the inmate to the facility and shall cover, but shall not be limited to, the following items:

(1) health history;

(2) current illnesses (prescriptions, special diets, and therapy);

(3) known pregnancy;

(4) current medical, mental, and dental care and treatment;

(5) behavioral observation, including state of consciousness and mental status;

(6) inventory of body deformities, ease of movement, markings, condition of body orifices, and presence of lice and vermin.

(b) Separate health records shall reflect all subsequent findings, diagnoses, treatment, disposition, special housing assignments, medical isolation, distribution of medications, and the name of any institution to which the inmate's health record has been released.

(c) The Texas Uniform Health Status Update form, in the format prescribed by the Commission, shall be completed and forwarded to the receiving criminal justice entity at the time an inmate is transferred or released from custody.

(d) Each facility shall report to the Department of State Health Services (DSHS) the release of an inmate who is receiving treatment for tuberculosis in accordance with DSHS Guidelines.

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 December 10, 2009.

TRD-200905725
Brandon S. Wood
Assistant Director
Texas Commission on Jail Standards
Effective date: December 30, 2009
Proposal publication date: October 2, 2009
For further information, please call: (512) 463-8236

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37 TAC §273.5

The Texas Commission on Jail Standards adopts amendments to §273.5, concerning Mental Disabilities/Suicide Prevention Plan, without changes to the proposed text as published in the October 2, 2009, issue of the *Texas Register* (34 TexReg 6843).

This amendment is being adopted to comply with changes enacted by the 81st Legislature.

This rule provides requirements for the inmate mental disabilities/suicide prevention plan and notification of a magistrate.

No comments were received regarding the proposal.

The amendment is adopted under Government Code, Chapter 511 which provides the Texas Commission on Jail Standards with the authority to adopt reasonable rules and procedures establishing standards for the construction, equipment, maintenance and operation of county jails.

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 December 10, 2009.

TRD-200905726
Brandon S. Wood
Assistant Director
Texas Commission on Jail Standards
Effective date: December 30, 2009
Proposal publication date: October 2, 2009
For further information, please call: (512) 463-8236

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CHAPTER 281. FOOD SERVICE

37 TAC §281.3

The Texas Commission on Jail Standards adopts amendments to §281.3, concerning Balanced Diet, without changes to the proposed text as published in the October 2, 2009, issue of the *Texas Register* (34 TexReg 6843).

This amendment is adopted to comply with changes enacted by the 81st Legislature.

This rule provides requirements for inmate meal services and balanced diets.

No comments were received regarding the proposal.

The amendment is adopted under Government Code, Chapter 511 which provides the Texas Commission on Jail Standards

with the authority to adopt reasonable rules and procedures establishing standards for the construction, equipment, maintenance and operation of county jails.

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 December 10, 2009.

TRD-200905727
Brandon S. Wood
Assistant Director
Texas Commission on Jail Standards
Effective date: December 30, 2009
Proposal publication date: October 2, 2009
For further information, please call: (512) 463-8236

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CHAPTER 289. WORK ASSIGNMENTS

37 TAC §289.1

The Texas Commission on Jail Standards adopts amendments to §289.1, concerning Assignment and Supervision, without changes to the proposed text as published in the October 2, 2009, issue of the *Texas Register* (34 TexReg 6844).

This amendment is adopted to comply with changes enacted by the 81st Legislature.

This rule provides requirements for inmate work assignments.

No comments were received regarding the proposal.

The amendment is adopted under Government Code, Chapter 511 which provides the Texas Commission on Jail Standards with the authority to adopt reasonable rules and procedures establishing standards for the construction, equipment, maintenance and operation of county jails.

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 December 10, 2009.

TRD-200905728
Brandon S. Wood
Assistant Director
Texas Commission on Jail Standards
Effective date: December 30, 2009
Proposal publication date: October 2, 2009
For further information, please call: (512) 463-8236

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 15. TEXAS VETERANS COMMISSION

CHAPTER 459. TRANSPORTATION SUPPORT SERVICES

40 TAC §§459.1 - 459.6

The Texas Veterans Commission (Commission) adopts new Chapter 459, §§459.1 - 459.6, concerning Transportation Support Services (TSS). The new sections are adopted without changes to the proposed text as published in the October 16, 2009, issue of the *Texas Register* (34 TexReg 7192) and will not be republished.

The new rules are authorized under Texas Government Code, §434.010, granting the Commission the authority to establish rules.

The purpose of TSS is to support veterans who are receiving employment services from a Veterans Employment Representative by providing temporary transportation assistance in order to obtain or retain employment.

There were no comments received on the new rules.

The new rules are adopted under Texas Government Code §434.010, which provides general authority for the Commission to adopt rules necessary for its administration.

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 December 8, 2009.

TRD-200905670
Tina M. Carnes
General Counsel
Texas Veterans Commission
Effective date: December 28, 2009
Proposal publication date: October 16, 2009
For further information, please call: (512) 463-1981

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PART 20. TEXAS WORKFORCE COMMISSION

CHAPTER 800. GENERAL ADMINISTRATION
SUBCHAPTER A. GENERAL PROVISIONS

40 TAC §800.9

The Texas Workforce Commission (Commission) adopts the following new section to Chapter 800, relating to General Administration, *without changes*, as published in the October 9, 2009, issue of the *Texas Register* (34 TexReg 7045):

Subchapter A. General Provisions, §800.9

PART I. PURPOSE, BACKGROUND, AND AUTHORITY

PART II. EXPLANATION OF INDIVIDUAL PROVISIONS WITH COMMENTS AND RESPONSES

PART I. PURPOSE, BACKGROUND, AND AUTHORITY

The purpose of the adopted Chapter 800 rule change is to establish rules 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 WITH COMMENTS AND RESPONSES

(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 A. GENERAL PROVISIONS

The Commission adopts the following amendments to Subchapter A:

§800.9. Grants and 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.

NO COMMENTS WERE RECEIVED.

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.

The rule is adopted 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 adopted rule affects Title 4, Texas Labor Code, particularly Chapters 301 and 302.

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 December 8, 2009.

TRD-200905652

Reagan Miller
Deputy Division Director, Workforce Policy and Service Delivery Branch
Texas Workforce Commission
Effective date: December 28, 2009
Proposal publication date: October 9, 2009
For further information, please call: (512) 475-0829

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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) adopts the following amendments to Chapter 801 relating to Local Workforce Development Boards, *without changes,* as published in the October 9, 2009, issue of the *Texas Register* (34 TexReg 7048):

Subchapter B, One-Stop Service Delivery Network, §801.23

PART I. PURPOSE, BACKGROUND, AND AUTHORITY

PART II. EXPLANATION OF INDIVIDUAL PROVISIONS WITH COMMENTS AND RESPONSES

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 WITH COMMENTS AND RESPONSES

(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 adopts 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).

NO COMMENTS WERE RECEIVED.

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.

The rule is adopted 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 adopted 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.

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 December 8, 2009.

TRD-200905653
Reagan Miller
Deputy Division Director, Workforce Policy and Service Delivery Branch
Texas Workforce Commission
Effective date: December 28, 2009
Proposal publication date: October 9, 2009
For further information, please call: (512) 475-0829

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REVIEW OF AGENCY RULES

This section contains notices of state agency rules review as directed by the Texas Government Code, §2001.039. Included here are (1) notices of *plan to review;* (2) notices of *intention to review,* which invite public comment to specified rules; and (3) notices of *readoption,* which summarize public comment to specified rules. The complete text of an agency's *plan to review* is available after it is filed with the Secretary of State on the Secretary of State's web site (http://www.sos.state.tx.us/texreg). The complete text of an agency's rule being reviewed and considered for *readoption* is available in the *Texas Administrative* Code on the web site (http://www.sos.state.tx.us/tac).

For questions about the content and subject matter of rules, please contact the state agency that is reviewing the rules. Questions about the web site and printed copies of these notices may be directed to the *Texas Register* office.

Proposed Rule Reviews

Texas State Cemetery Committee

Title 13, Part 5

In accordance with Texas Government Code, §2001.039, the Texas State Cemetery Committee (the Committee) proposes to review its administrative rules contained in Texas Administrative Code, Title 13, Part 5, Chapter 71, entitled *Texas State Cemetery.*

Chapter 71, entitled *Texas State Cemetery,* relates to the Committee's duties and functions concerning operation and administration of the Texas State Cemetery, including organization, definitions, monuments, vaults and graveliners, cenotaphs, landscaping, designation of special burial areas, cemetery annex, burial reservations, and cancellation of burial reservations.

As required by Texas Government Code, §2001.039, the Committee conducts this review to determine whether the statutory authority and the business reasons for Chapter 71 continue to exist.

Comments on the proposals may be submitted to Kay Molina, General Counsel, Texas Facilities Commission, P.O. Box 13047, Austin, Texas 78711-3047. Comments may also be sent via electronic mail to *rulescomments@tfc.state.tx.us* and should state "Proposed Rule Review, Title 13, Ch. 71" in the subject line of e-mailed comments. Comments must be received no later than thirty (30) days from the date of publication of the proposal in the *Texas Register.*

TRD-200905714
Kay Molina
General Counsel
Texas State Cemetery Committee
Filed: December 9, 2009

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Texas Department of Criminal Justice

Title 37, Part 6

The Texas Board of Criminal Justice (TBCJ) files this notice of intent to review §152.71, Acceptance of Gifts and Grants Related to Buildings for Religious and Programmatic Purposes. This review is conducted pursuant to Texas Government Code §2001.039, which requires rule review every four years.

Comments should be directed to Melinda Hoyle Bozarth, General Counsel, Texas Department of Criminal Justice, P.O. Box 13084, Austin, Texas 78711, Melinda.Bozarth@tdcj.state.tx.us. Written comments from the general public should be received within 30 days of the publication of this proposed rule review.

TRD-200905806
Melinda Hoyle Bozarth
General Counsel
Texas Department of Criminal Justice
Filed: December 14, 2009

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Employees Retirement System of Texas

Title 34, Part 4

The Employees Retirement System of Texas will review and consider whether to re-adopt, re-adopt with amendments, or repeal 34 Texas Administrative Code, Chapter 82, concerning health services in state office complexes in accordance with Chapter 671 of the Texas Government Code. This review is done pursuant to Texas Government Code §2001.039.

The Board will assess whether the reason(s) for adopting or re-adopting this chapter continues to exist. Each section of the chapter will be reviewed to determine whether it is obsolete, reflects current legal and policy considerations, reflects current general provisions in the governance of the Board, and/or whether it is in compliance with Chapter 2001 of the Texas Government Code (Administrative Procedure Act).

Comments on the review may be submitted in writing within 30 days following the publication of this rule review in the *Texas Register* to Paula A. Jones, General Counsel and Chief Compliance Officer, Employees Retirement System of Texas, P.O. Box 13207, Austin, Texas 78711-3207 or you may email Ms. Jones at paula.jones@ers.state.tx.us. The deadline for receiving comments is Monday, January 25, 2010, at 10:00 a.m. Any proposed changes to the sections of this chapter as a result of the review will be published in the Proposed Rules Section of the *Texas Register* and will be open for an additional 30 day public comment period prior to final adoption of any repeal, amendment, or re-adoption.

TRD-200905819
Paula A. Jones
General Counsel and Chief Compliance Officer
Employees Retirement System of Texas
Filed: December 14, 2009

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Texas State Board of Pharmacy

Title 22, Part 15

The Texas State Board of Pharmacy files this notice of intent to review Chapter 291, Subchapter C, §§291.51 - 291.55, concerning Nu-

clear Pharmacies (Class B), pursuant to the Texas Government Code, §2001.039, regarding Agency Review of Existing Rules.

All comments regarding the rule review may be submitted to Allison Benz, R.Ph., M.S., Director of Professional Services, Texas State Board of Pharmacy, 333 Guadalupe Street, Suite 3-600, Austin, Texas 78701, Fax: (512) 305-8082. The public comment period ends on January 29, 2010, at 5:00 p.m.

TRD-200905886
Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
Filed: December 16, 2009

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The Texas State Board of Pharmacy files this notice of intent to review Chapter 305, §305.1 and §305.2, regarding Educational Requirements, pursuant to the Texas Government Code, §2001.039, regarding Agency Review of Existing Rules.

All comments regarding the rule review may be submitted to Allison Benz, R.Ph., M.S., Director of Professional Services, Texas State Board of Pharmacy, 333 Guadalupe Street, Suite 3-600, Austin, Texas 78701, Fax: (512) 305-8082. The public comment period ends on January 29, 2010, at 5:00 p.m.

TRD-200905887
Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
Filed: December 16, 2009

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The Texas State Board of Pharmacy files this notice of intent to review Chapter 309, §§309.1 - 309.8, regarding Substitution of Drug Products, pursuant to the Texas Government Code, §2001.039, regarding Agency Review of Existing Rules.

All comments regarding the rule review may be submitted to Allison Benz, R.Ph., M.S., Director of Professional Services, Texas State Board of Pharmacy, 333 Guadalupe Street, Suite 3-600, Austin, Texas 78701, Fax: (512) 305-8082. The public comment period ends on January 29, 2010, at 5:00 p.m.

TRD-200905888
Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
Filed: December 16, 2009

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Texas Real Estate Commission

Title 22, Part 23

The Texas Real Estate Commission (TREC) proposes to review Chapter 534, General Administration; Chapter 539, Provisions of The Residential Service Company Act; and Chapter 543, Rules Relating to the Provisions of The Texas Timeshare Act in accordance with the Texas Government Code, §2001.039.

Review of the rules under these chapters will determine whether the reasons for adoption of the rules continue to exist. During the review process, TREC may also determine that a specific rule may need to be amended to further refine TREC's legal and policy considerations; whether the rules reflect current TREC procedures; that no changes to a rule as currently in effect are necessary; or that a rule is not longer valid or applicable. Rules will also be combined or reduced for simplification and clarity when feasible. Readopted rules will be noted in the *Texas Register's* Rules Review section without publication of the text. Any proposed amendments or repeal of a rule or chapter as a result of the review will be published in the Proposed Rules section of the *Texas Register* and will be open for an additional 30-day public comment period prior to final adoption or repeal.

TREC invites comments during the review process for 30 days following the publication of this notice in the *Texas Register*. Any questions or comments pertaining to this notice of intention to review should be directed to Loretta R. DeHay, General Counsel, Texas Real Estate Commission. P.O. Box 12188, Austin, Texas 78711-2188 or e-mail to general.counsel@trec.state.tx.us within 30 days of publication.

TRD-200905885
Loretta R. DeHay
Deputy Administrator and General Counsel
Texas Real Estate Commission
Filed: December 16, 2009

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Texas State Soil and Water Conservation Board

Title 31, Part 17

The Texas State Soil and Water Conservation Board files this notice of intent to review rule Title 31, Part 17, Chapter 518, Subchapter B, §518.5, Historically Undrerutilized Business Program, of the Texas Administrative Code (TAC) in accordance with the Texas Government Code, §2001.039. The agency finds that the reason for adopting the rule continues to exist.

As required by §2001.039 of the Texas Government Code, the agency will accept comments and make a final assessment regarding whether the reason for adopting the rule continues to exist. The comment period will last 30 days beginning with the publication of this notice of intent to review.

Comments or questions regarding this rule review may be submitted to Rex Isom, Executive Director, Texas state Soil and Water Conservation Board, P.O. Box 658, Temple, Texas 76503, by e-mail to risom@tsswcb.state.tx.us, or by facsimile at (254) 773-3311.

TRD-200905828
Mel Davis
Special Projects Coordinator
Texas State Soil and Water Conservation Board
Filed: December 14, 2009

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Adopted Rule Reviews

Texas Youth Commission

Title 37, Part 3

Pursuant to Government Code §2001.039, the Texas Youth Commission files this notice of readoption for 37 TAC Chapter 91 (Program Services), Chapter 93 (Youth Rights and Remedies), and Chapter 95 (Behavior Management and Youth Discipline). The proposed review was published in the October 23, 2009, issue of the *Texas Register* (34 TexReg 7345). No public comments were received regarding this review.

The Commission has determined that the reasons for adopting the rules contained in these chapters continue to exist.

This concludes the agency's review of Chapters 91, 93, and 95.

TRD-200905818
Toysha Martin
General Counsel
Texas Youth Commission
Filed: December 14, 2009

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TABLES & GRAPHICS

Graphic images included in rules are published separately in this tables and graphics section. Graphic images are arranged in this section in the following order: Title Number, Part Number, Chapter Number and Section Number.

Graphic images are indicated in the text of the emergency, proposed, and adopted rules by the following tag: the word "Figure" followed by the TAC citation, rule number, and the appropriate subsection, paragraph, subparagraph, and so on.

Figure: 19 TAC §61.1201(b)(1)

NOTIFICATION OF ELIGIBILITY FOR AUTOMATIC COLLEGE ADMISSION

This notice confirms that, pending the satisfaction of all applicable requirements (see below), _____ will be eligible for automatic college admission.

In accordance with Texas Education Code (TEC), §51.803, a student is eligible for automatic admission to a college or university as an undergraduate student if the applicant earned a grade point average in the **top 10 percent** of the student's high school graduating class, or the **top 8 percent** for admission to the University of Texas at Austin, and the applicant:

(1) successfully completed the requirements for the Recommended High School Program (RHSP) or the Distinguished Achievement Program (DAP); or

(2) satisfied ACT's College Readiness Benchmarks on the ACT assessment or earned on the SAT assessment a score of at least 1,500 out of 2,400 or the equivalent.

In accordance with Title 19 Texas Administrative Code (TAC), §5.5(e), high school rank for students seeking automatic admission to a general academic teaching institution on the basis of class rank is determined and reported as follows.

(1) Class rank shall be based on the end of the 11th grade, middle of the 12th grade, or at high school graduation, whichever is most recent at the application deadline.

(2) The top 10 percent of a high school class shall not contain more than 10 percent of the total class size.

(3) The student's rank shall be reported by the applicant's high school or school district as a specific number out of a specific number total class size.

(4) Class rank shall be determined by the school or school district from which the student graduated or is expected to graduate.

An applicant who does not satisfy the course requirements is considered to have satisfied those requirements if the student completed the portion of the RHSP or the DAP that was available to the student but was unable to complete the remainder of the coursework solely because courses were unavailable to the student at the appropriate times in the student's high school career as a result of circumstances not within the student's control.

To qualify for automatic admission an applicant must:

(1) submit an application before the deadline established by the college or university to which the student seeks admission; and

(2) provide a high school transcript or diploma that indicates whether the student has satisfied or is on schedule to satisfy the requirements of the RHSP or DAP or the portion of the RHSP or DAP that was available to the student.

Colleges and universities are required to admit an applicant for admission as an undergraduate student if the applicant is the child of a public servant who was killed or sustained a fatal injury in the line of duty and meets the minimum requirements, if any, established by the governing board of the college or university for high school or prior college-level grade point average and performance on standardized tests.

My signature below constitutes my acknowledgement that I have been provided with a copy of the notification of automatic college admission and explanation of eligibility for automatic college admission.

_____ Date_____
Signature of Student

_____ Date_____
Signature of Parent or Guardian

Figure 1: 30 TAC Chapter 101--Preamble

Projected Impact to Revenue for Operating Permit Fees Account 5094

Account 5094	Year 1	Year 2	Year 3	Year 4	Year 5
Anticipated Revenue Gain	$496,800	$511,704	$527,115	$542,982	$559,356
Anticipated Revenue Loss	-$600,000	-$618,000	-$636,540	-$655,636	-$675,305
Net Change in Revenue	-$103,200	-$106,296	-$109,425	-$112,654	-$115,949

Figure 2: 30 TAC Chapter 101--Preamble

Projected Costs to Units of Local Government for Emissions Fees

Local Government	Year 1	Year 2	Year 3	Year 4	Year 5
Landfills (31)	$55,800	$57,474	$59,210	$60,977	$62,806
Incinerators (5)	$5,000	$5,150	$5,305	$5,465	$5,630
Totals	$60,800	$62,624	$64,515	$66,442	$68,436

Figure 3: 30 TAC Chapter 101--Preamble

Projected Costs to Businesses for Emissions Fees

Privately Owned	Year 1	Year 2	Year 3	Year 4	Year 5
Landfill Fee Costs (20)	$36,000	$37,080	$38,200	$39,340	$40,520
Incinerators Fee Costs (400)	$400,000	$412,000	$424,400	$437,200	$450,400
Total Costs	$436,000	$449,080	$462,600	$476,540	$490,920
Fee Reduction*	-$600,000	-$618,000	-$636,540	-$655,636	-$675,305
Net Impact (Cost Savings)	-$164,000	-$168,920	-$173,920	-$179,096	-$184,385

* For 400 entities that will no longer be assessed the emissions fee

Figure 4: 30 TAC Chapter 101--Preamble

Impact to Small or Micro-Businesses

Small or Micro-business	Year 1	Year 2	Year 3	Year 4	Year 5
Incinerators Fee Costs (400)	$400,000	$412,000	$424,400	$437,200	$450,400
Fee Reduction (400)	-$600,000	-$618,000	-$636,540	-$655,636	-$675,305
Net Impact (Fee Reduction)	-$200,000	-$206,000	-$212,140	-$218,436	-$224,905

Figure: 30 TAC §101.27(f)(1)

Emissions Fee Schedule		
Fiscal Year	**Rate Per Ton**	**Minimum Fee**
1992	$3	
1993	$5	$25
1994	$25	$25
1995 - 2002	$26	$26

For fiscal year 2003 and subsequent years, the rate per ton must be calculated using the following formula. The minimum fee must be equal to the rate per ton.

Rate per ton = $\$25.00 \times (1 - CO) \times (CPI / 122.15)$

Where:
CO = carbon monoxide fraction of the fee basis, for all emissions fee payers for the previous fiscal year;

CPI = average of the consumer price index for the 12 months preceding the fiscal year that a fee is being assessed (as published by the United States Bureau of Labor Statistics, CPI - All Urban Consumers, Not Seasonally Adjusted, base period 1982 - 84 = 100); and

122.15 = average consumer price index for fiscal year 1989 (as published by the United States Bureau of Labor Statistics, CPI - All Urban Consumers, Not Seasonally Adjusted, base period 1982 - 84 = 100).

Figure: 30 TAC §115.358(e)(1)

Monitoring Frequency	Detection Sensitivity Level (Grams per Hour)
Bi-Monthly	60
Semi-Quarterly	85
Monthly	100

Where:

Bi-Monthly = Every other calendar month.
Semi-Quarterly = Twice per calendar quarter, but at least 30 days apart.
Monthly = Once per calendar month.

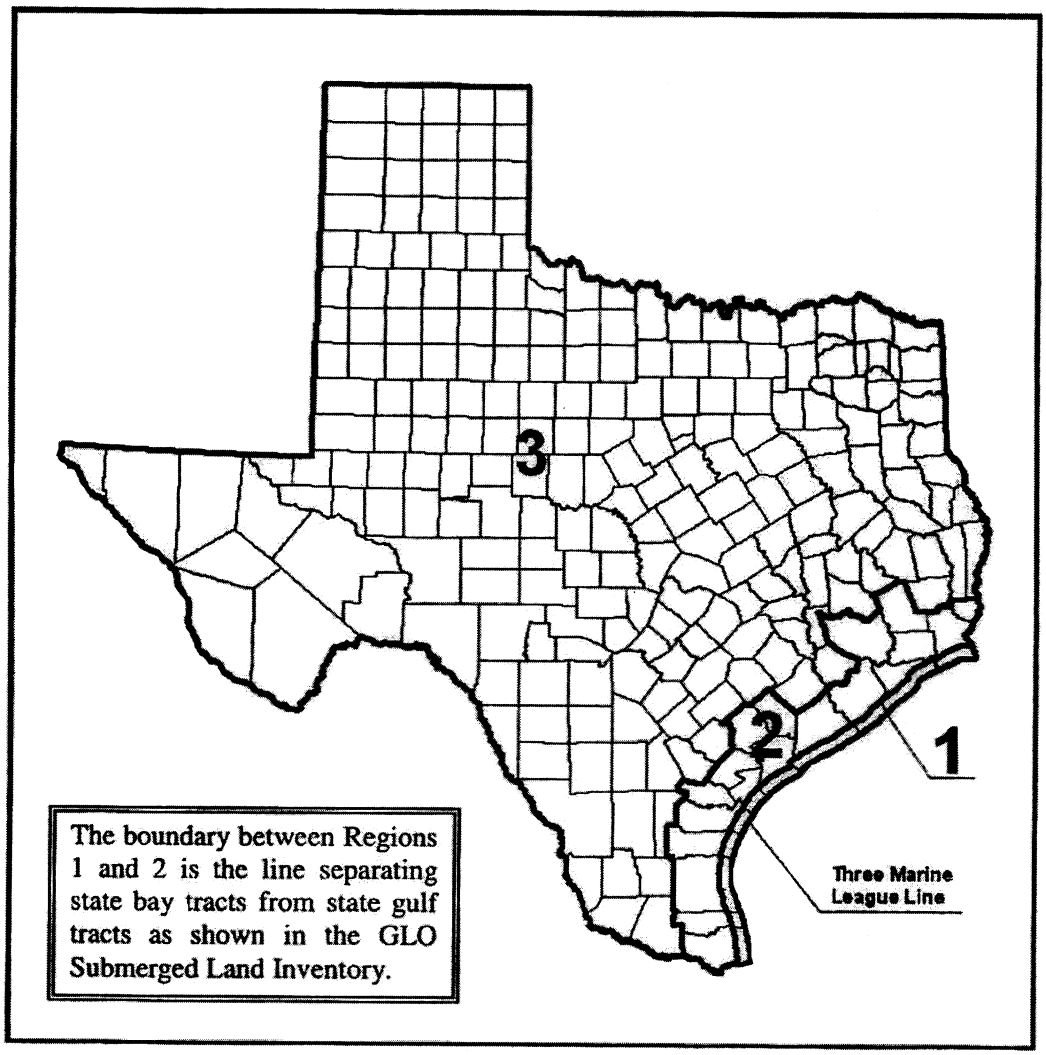
Figure: 31 TAC §13.17(e)

Power Line Right-Of-Way Easement Fees, Rates and Terms[1]

Power Line Capacity	Fee[2]	Base Rate (per rod)[3]				Damages (per rod)[4]	Term
		Region 1	Region 2	Region 3	Special Areas[5]		
<69 KV	$350	$ 15	$ 25	$ 20	Negotiable	$ 10	10 Years
69-137 KV	$350	$ 25	$ 35	$ 30	Negotiable	$ 15	10 Years
138 KV	$350	$ 45	$ 55	$ 50	Negotiable	$ 17	10 Years
>138 KV	$350	$ 65	$ 75	$ 70	Negotiable	$ 20	10 Years

[1] Minimum of $1,000 consideration per line per 10-year contract term.
[2] Fee is assessed for each event of application, renewal, assignment, or amendment.
[3] Base Rate to increase (but not decrease) September 1 of each year according to the Consumer Price Index for All Urban Consumers.
[4] Damages apply to new easements only.
[5] Rates for right-of-way easements over or across properties acquired by the Permanent School Fund and properties within a municipality or its extraterritorial jurisdiction (ETJ) are based on the appraised value of the property and are negotiated.

EASEMENTS REGIONS MAP



IN ADDITION

The *Texas Register* is required by statute to publish certain documents, including applications to purchase control of state banks, notices of rate ceilings issued by the Office of Consumer Credit Commissioner, and consultant proposal requests and awards. State agencies also may publish other notices of general interest as space permits.

Texas State Affordable Housing Corporation

2010 Annual Action Plan Now Available for Public Comment

The Texas State Affordable Housing Corporation presents for public comment its draft of the 2010 Annual Action Plan. A copy of the 2010 Annual Action Plan may be found on the Corporation's website at www.tsahc.org. The public comment period for the Corporation's 2010 Annual Action Plan is December 17, 2009 through January 21, 2010.

Written comment may be sent to Janie Taylor, Manager of Government Relations at 2200 E. Martin Luther King Jr. Blvd., Austin, TX 78702 or by email at jtaylor@tsahc.org.

TRD-200905844
David Long
President
Texas State Affordable Housing Corporation
Filed: December 15, 2009

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Texas Department of Agriculture

Notice Regarding Percentage Volume of Texas Grapes Required by Texas Alcoholic Beverage Code, §16.011

Texas Alcoholic Beverage Code, §16.011 (§16.011), establishes an exception to the bar on the sale of alcoholic beverages in dry areas for wineries that sell or dispense wine that contains seventy-five percent (75%), by volume, of Texas grown grapes or fruit. Texas Agriculture Code, §12.039 (§12.039), provides that the commissioner of agriculture may reduce the percentage by volume of fermented juice of grapes or other fruit grown in this state that wine containing that particular variety of grape or other fruit must contain under §16.011. The commissioner has received a report from the Texas Wine Marketing Research Institute (TWMRI), Texas Grape Production and Demand Report 2009 (Report), as provided for in §12.039. The Report issued by the TWMRI is based in part on responses to surveys sent to Texas wineries, and other research. The Report does not include information from the annual United States Department of Agriculture (USDA) grape production report, which is issued in January of each year. Upon review of the TWMRI Report, and the recommendation made in the Report, the commissioner has determined that there is sufficient information to reduce the percentage of Texas grown grapes and fruit that is required by §16.011 to be in wine produced by wineries located in dry areas of Texas from seventy-five percent (75%) to sixty-five percent (65%) for the 2010 calendar year. The exception to the statutory prohibition on alcohol sales in dry areas is lowered from the statutory seventy five percent (75%) to sixty-five percent (65%) based upon several factors, although data is limited. First, the Report indicates that, of wineries responding to the TWMRI survey statewide, approximately 53% of wine produced in Texas is from Texas grapes. To maintain the intent of the statutory prohibition of locally-determined dry area alcohol sales, combined with the limited exception enacted for wines meeting a high threshold of Texas grape content, the established level for dry area wineries should be higher than what is already being met by wineries statewide. Second, the level established in previous years was based in part on grape production factors limited by weather or natural causes. Although the Report indicates that there were some similar circumstances this year and that some wineries are having difficulties obtaining Texas grapes, it also indicates that some wineries were able to obtain sufficient Texas grapes to meet their needs. Third, as noted below, for situations where a winery is not able to obtain enough Texas grapes to meet their needs, the commissioner will review individual appeals for further reduction of the level set for calendar year 2010. Because the TWMRI Report does not include the annual USDA grape production information, the commissioner has requested that Tim Dodd, the Director of the TWMRI, review the USDA report when it becomes available and submit to the commissioner at that time a recommendation for any needed adjustments to the 65% rate, as a result of the USDA data. The commissioner will review any such request and make adjustments to the rate, as deemed necessary. Any change to the rate will be published in the *Texas Register* and posted on the Texas Department of Agriculture website.

In accordance with §12.039(g), even after the commissioner's decision to reduce the percentage of Texas grown grapes and fruit that is required by §16.011 to sixty-five percent (65%), if a winery in a dry area of Texas finds that a particular variety of grape or other fruit is not available to a level sufficient for the winery to meet the winery's planned production for the relevant year, the winery may submit documentation or other information requested by the commissioner substantiating that the winery has not been able to acquire those grapes or other fruit grown in this state in an amount sufficient to meet the winery's production needs and to comply with requirements of §16.011. If the commissioner determines that there is not a sufficient quantity of that variety of grapes or other fruit grown in this state to meet the needs of that winery, the commissioner may further reduce the percentage requirement for wine bottled during the remainder of the calendar year that contains that variety of grape or fruit.

TRD-200905865
Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
Filed: December 16, 2009

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Department of Assistive and Rehabilitative Services

Notification of Consulting Procurement

Pursuant to Chapter 2254, Subchapter B, Texas Government Code, the Texas Health and Human Services Commission (HHSC), on behalf of the Department of Assistive and Rehabilitative Services (DARS), announces the release of its RFP #538-10-17077 entitled Early Childhood Intervention (ECI) Contract Structure Consulting Services.

The purpose of this procurement is to secure the services of a single, qualified vendor to research feasible contract structures for the three categories of services, including a review of other states' federal IDEA, Part C ECI contract structures, and to make a recommendation for a contract structure that will work best in Texas. DARS intends to award

a consulting contract based on the best value factors discussed in the RFP.

The solicitation documents may be accessed at http://esbd.cpa.state.tx.us. Under "Browse Postings" find "Agency: Sort pulldown list by Name, Number" and select "Department of Assistive and Rehabilitative Services-538" from the Name pulldown list. Click the "Go" button.

On the next page, scroll through the selections to find "Early Childhood Intervention (ECI) Contract Structure Consulting Services". Select either the solicitation title or the requisition number.

The next page is specific to the RFP. Locate the link to Package 1. Click on the link to open the package (RFP).

HHSC's sole point of contact for the RFP is Elizabeth Ward, Texas Health and Human Services Commission, 4405 North Lamar Boulevard, Austin, Texas 78756; Telephone: (512) 206-5416; Fax: (512) 206-5515; E-mail: elizabeth.ward@hhsc.state.tx.us.

All proposals must be received at the above-referenced address on or before January 26, 2010, 2:00 p.m. (CST).

TRD-200905798
Sylvia F. Hardman
General Counsel
Department of Assistive and Rehabilitative Services
Filed: December 14, 2009

♦ ♦ ♦

Office of the Attorney General

Notice Regarding Update of the Texas Landowner's Bill of Rights

The 81st Legislature recently passed House Bill 2685, which requires the Office of the Attorney General to update the Texas Landowner's Bill of Rights in order to reflect the legislative and constitutional changes made during the 81st Legislative Session.

The text of the proposed updated Texas Landowner's Bill of Rights is published below. Written comments should be directed to Brooke Paup, Deputy Division Chief, Intergovernmental Relations Division, Office of the Attorney General, P.O. Box 12548, Austin, Texas 78711-2548, facsimile (512) 475-4421. All comments must be received no later than February 5, 2010.

The Office of the Attorney General will review any comments submitted and will publish the final document on the agency Web site (www.oag.state.tx.us) by February 26, 2010.

TEXAS LANDOWNER'S BILL OF RIGHTS

This Bill of Rights applies to any attempt by the government or a private entity to take your property. The contents of this Bill of Rights are prescribed by the Texas Legislature in Texas Government Code §402.031 and Chapter 21 of the Texas Property Code.

1. You are entitled to receive adequate compensation if your property is taken for a public use.

2. Your property can only be taken for a public use.

3. Your property can only be taken by a governmental entity or private entity authorized by law to do so.

4. The entity that wants to take your property must notify you about its interest in taking your property.

5. The entity proposing to take your property must provide you with an assessment of the adequate compensation for your property.

6. The entity proposing to take your property must make a good faith offer to buy the property before it files a lawsuit to condemn the property.

7. You may hire an appraiser or other professional to determine the value of your property or to assist you in any condemnation proceeding.

8. You may hire an attorney to negotiate with the condemning entity and to represent you in any legal proceedings involving the condemnation.

9. Before your property is condemned, you are entitled to a hearing before a court appointed panel that includes three special commissioners. This specialized hearing panel must determine the amount of compensation the condemning entity owes for the taking of your property. The commissioners must also determine what compensation, if any, you are entitled to receive for any reduction in value of your remaining property.

10. If you are unsatisfied with the compensation awarded by the special commissioners, or if you question whether the taking of your property was proper, you have the right to a trial by a judge or jury. If you are dissatisfied with the trial court's judgment, you may appeal that decision.

CONDEMNATION PROCEUDRE

Eminent Domain is the ability of certain entities to take private property for a public use. Private property can include land and certain improvements that are on that property.

Private property may only be taken by a governmental entity or private entity authorized by law to do so.

Your property may be taken only for a public use. That means it can only be taken for a purpose or use that serves the general public. However, Texas law prohibits condemnation authorities from taking your property to enhance tax revenues or foster economic development.

Your property cannot be taken without adequate compensation. Adequate compensation includes the market value of the property being taken. It may also include certain damages, if any, to your remaining property caused by the acquisition itself or by the way the condemning entity will use the property.

How the Taking Process Begins

The taking of private property by eminent domain must follow certain procedures. First, the entity that wants to condemn your property must provide you a copy of this Landowner's Bill of Rights before or at the same time the entity notifies you of its interest in acquiring your property.

Second, the condemning entity must send this Landowner's Bill of Rights to the last known address of the person in whose name the property is listed on the most recent tax roll at least seven days before the entity makes a final offer to acquire your property.

Third, the condemning entity must make a good faith offer to purchase the property. The condemning entity's offer must be based on an investigation and an assessment of adequate compensation for the property. At the time the offer is made, the governmental condemning entity must disclose any appraisal reports it used to determine the value of its offer to acquire the property. You have the right to either accept or reject the offer made by the condemning entity.

Condemnation Proceedings

If you and the condemning entity do not agree on the value of the property being taken, the entity may begin condemnation proceedings. Condemnation is the legal process for the taking of private property. It begins with a condemning entity filing a claim for your property in

court. If you live in a county where part of the property being condemned is located, the claim must be filed in that county. Otherwise, the claim can be filed in any county where at least part of the property being condemned is located. The claim must describe the property being condemned, the intended public use, the name of the landowner, a statement that the landowner and the condemning entity were unable to agree on the value of the property, and that the condemning entity provided the landowner with the Landowner's Bill of Rights statement.

Special Commissioners' Hearing

After the condemning entity files a claim in court, the judge will appoint three landowners to serve as special commissioners. These special commissioners must live in the county where the condemnation proceeding is filed, and they must take an oath to assess the amount of adequate compensation fairly, impartially, and according to the law. The special commissioners are not authorized to decide whether the condemnation is necessary or if the public use is proper. After being appointed, the special commissioners must schedule a hearing at the earliest practical time and place and provide you written notice of that hearing.

You are required to disclose to the governmental condemning entity, at least ten days before the special commissioners' hearing, any appraisal reports used to determine your opinion about adequate compensation for the property. You may hire an appraiser or real estate professional to help your determine the value of your private property. You may also hire an attorney regarding these proceedings.

At the hearing, the special commissioners will consider evidence on the value of the property, the damages to remaining property, any value added to the remaining property as a result of the project, and the uses to be made of the property being taken.

Special Commissioners' Award

After hearing evidence from all interested parties, the special commissioners will determine the amount of money to be awarded as adequate compensation. You may be responsible for the costs if the Award is less than or equal to the amount the condemning entity offered before the condemnation proceeding began. Otherwise, the condemning entity will be responsible for the costs. The special commissioners will give a written decision to the court that appointed them. That decision is called the "Award." The Award must be filed with the court and the court must send written notice of the Award to all parties.

After the Award is filed, the condemning entity may take possession of the property being condemned, even if either party appeals the Award of the special commissioners. To take possession of the property, the condemning entity must either pay you the amount of the Award or deposit the amount of the Award into the registry of the court. You have the right to withdraw the deposited funds from the registry of the court.

Objection to the Special Commissioners' Award

If either you or the condemning entity is dissatisfied with the amount of the Award, either party can object to the Award by filing a written statement of objection with the court. If neither party timely objects to the Award, the court will adopt the Award as the final judgment of the court. If a party timely objects to the special commissioners' Award, the court will hear the case in the same manner as other civil cases.

If you object to the Award and ask the court to hear the matter, you have the right to a trial by judge or jury. The allocation of costs is handled in the same manner as with the special commissioners' Award. After that trial, either party may appeal any judgment entered by the court.

Dismissal of the Condemnation Action

A condemning entity may file a motion to dismiss the condemnation proceeding if it decides it no longer needs your property. If the court grants the motion to dismiss, the case is over and you are entitled to recover reasonable and necessary fees for attorneys, appraisers, photographers, and for other expenses incurred to the date of the hearing on the motion to dismiss.

You may also file a motion to dismiss the condemnation proceeding on the ground that the condemning entity did not have the right to condemn the property, including a challenge as to whether the property is being taken for a public use. If the court grants your motion, the court may award you reasonable and necessary fees for attorneys, appraisers, photographers, and for other expenses incurred to the date of the hearing or judgment.

Relocation Costs

If you are displaced from a residence or place of business, you may be entitled to reimbursement for reasonable expenses incurred while moving personal property from the residence or relocating the business to a new site. You are not entitled to these relocation costs if they are recoverable under another law. If you are entitled to these costs, they cannot exceed the market value of the property being moved and can only be reimbursed for moving distances within 50 miles.

Reclamation Options

If private property was condemned by a governmental entity, and the purpose for which the property was acquired is canceled before the 10th anniversary of the date of the acquisition, you may have the right to seek to repurchase the property for the fair market value of the property at the time the public use was canceled. This provision does not apply to property acquired by a county, a municipality, or the Texas Department of Transportation.

Disclaimer

The information in this statement is intended to be a summary of the applicable portions of Texas state law as required by HB 1495, enacted by the 80th Texas Legislature, Regular Session. This statement is not legal advice and is not a substitute for legal counsel.

Additional Resources

Further information regarding the procedures, timelines and requirements outlined in this document can be found in Chapter 21 of the Texas Property Code.

For information regarding this publication, contact Zindia Thomas, Agency Liaison, at (512) 936-9901.

TRD-200905874
Stacey Napier
Deputy Attorney General
Office of the Attorney General
Filed: December 16, 2009

♦ ♦ ♦

Capital Area Rural Transportation System

Request for Proposals

The Capital Area Rural Transportation System (CARTS), a Rural Transit District serving a nine-county region surrounding Austin, Texas requests a solutions-based proposal from qualified companies to effect its Phase 3 advanced technology project. This project will provide for its local and regional fixed route services to be integrated with its extant ITS network, including its electronic fare media, and incorporating route and schedule management software, station-based and route-based on-time bus arrival technology and displays, including its

solar-powered flag stop prototype. CARTS will contract with one company to integrate all aspects of the project.

Release of RFP: December 7, 2009

Pre-Proposal meeting: December 16, 2009

Proposal Due Date: January 20, 2010

If you wish to receive a copy of the RFP please send by electronic mail a notice that your company wishes to participate with appropriate contact information and a brief description of products or services that you provide.

These notices should be sent to ITSP3@RideCARTS.com.

TRD-200905762
Dave Marsh
General Manager
Capital Area Rural Transportation System
Filed: December 11, 2009

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Comptroller of Public Accounts

Certification of the Average Taxable Price of Gas and Oil - November 2009

The Comptroller of Public Accounts, administering agency for the collection of the Crude Oil Production Tax, has determined that the average taxable price of crude oil for reporting period November 2009, as required by Tax Code, §202.058, is $58.71 per barrel for the three-month period beginning on August 1, 2009, and ending October 31, 2009. Therefore, pursuant to Tax Code, §202.058, crude oil produced during the month of November 2009, from a qualified Low-Producing Oil Lease, is not eligible for exemption from the crude oil production tax imposed by Tax Code, Chapter 202.

The Comptroller of Public Accounts, administering agency for the collection of the Natural Gas Production Tax, has determined that the average taxable price of gas for reporting period November 2009, as required by Tax Code, §201.059, is $3.06 per mcf for the three-month period beginning on August 1, 2009, and ending October 31, 2009. Therefore, pursuant to Tax Code, §201.059, gas produced during the month of November 2009, from a qualified Low-Producing Gas Well, is eligible for 25% credit on the natural gas production tax imposed by Tax Code, Chapter 201.

Inquiries should be directed to Bryant K. Lomax, Manager, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711-3528.

TRD-200905805
Ashley Harden
General Counsel
Comptroller of Public Accounts
Filed: December 14, 2009

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Notice of Contract Amendment

Pursuant to Chapters 403, Texas Government Code, and Chapter 54, Education Code, the Comptroller of Public Accounts (Comptroller) announces the amendment of the following contract award:

The notice of request for proposals was published in the May 2, 2008, issue of the *Texas Register* (33 TexReg 3669) (RFP #184c). The Notice of Award was published in the September 19, 2008, issue of the *Texas Register* (33 TexReg 8050).

The contractor provides outside counsel services to the Comptroller and the Texas Prepaid Higher Education Tuition Board.

The contract was awarded to Clark, Thomas & Winters, PC, 300 West 6th Street, 15th Floor, Austin, Texas 78701. The original term of the contract was September 1, 2008 through August 31, 2010. The total amount of the contract was not to exceed $150,000.00. The amendment adds $75,000 to the contract for a new contract amount of not to exceed $225,000.00.

TRD-200905716
William Clay Harris
Assistant General Counsel, Contracts
Comptroller of Public Accounts
Filed: December 10, 2009

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Notice of Contract Award

The Comptroller of Public Accounts (Comptroller) announces this notice of award of a contract to Reznick Group, P.C., 100 Congress Avenue, Suite 480, Austin, Texas 78701 in connection with the Request for Proposals (RFP #195c) for professional certified public accounting services to conduct a cost accounting review of certain Texas Department of Transportation projects. The total amount of the contract is not to exceed $210,000.00. The term of the contract is November 20, 2009 through August 31, 2011, with option to renew for up to two (2) additional one (1) year terms, one (1) year at a time.

The notice of request for proposals (RFP #195c) was published in the September 25, 2009, issue of the *Texas Register* (34 TexReg 6676).

TRD-200905711
William Clay Harris
Assistant General Counsel, Contracts
Comptroller of Public Accounts
Filed: December 9, 2009

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Notice of Contract Award

Pursuant to Chapters 403; 2305; and Chapter 2254, Subchapter A, Texas Government Code, the Comptroller of Public Accounts (Comptroller) State Energy Conservation Office (SECO) announces the following contract awards:

The notice of request for proposals (RFP 194b) was published in the June 5, 2009, issue of the *Texas Register* (34 TexReg 3531).

The contractors will provide energy engineering services for the Schools Program.

Three contracts were awarded as follows:

1. Energy Systems Associates, Inc., 105 East Main, Suite 20, Round Rock, Texas 78664. The total amount of this contract is not to exceed $266,666.67. The term of the contract is December 10, 2009 through December 30, 2010, with option to renew for up to two (2) additional one (1) year terms, one (1) year at a time;

2. Estes, McClure and Associates, Inc., 3608 West Way, Tyler, Texas 75703. The total amount of this contract is not to exceed $266,666.66. The term of the contract is December 10, 2009 through December 31, 2010, with option to renew for up to two (2) additional one (1) year terms, one (1) year at a time; and

3. Texas Energy Engineering Services, Inc., 1301 S. Capital of Texas Hwy., #B32, Austin, Texas 78746. The total amount of this contract is not to exceed $266,666.67. The term of the contract is December 10,

2009 through December 31, 2010, with option to renew for up to two (2) additional one (1) year terms, one (1) year at a time.

TRD-200905875
William Clay Harris
Assistant General Counsel, Contracts
Comptroller of Public Accounts
Filed: December 16, 2009

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Notice of Intent to Amend Major Consulting Contract

Pursuant to Chapter 2254, Subchapter B, and Chapter 2161, as amended by House Bill 3560 (HB 3560), 80th Texas Legislature, Regular Session (2007), and Chapter 403, Texas Government Code, the Texas Procurement and Support Services Division (TPASS) of the Comptroller of Public Accounts (Comptroller) announces its intent to amend and extend a major consulting services agreement to assist Comptroller and TPASS in conducting a Historically Underutilized Business (HUB) Disparity Study of State Contracting (Study) for the State of Texas, including preparation and submission of a written report complete with findings and recommendations to Comptroller. The proposed term of the Contract as amended is September 29, 2008, through March 31, 2010. The total amount of the Contract shall remain the same.

Current Contract: MGT of America, Inc., 2123 Centre Pointe Boulevard, Tallahassee, Florida 32308. The total amount of the contract is not to exceed $994,961.00. The term of the contract is September 29, 2008 through December 31, 2009, with option to renew for up to two (2) additional one (1) year periods, one (1) year at a time. The final report is due no later than March 31, 2010.

The notice of request for proposals (RFP #186a) was published in the July 11, 2008, issue of the *Texas Register* (33 TexReg 5569).

TRD-200905870
William Clay Harris
Assistant General Counsel, Contracts
Comptroller of Public Accounts
Filed: December 16, 2009

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Notice of Request for Proposals

Notice of Request for Proposals: Pursuant to §1201.027, Texas Government Code; Chapter 2254, Subchapter B, Texas Government Code; and Chapter 404, Subchapter H, Texas Government Code, the Comptroller of Public Accounts (Comptroller) announces its Request for Proposals (RFP #196a) from qualified, independent firms to serve as Financial Advisor to the Comptroller. The Comptroller desires to obtain the services of a Financial Advisor related to the document preparation, issuance, sale, and delivery of Tax and Revenue Anticipation Notes, including Commercial Paper Notes (Notes) as well as assistance in handling of disclosure issues relating to the Notes. The successful respondent will be expected to begin performance of the contract on or about March 1, 2010.

Contact: Parties interested in submitting a proposal should contact Jessica Perry, Assistant General Counsel, Contracts, Comptroller of Public Accounts, 111 E. 17th St., Rm 201, Austin, Texas, 78774, telephone number: (512) 305-8673, to obtain a copy of the RFP. The Comptroller will mail copies of the RFP only to those specifically requesting a copy. The RFP will be available for pick-up at the above-referenced address on December 28, 2009, between 10:00 a.m. and 5:00 p.m., Central Zone Time (CZT), and during normal business hours thereafter. The Comptroller will also make the RFP available electronically on the Electronic State Business Daily after Monday, December 28, 2009, 10:00 a.m. (CZT).

Questions and Non-Mandatory Letters of Intent: All written inquiries, questions, and non-mandatory Letters of Intent to propose must be received at the above-referenced address not later than 2:00 p.m. (CZT) on Monday, January 11, 2010. Prospective respondents are encouraged to fax or e-mail non-mandatory Letters of Intent and Questions to (512) 463-3669 or contracts@cpa.state.tx.us to ensure timely receipt. The Letter of Intent must be addressed to Jessica Perry, Assistant General Counsel, Contracts, and must contain the information as stated in the corresponding Section of the RFP and be signed by an official of that entity. Non-mandatory Letters of Intent and Questions received after this time and date will not be considered. On or about Thursday, January 14, 2010, the Comptroller expects to post responses to questions as a revision to the Electronic State Business Daily notice on the issuance of this RFP.

Closing Date: Proposals must be delivered to the Office of the Assistant General Counsel, Contracts, at the location specified above (Room 201) no later than 2:00 p.m. (CZT), on Friday, January 29, 2010. Proposals received in Room 201 after this time and date will not be considered regardless of the reason for the late delivery and receipt. Respondents are encouraged to verify and are solely responsible for verifying timely receipt of proposals in that office (Room 201).

Evaluation Criteria: Proposals will be evaluated under the evaluation criteria outlined in the RFP. The Comptroller shall make the final decision on any contract award or awards resulting from this RFP.

The Comptroller reserves the right, in its sole discretion, to accept or reject any or all proposals submitted. The Comptroller is not obligated to award or execute any contracts on the basis of this notice or the distribution of any RFP. The Comptroller shall not pay for any costs incurred by any entity in responding to this notice or the RFP.

The anticipated schedule of events is as follows: Issuance of RFP - December 28, 2009, 10:00 a.m. CZT; Non-Mandatory Letter of Intent to propose and Questions Due - January 11, 2010, 2:00 p.m. CZT; Official Responses to Questions posted - January 14, 2010, or as soon thereafter as practical; Proposals Due - January 29, 2010, 2:00 p.m. CZT, Contract Execution - February 26, 2010, or as soon thereafter as practical; and Commencement of Project Activities - March 1, 2010.

TRD-200905872
Pamela Smith
Deputy General Counsel for Contracts
Comptroller of Public Accounts
Filed: December 16, 2009

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Notice of Request for Proposals

Pursuant to Chapters 2155 and 2156, Texas Government Code and Chapters 403 and 447, Texas Government Code; 42 U.S.C. §§6321, et seq, and the American Recovery and Reinvestment Act of 2009, P.L. 111-5 (2009) (ARRA), the Comptroller of Public Accounts (Comptroller) announces its Request for Proposals #196b (RFP #196b) from rebate program implementation contractors to provide a streamlined, auditable, accurate, and simple consumer rebate process with all the support tools (online, phone, email, and print) to assist consumers in understanding the rebate opportunity, process rebate submissions, answer questions, generate rebate payment, and manage consumer and retailer expectations. The successful respondent will be expected to begin performance of the contract on or about February 1, 2010.

Contact: Parties interested in submitting a proposal should contact Rose-Michel Munguía, Assistant General Counsel, Contracts, Comp-

troller of Public Accounts, 111 E. 17th St., Rm 201, Austin, Texas 78774, telephone number: (512) 305-8673, to obtain a copy of the RFP. The Comptroller will mail copies of the RFP only to those specifically requesting a copy. The RFP will be available for pick-up at the above-referenced address on December 28, 2009, between 10:00 a.m. and 5:00 p.m., Central Standard Time (CST), and during normal business hours thereafter. The Comptroller will also make the RFP available electronically on the Electronic State Business Daily after Monday, December 28, 2009, 10:00 a.m. CST.

Non-Mandatory Letters of Intent: All non-mandatory Letters of Intent to propose must be received at the above-referenced address not later than 2:00 p.m. CST on Wednesday, January 6, 2010. Prospective respondents are encouraged to fax or e-mail non-mandatory Letters of Intent (512) 463-3669 or contracts@cpa.state.tx.us to ensure timely receipt. The non-mandatory Letter of Intent must be addressed to Rose-Michel Munguía, Assistant General Counsel, Contracts, and must contain the information as stated in the corresponding Section of the RFP and be signed by an official of that entity. Non-mandatory Letters of Intent received after this time and date will not be considered.

Closing Date: Proposals must be delivered to the Office of the Assistant General Counsel, Contracts, at the location specified above (Room 201) no later than 2:00 p.m. CST, on Wednesday, January 13, 2010. Proposals received in Room 201 after this time and date will not be considered regardless of the reason for the late delivery and receipt. Respondents are encouraged to verify and are solely responsible for verifying timely receipt of proposals in Room 201.

Evaluation Criteria: Proposals will be evaluated under the evaluation criteria outlined in the RFP. The Comptroller shall make the final decision on any contract award or awards resulting from this RFP.

The Comptroller reserves the right, in its sole discretion, to accept or reject any or all proposals submitted. The Comptroller is not obligated to award or execute any contracts on the basis of this notice or the distribution of any RFP. The Comptroller shall not pay for any costs incurred by any entity in responding to this notice or the RFP.

The anticipated schedule of events is as follows: Issuance of RFP - December 28, 2009, 10:00 a.m. CST; Non-Mandatory Letter of Intent to propose - January 6, 2010, 2:00 p.m. CST; Proposals Due - January 13, 2010, 2:00 p.m. CST, Contract Execution - January 27, 2010, or as soon thereafter as practical; and Commencement of Project Activities - February 1, 2010, or as soon thereafter as practical.

TRD-200905873
Pamela Smith
Deputy General Counsel for Contracts
Comptroller of Public Accounts
Filed: December 16, 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 12/21/09 - 12/27/09 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 12/21/09 - 12/27/09 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-200905846
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: December 15, 2009

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Credit Union Department

Application for a Merger or Consolidation

Notice is given that the following application has been filed with the Credit Union Department (Department) and is under consideration:

An application was received from Graphic Arts Credit Union (Houston) seeking approval to merge with SPCO Federal Credit Union (Houston). Graphic Arts Credit Union will be the surviving credit union.

Comments or a request for a meeting by any interested party relating to an application must be submitted in writing within 30 days from the date of this publication. Any written comments must provide all information that the interested party wishes the Department to consider in evaluating the application. All information received will be weighed during consideration of the merits of an application. Comments or a request for a meeting should be addressed to the Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699.

TRD-200905857
Harold E. Feeney
Commissioner
Credit Union Department
Filed: December 16, 2009

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Application to Amend Articles of Incorporation

Notice is given that the following application has been filed with the Credit Union Department (Department) and is under consideration:

An application for a name change was received from Graphic Arts Credit Union, Houston, Texas. The credit union is proposing to change its name to SPCO Credit Union.

Comments or a request for a meeting by any interested party relating to an application must be submitted in writing within 30 days from the date of this publication. Any written comments must provide all information that the interested party wishes the Department to consider in evaluating the application. All information received will be weighed during consideration of the merits of an application. Comments or a request for a meeting should be addressed to the Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699.

TRD-200905855
Harold E. Feeney
Commissioner
Credit Union Department
Filed: December 16, 2009

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Applications to Expand Field of Membership

Notice is given that the following applications have been filed with the Credit Union Department (Department) and are under consideration:

An application was received from Cabot & NOI Employees Credit Union, Pampa, Texas to expand its field of membership. The proposal

would permit employees of Titan Specialties, Ltd., 11785 Highway 152, Pampa, Texas 79065, to be eligible for membership in the credit union.

An application was received from Texas Dow Employees Credit Union, Lake Jackson, Texas to expand its field of membership. The proposal would permit persons who live, work, worship, or attend school in, and businesses and other legal entities located within a 10-mile radius of the branch office located at 10201 Broadway Street, Pearland, Texas, to be eligible for membership in the credit union.

An application was received from Baptist Credit Union, San Antonio, Texas to expand its field of membership. The proposal would permit members of churches and churches affiliated with the Southern Baptists of Texas Convention who reside within Texas, to be eligible for membership in the credit union.

Comments or a request for a meeting by any interested party relating to an application must be submitted in writing within 30 days from the date of this publication. Credit unions that wish to comment on any application must also complete a Notice of Protest form. The form may be obtained by contacting the Department at (512) 837-9236 or downloading the form at http://www.tcud.state.tx.us/applications.html. Any written comments must provide all information that the interested party wishes the Department to consider in evaluating the application. All information received will be weighed during consideration of the merits of an application. Comments or a request for a meeting should be addressed to the Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699.

TRD-200905856
Harold E. Feeney
Commissioner
Credit Union Department
Filed: December 16, 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 **January 25, 2010.** 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 January 25, 2010.** Written comments may also be sent by facsimile machine to the enforcement coordinator at (512) 239-2550. The commission enforcement coordinators are available to discuss the AOs and/or the comment procedure at the listed phone numbers; however, §7.075 provides that comments on the AOs shall be submitted to the commission in **writing.**

(1) COMPANY: Alloy Polymers Orange, LLC; DOCKET NUMBER: 2009-1325-IWD-E; IDENTIFIER: RN100590207; LOCATION: Orange, Orange County; TYPE OF FACILITY: plastic compounding; RULE VIOLATED: 30 Texas Administrative Code (TAC) §305.125(1), Texas Pollutant Discharge Elimination System (TPDES) Permit Number WQ0002835000, Interim Effluent Limitations and Monitoring Requirements Numbers 1 and 2 for Outfalls 002 and 003, and the Code, §26.121(a), by failing to comply with permitted effluent limits for five-day biochemical oxygen demand, total suspended solids, pH, and total organic carbon; PENALTY: $13,300; Supplemental Environmental Project (SEP) offset amount of $5,320 applied to Texas Association of Resource Conservation and Development Areas, Inc. (RC&D) - Water or Wastewater Treatment Assistance; ENFORCEMENT COORDINATOR: Carlie Konkol, (512) 239-0735; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(2) COMPANY: Allsup Petroleum, Inc. dba Allsups 356; DOCKET NUMBER: 2009-1243-PST-E; IDENTIFIER: RN102439387; LOCATION: San Angelo, Tom Green County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC § 334.51(a)(6) and the Code, §26.3475(c)(2), by failing to ensure that all spill and overfill prevention devices are maintained in good operating condition and that such devices are inspected and serviced in accordance with manufacturers' specifications; 30 TAC §334.72(3), by failing to report a suspected release; 30 TAC §334.49(a)(4) and the Code, §26.3475(d), by failing to provide corrosion protection to all underground components of an underground storage tank (UST) system; 30 TAC §334.46(g)(1)(H), by failing to ensure that all monitoring and observation wells are properly capped, labeled, and secured or locked to prevent unauthorized access, tampering, or any deliberate or accidental depositing of unauthorized substances; and 30 TAC §334.50(b)(1)(A) and the Code, §26.3475(c)(1), by failing to ensure that all USTs are monitored in a manner which will detect a release; PENALTY: $7,759; ENFORCEMENT COORDINATOR: Judy Kluge, (817) 588-5800; REGIONAL OFFICE: 622 South Oakes, Suite K, San Angelo, Texas 76903-7035, (325) 655-9479.

(3) COMPANY: Bell 11700, Limited; DOCKET NUMBER: 2009-1508-EAQ-E; IDENTIFIER: RN105733356; LOCATION: Austin, Travis County; TYPE OF FACILITY: commercial office property; RULE VIOLATED: 30 TAC §213.4(a)(1), by failing to obtain approval of a water pollution abatement plan; PENALTY: $2,250; ENFORCEMENT COORDINATOR: Jordan Jones, (512) 239-2569; REGIONAL OFFICE: 2800 South IH 35, Suite 100, Austin, Texas 78704-5700, (512) 339-2929.

(4) COMPANY: City of Carrizo Springs; DOCKET NUMBER: 2009-1412-MWD-E; IDENTIFIER: RN101721124; LOCATION: Carrizo Springs, Dimmit County; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1) and (5) and TPDES Permit Number WQ0010145001, Operational Requirements Number 4, by failing to maintain adequate safeguards to prevent the discharge of untreated or inadequately treated wastes during electrical power failures; PENALTY: $5,650; ENFORCEMENT COORDINATOR: Merrilee Hupp, (512) 239-4490; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(5) COMPANY: Chevron Phillips Chemical Company; DOCKET NUMBER: 2009-1466-AIR-E; IDENTIFIER: RN100215615; LO-

CATION: Orange, Orange County; TYPE OF FACILITY: chemical manufacturing plant; RULE VIOLATED: 30 TAC §122.143(4) and §122.146(1) and (2), Federal Operating Permit (FOP) Number O-01310, General Terms and Conditions (GTC), and Texas Health and Safety Code (THSC), §382.085(b), by failing to submit the annual compliance certification (ACC); PENALTY: $2,600; ENFORCEMENT COORDINATOR: Raymond Marlow, (409) 898-3838; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(6) COMPANY: ConocoPhillips Company; DOCKET NUMBER: 2009-1481-AIR-E; IDENTIFIER: RN101619179; LOCATION: Old Ocean, Brazoria County; TYPE OF FACILITY: petroleum refinery; RULE VIOLATED: 30 TAC §116.115(c), Air Permit Numbers 5920A, 7467, and 30513, Special Condition (SC) Number 1, and THSC, §382.085(b), by failing to prevent unauthorized emissions; PENALTY: $10,000; SEP offset amount of $5,000 applied to Texas Parent Teacher Association (PTA) - *Texas PTA Clean School Buses;* ENFORCEMENT COORDINATOR: Nadia Hameed, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(7) COMPANY: David Besser Homes, LLC; DOCKET NUMBER: 2009-1874-WQ-E; IDENTIFIER: RN105584668; LOCATION: Rockwall, Rockwall County; TYPE OF FACILITY: home builder; RULE VIOLATED: 30 TAC §281.25(a)(4), by failing to obtain a construction general permit; PENALTY: $700; ENFORCEMENT COORDINATOR: Jordan Jones, (512) 239-2569; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(8) COMPANY: DECOTY COFFEE COMPANY; DOCKET NUMBER: 2009-1873-WQ-E; IDENTIFIER: RN102562840; LOCATION: San Angelo, Tom Green County; TYPE OF FACILITY: roasted coffee; RULE VIOLATED: 30 TAC §281.25(a)(4), by failing to obtain a multi-sector general permit; PENALTY: $700; ENFORCEMENT COORDINATOR: Jordan Jones, (512) 239-2569; REGIONAL OFFICE: 622 South Oakes, Suite K, San Angelo, Texas 76903-7035, (325) 655-9479.

(9) COMPANY: FASTRAC FOOD STORE'S, INC. dba Fastrac 280; DOCKET NUMBER: 2009-1212-PST-E; IDENTIFIER: RN101782233; LOCATION: Spring, Harris County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §115.245(2) and THSC, §382.085(b), by failing to verify proper operation of the Stage II equipment; PENALTY: $2,221; ENFORCEMENT COORDINATOR: Mike Pace, (817) 588-5800; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(10) COMPANY: Firestone Polymers, LLC; DOCKET NUMBER: 2009-1402-AIR-E; IDENTIFIER: RN100224468; LOCATION: Orange, Orange County; TYPE OF FACILITY: rubber manufacturing plant; RULE VIOLATED: 30 TAC §116.715(a) and (c)(7) and §122.143(4), FOP Number O-01271, GTC and SC Number 10, Air Permit Number 292, SC Number 1, and THSC, §382.085(b), by failing to prevent unauthorized emissions; and 30 TAC §101.201(a) and (c) and §122.143(4), FOP Number O-01271, GTC and SC Number 2F, and THSC, §382.085(b), by failing to properly report an emissions event; PENALTY: $6,531; ENFORCEMENT COORDINATOR: Raymond Marlow, (409) 898-3838; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(11) COMPANY: Frontera Generation Limited Partnership; DOCKET NUMBER: 2009-1597-AIR-E; IDENTIFIER: RN102344645; LOCATION: Mission, Hidalgo County; TYPE OF FACILITY: power station; RULE VIOLATED: 30 TAC §§122.143(4), 122.145(2)(B) and (C), and 122.146(1), FOP Number O-01888, GTC, and THSC, §382.085(b), by failing to timely submit a permit compliance certification (PCC) and semi-annual deviation report; PENALTY: $5,600; ENFORCEMENT COORDINATOR: Kirk Schoppe, (512) 239-0489; REGIONAL OFFICE: 1804 West Jefferson Avenue, Harlingen, Texas 78550-5247, (956) 425-6010.

(12) COMPANY: GB Biosciences Corporation; DOCKET NUMBER: 2009-1394-AIR-E; IDENTIFIER: RN100238492; LOCATION: Houston, Harris County; TYPE OF FACILITY: chemical manufacturing plant; RULE VIOLATED: 30 TAC §122.143(4) and §122.146(2), FOP Number O-02266, GTC, and THSC, §382.085(b), by failing to submit the PCC for the Isophthalonitrile Unit; 30 TAC §122.143(4) and §122.146(2)(A), FOP Number O-02266, GTC, and THSC, §382.085(b), by failing to report all instances of deviations; and 30 TAC §§122.143(4), 122.145(2)(C), and 122.146, FOP Number O-02266, GTC, and THSC, §382.085(b), by failing to submit the first semi-annual deviation report within 30 days of the end of the deviation reporting period; PENALTY: $9,843; SEP offset amount of $3,937 applied to Houston-Galveston AERCO's Clean Cities/Clean Vehicles Program; ENFORCEMENT COORDINATOR: Roshondra Lowe, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(13) COMPANY: Georgia-Pacific Wood Products, LLC; DOCKET NUMBER: 2009-1380-AIR-E; IDENTIFIER: RN102433299; LOCATION: Newton County; TYPE OF FACILITY: plywood mill; RULE VIOLATED: 30 TAC §122.143(4) and §122.146(2), FOP Number O-01195, GTC, and THSC, §382.085(b), by failing to submit an ACC report; PENALTY: $1,875; ENFORCEMENT COORDINATOR: Suzanne Walrath, (512) 239-2134; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(14) COMPANY: Hempstead Independent School District; DOCKET NUMBER: 2009-1151-PST-E; IDENTIFIER: RN102027091; LOCATION: Hempstead, Waller County; TYPE OF FACILITY: fleet fueling; RULE VIOLATED: 30 TAC §334.10(b), by failing to maintain the required UST records and make them immediately available for inspection; 30 TAC §334.7(d)(3), by failing to provide an amended UST registration to the agency for any change or additional information regarding the UST; 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 TCEQ delivery certificate; 34 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 §115.244(1) and THSC, §382.085(b), by failing to conduct daily and monthly inspections of the Stage II vapor recovery system (VRS); 30 TAC §115.248(1) and THSC, §382.085(b), by failing to ensure that at least one station representative received training in the operation and maintenance of the Stage II VRS and each current employee receives in-house Stage II vapor recovery training regarding the purpose and operation of the VRS; and 30 TAC §115.242(1)(C) and THSC, §382.085(b), by failing to upgrade the Stage II equipment to onboard refueling vapor recovery compatible systems; PENALTY: $11,875; SEP offset amount of $9,500 applied to RC&D - Water or Wastewater Treatment Assistance; ENFORCEMENT COORDINATOR: Judy Kluge, (817) 588-5800; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(15) COMPANY: Irion County; DOCKET NUMBER: 2009-1422-MLM-E; IDENTIFIER: RN105789614; LOCATION: Irion County; TYPE OF FACILITY: unauthorized disposal site; RULE VIOLATED: 30 TAC §111.201 and THSC, §382.085(b), by failing to comply with the general prohibition on outdoor burning; and 30 TAC §330.15(c),

by failing to prevent the unauthorized disposal of municipal solid waste (MSW); PENALTY: $1,900; SEP offset amount of $1,520 applied to San Angelo Friends of the Environment; ENFORCEMENT COORDINATOR: Mike Pace, (817) 588-5800; REGIONAL OFFICE: 622 South Oakes, Suite K, San Angelo, Texas 76903-7035, (325) 655-9479.

(16) COMPANY: J & J Prairie Oaks, LLC dba Prairie Oaks Ranch; DOCKET NUMBER: 2009-1959-WR-E; IDENTIFIER: RN105817720; LOCATION: Montague County; TYPE OF FACILITY: water rights; RULE VIOLATED: the Code, §11.081 and §11.121, by impounding, diverting, or using state water without a required permit; PENALTY: $350; ENFORCEMENT COORDINATOR: Harvey Wilson, (512) 239-0321; REGIONAL OFFICE: 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (325) 698-9674.

(17) COMPANY: J R Thompson, Inc. dba Running N Ranch Industrial Complex; DOCKET NUMBER: 2009-1957-WR-E; IDENTIFIER: RN104679329; LOCATION: Saint Jo, Montague County; TYPE OF FACILITY: water rights; RULE VIOLATED: the Code, §11.081 and §11.121, by impounding, diverting, or using state water without a required permit; PENALTY: $350; ENFORCEMENT COORDINATOR: Harvey Wilson, (512) 239-0321; REGIONAL OFFICE: 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (325) 698-9674.

(18) COMPANY: LEO GROUP, INC. dba Broadway 610 Gas & Go; DOCKET NUMBER: 2009-1273-PST-E; IDENTIFIER: RN101432672; LOCATION: Houston, Harris County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.50(b)(1)(A) and the Code, §26.3475(a), by failing to monitor USTs for releases; 30 TAC §334.50(b)(2) and the Code, §26.3475(c)(1), by failing to provide proper 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; and 30 TAC §115.245(2) and THSC, §382.085(b), by failing to verify proper operation of the Stage II equipment; PENALTY: $8,184; ENFORCEMENT COORDINATOR: Brianna Carlson, (956) 425-6010; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston. Texas 77023-1452, (713) 767-3500.

(19) COMPANY: Taylor B. McLemore; DOCKET NUMBER: 2009-1552-LII-E; IDENTIFIER: RN105700843; LOCATION: Chico, Wise County; TYPE OF FACILITY: landscaping business; RULE VIOLATED: 30 TAC §30.5(b) and §334.30(a)(2), the Code, §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: $188; ENFORCEMENT COORDINATOR: Brianna Carlson, (956) 425-6010; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(20) COMPANY: Tommy Patterson; DOCKET NUMBER: 2009-1900-WOC-E; IDENTIFIER: RN105805774; LOCATION: Waco, McLennan County; TYPE OF FACILITY: 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: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(21) COMPANY: Postel Industries, Inc.; DOCKET NUMBER: 2009-1415-WQ-E; IDENTIFIER: RN101980365; LOCATION: Livingston, Polk County; TYPE OF FACILITY: metal fabrication; RULE VIOLATED: 30 TAC §281.25(a)(4) and 40 Code of Federal Regulations §122.26(c), by failing to obtain authorization to discharge storm water associated with industrial activities; PENALTY: $950; ENFORCEMENT COORDINATOR: Jorge Ibarra, (817) 588-5800; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-183, (409) 898-3838.

(22) COMPANY: Red River Authority of Texas; DOCKET NUMBER: 2009-1648-MWD-E; IDENTIFIER: RN101702256; LOCATION: Hall County; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number WQ0011252001, Final Effluent Limitations and Monitoring Requirements Number 1, and the Code, §26.121(a), by failing to comply with the permitted effluent limitations for ammonia nitrogen; PENALTY: $1,570; SEP offset amount of $1,256 applied to Keep Texas Beautiful - Texas Waterways Cleanup Program; ENFORCEMENT COORDINATOR: Samuel Short, (512) 239-5363; REGIONAL OFFICE: 3918 Canyon Drive, Amarillo, Texas 79109-4933, (806) 353-9251.

(23) COMPANY: City of Santa Rosa; DOCKET NUMBER: 2009-1551-PWS-E; IDENTIFIER: RN101242170; LOCATION: Santa Rosa, Cameron County; TYPE OF FACILITY: municipal public water supply (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: $895; ENFORCEMENT COORDINATOR: Epifanio Villarreal, (361) 825-3100; REGIONAL OFFICE: 1804 West Jefferson Avenue, Harlingen, Texas 78550-5247, (956) 425-6010.

(24) COMPANY: STELLA LINK BUSINESS, LLC dba Corner Drive in Grocery; DOCKET NUMBER: 2009-1601-PST-E; IDENTIFIER: RN102036225; LOCATION: Houston, Harris County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §115.245(2) and THSC, §382.085(b), by failing to verify proper operation of the Stage II equipment; PENALTY: $2,368; ENFORCEMENT COORDINATOR: Brianna Carlson, (956) 425-6010; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(25) COMPANY: Stolthaven Houston, Inc.; DOCKET NUMBER: 2009-1484-AIR-E; IDENTIFIER: RN100210475; LOCATION: Houston, Harris County; TYPE OF FACILITY: bulk storage plant; RULE VIOLATED: 30 TAC §116.115(c) and §122.143(4), FOP Number O-01060, GTC, Special Terms and Conditions Number 16, Air Permit Number 41618, SC Number 20B, and THSC, §382.085(b), by failing to perform quarterly testing on the tank farm vent flare pilot flame monitoring device; PENALTY: $1,630; ENFORCEMENT COORDINATOR: Roshondra Lowe, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(26) COMPANY: City of Taft; DOCKET NUMBER: 2009-1624-MSW-E; IDENTIFIER: RN104617352; LOCATION: Taft, San Patricio County; TYPE OF FACILITY: unauthorized disposal site; RULE VIOLATED: 30 TAC §330.15(c), by failing to prevent the unauthorized disposal of MSW; PENALTY: $1,200; ENFORCEMENT COORDINATOR: Rajesh Acharya, (512) 239-0577; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5839, (361) 825-3100.

(27) COMPANY: The J.B. Allen Company; DOCKET NUMBER: 2009-1293-MLM-E; IDENTIFIER: RN105750541; LOCATION: Dimmit County; TYPE OF FACILITY: sludge transporter; RULE VIOLATED: 30 TAC §312.142(a), by failing to apply for and receive a registration to transport sewage sludge or chemical toilet waste prior to commencing operations; and 30 TAC §330.15(c), by failing to prevent unauthorized disposal of MSW; PENALTY: $1,895; ENFORCEMENT COORDINATOR: Tom Jecha, (512) 239-2576; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(28) COMPANY: Tom Green County Fresh Water Supply District 2; DOCKET NUMBER: 2009-1374-PWS-E; IDENTIFIER: RN101426047; LOCATION: Christoval, Tom Green County; TYPE OF FACILITY: PWS; RULE VIOLATED: 30 TAC §290.42(d)(5), by failing to provide a flow measuring device for the raw water supplied to the treatment facility; 30 TAC §290.46(f)(3)(B)(v), by failing to maintain records of the monthly calibration conducted on the on-line turbidimeters; 30 TAC §290.46(j), by failing to complete a customer service inspection certificate prior to providing continuous water service to new construction; 30 TAC §290.46(m)(1)(A), by failing to inspect each of the facility's ground storage tanks on an annual basis; 30 TAC §290.46(m)(1)(B), by failing to inspect the facility's pressure tank on an annual basis; 30 TAC §290.46(n)(2), by failing to maintain an accurate and up-to-date map of the distribution system; 30 TAC §290.46(s)(2)(B)(iv), by failing to check the calibration of the on-line turbidimeters; and 30 TAC §290.42(c)(1), by failing to complete the minimum level of required treatment to the water source prior to the water entering the distribution system; PENALTY: $2,534; ENFORCEMENT COORDINATOR: Rebecca Clausewitz, (210) 490-3096; REGIONAL OFFICE: 622 South Oakes, Suite K, San Angelo, Texas 78903-7035, (325) 655-9479.

(29) COMPANY: Mauricio Villeda; DOCKET NUMBER: 2009-1366-LII-E; IDENTIFIER: RN105763502; LOCATION: Plano, Dallas County; TYPE OF FACILITY: landscaping business; RULE VIOLATED: 30 TAC §30.5(b) and §344.30(a)(2), the Code, §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: $188; ENFORCEMENT COORDINATOR: Mike Pace, (817) 588-5800; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(30) COMPANY: Waste Management of Texas, Inc.; DOCKET NUMBER: 2009-1419-AIR-E; IDENTIFIER: RN100542257; LOCATION: Lewisville, Denton County; TYPE OF FACILITY: municipal solid waste landfill; RULE VIOLATED: 30 TAC §122.145(2)(C), General Operating Permit (GOP) Number O-01478 (issued to authorize operation under GOP Number 517 - MSW Landfill General Operating Permit), GTC, and THSC, §382.085(b), by failing to report deviations within 30 days after the end of the semi-annual deviation reporting period; PENALTY: $1,925; ENFORCEMENT COORDINATOR: Trina Grieco, (210) 490-3096; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

TRD-200905847
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: December 15, 2009

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Notice of Receipt of Application and Intent to Obtain a New Municipal Solid Waste Permit (Proposed) Permit No. 2364

APPLICATION. Waste Corporation of Texas, L.P., c/o Ralston Road Landfill, 6632 John Ralston Road, Houston, Harris County, Texas 77049, has applied to the Texas Commission on Environmental Quality (TCEQ) for a new MSW Type V Transfer Station permit. The facility is located within the extraterritorial jurisdiction of the City of Houston, at the intersection of John Ralston Road and U.S. Highway 90, approximately 3.4 miles northeast of the intersection of U.S. Highway 90 and Interstate 610, Houston, Harris County, Texas 77049. The TCEQ received the application on October 26, 2009. The permit application is available for viewing and copying at the Houston Public Library System, Lakewood Neighborhood Branch, 8815 Feland Street, Houston, Harris County, Texas 77028. The TCEQ Executive Director has reviewed this action for consistency with the goals and policies of the Texas Coastal Management Program (CMP) in accordance with the regulations of the Coastal Coordination Council (CCC) and has determined that the action is consistent with the applicable CMP goals and policies.

ADDITIONAL NOTICE. TCEQ's Executive Director has determined the application is administratively complete and will conduct a technical review of the application. After technical review of the application is complete, the Executive Director may prepare a draft permit and will issue a preliminary decision on the application. Notice of the Application and Preliminary Decision will be published and mailed to those who are on the county-wide mailing list and to those who are on the mailing list for this application. That notice will contain the deadline for submitting public comments.

PUBLIC COMMENT/PUBLIC MEETING. You may submit public comments or request a public meeting on this application. The purpose of a public meeting is to provide the opportunity to submit comments or to ask questions about the application. TCEQ will hold a public meeting if the Executive Director determines that there is a significant degree of public interest in the application or if requested by a local legislator. A public meeting is not a contested case hearing.

OPPORTUNITY FOR A CONTESTED CASE HEARING. After the deadline for submitting public comments, the Executive Director will consider all timely comments and prepare a response to all relevant and material, or significant public comments. Unless the application is directly referred for a contested case hearing, the response to comments, and the Executive Director's decision on the application, will be mailed to everyone who submitted public comments and to those persons who are on the mailing list for this application. If comments are received, the mailing will also provide instructions for requesting reconsideration of the Executive Director's decision and for requesting a contested case hearing. A person who may be affected by the facility is entitled to request a contested case hearing from the commission. A contested case hearing is a legal proceeding similar to a civil trial in state district court.

TO REQUEST A CONTESTED CASE HEARING, YOU MUST INCLUDE THE FOLLOWING ITEMS IN YOUR REQUEST: your name, address, phone number; applicant's name and permit number; the location and distance of your property/activities relative to the facility; a specific description of how you would be adversely affected by the facility in a way not common to the general public; and, the statement "[I/we] request a contested case hearing." If the request for contested case hearing is filed on behalf of a group or association, the request must designate the group's representative for receiving future correspondence; identify an individual member of the group who would be adversely affected by the facility or activity; provide the information discussed above regarding the affected member's location and distance from the facility or activity; explain how and why the member would be affected; and explain how the interests the group seeks to protect are relevant to the group's purpose.

Following the close of all applicable comment and request periods, the Executive Director will forward the application and any requests for reconsideration or for a contested case hearing to the TCEQ Commissioners for their consideration at a scheduled Commission meeting. The Commission will only grant a contested case hearing on disputed issues of fact that are relevant and material to the Commission's decision on the application. Further, the Commission will only grant a hearing on issues that were raised in timely filed comments that were not subsequently withdrawn.

MAILING LIST. If you submit public comments, a request for a contested case hearing or a reconsideration of the Executive Director's decision, you will be added to the mailing list for this specific application to receive future public notices mailed by the Office of the Chief Clerk. In addition, you may request to be placed on: (1) the permanent mailing list for a specific applicant name and permit number; and/or (2) the mailing list for a specific county. If you wish to be placed on the permanent and/or the county mailing list, clearly specify which list(s) and send your request to TCEQ Office of the Chief Clerk at the address below.

AGENCY CONTACTS AND INFORMATION. All written public comments and requests must be submitted to the Office of the Chief Clerk, MC 105, TCEQ, P.O. Box 13087, Austin, TX 78711-3087 or electronically at www.tceq.state.tx.us/about/comments.html. If you need more information about this permit application or the permitting process, please call TCEQ Office of Public Assistance, Toll Free, at 1-800-687-4040. Si desea informacion en Español, puede llamar al 1-800-687-4040. General information about TCEQ can be found at our web site at www.tceq.state.tx.us. Further information may also be obtained from Waste Corporation of Texas, L.P., c/o Ralston Road Transfer Station at the address stated above or by calling Mr. Steve Seed, Vice President at (281) 459-4441.

TRD-200905860
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: December 16, 2009

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Notice of Request for Public Comment and Notice of a Public Meeting for Eight Total Maximum Daily Loads

The Texas Commission on Environmental Quality (TCEQ or commission) has made available for public comment eight draft total maximum daily loads (TMDLs) for indicator bacteria in Greens Bayou Above Tidal and Tributaries (Segments 1016, 1016A, 1016B, 1016C, and 1016D), of the San Jacinto River Basin, in Harris County.

The TCEQ will conduct a public meeting to receive comments on the draft TMDLs. This announcement also constitutes notice that the TMDLs will become part of the State Water Quality Management Plan upon approval by the United States Environmental Protection Agency (EPA).

Texas is required to develop TMDLs for impaired water bodies included in the State of Texas Clean Water Act, §303(d) list of impaired water bodies. A TMDL is a detailed water quality assessment that provides the scientific foundation to allocate pollutant loads in a certain body of water in order to restore and maintain designated uses.

The TCEQ will conduct a public meeting on the draft TMDLs for indicator bacteria in Greens Bayou Above Tidal and Tributaries (Segments 1016, 1016A, 1016B, 1016C, and 1016D). The purpose of the public meeting is to provide the public an opportunity to comment on the draft TMDLs. The commission requests comment on each of the major components of the TMDL: problem definition, endpoint identification, source analysis, seasonal variation, linkage between sources and receiving waters, margin of safety, pollutant loading allocation, public participation, and implementation and reasonable assurances. After the public comment period, TCEQ staff may revise the TMDLs, if appropriate. A request will then be made that the final TMDLs be considered by the commission for adoption. Upon adoption of the TMDLs by the commission, the final TMDLs and a response to all comments received will be made available on the TCEQ Web site. The TMDLs will then be submitted to EPA Region 6 for final action by EPA. Upon approval by EPA, the TMDLs will be certified as an update to the State of Texas Water Quality Management Plan.

The public comment meeting will be held on **January 21, 2010, at 6:30 p.m., at Lone Star College Greenspoint Center Building, 3rd Floor, Room 306, 250 North Sam Houston Parkway East, Houston, Texas 77060.** At this meeting individuals have the opportunity to present oral statements when called upon in order of registration. An agency staff member will give a brief presentation at the start of the meeting and will be available to answer questions before and after public comments have been received.

Written comments should be submitted to Jason Leifester, Water Quality Planning Division, Texas Commission on Environmental Quality, MC 203, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-1414. All comments must be received by **5:00 p.m., January 25, 2010,** and should reference *Eight Total Maximum Daily Loads for Indicator Bacteria in Greens Bayou Above Tidal and Tributaries, For Segment Numbers 1016, 1016A, 1016B, 1016C, and 1016D.* For further information regarding the draft TMDLs, please contact Jason Leifester, Water Quality Planning Division, at (512) 239-6457 or *jleifest@tceq.state.tx.us.* Copies of the draft TMDL document will be available and can be obtained via the commission's Web site at: *http://www.tceq.state.tx.us/implementation/water/tmdl/tmdlcalendar.html* or by calling Earlene Lambeth at (512) 239-3129.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the meeting should contact Earlene Lambeth at (512) 239-3129. Requests should be made as far in advance as possible.

TRD-200905841
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: December 15, 2009

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Notice of Response to Comments on Underground Injection Control General Permit number WDWG010000

The executive director of the Texas Commission on Environmental Quality (the commission or TCEQ) files this Response to Public Comment (Response) on the General Permit (GP) to Dispose of Nonhazardous Brine from a Desalination Operation or Nonhazardous Drinking Water Treatment Residuals into a Class I Injection Well, Underground Injection Control (UIC) permit number WDWG010000. As required by Texas Water Code (TWC), §27.025(d) and Title 30 Texas Administrative Code (TAC) §331.202(e), before a GP is issued, the executive director must prepare a response to all timely received comments. The response must be made available to the public and filed with the Office of the Chief Clerk at least ten days before the commission considers the approval of the GP. The commission issues its written response to comments on the GP at the same time the commission issues or denies the GP. This response addresses all written comments received during the comment period and oral or written comments received during the public meeting held by the commission. Timely public comments were received from the Travis County Natural Resources and Environmental Quality Division (Travis County) and the Water Environment Association of Texas (WEAT).

BACKGROUND

This GP implements rules adopted as a result of House Bill (HB) 2654, 80th Legislature, 2007. HB 2654 and subsequent amended rules effective July 10, 2008 allow the commission to issue a GP to authorize the use of a Class I injection well to dispose of nonhazardous desalina-

tion concentrate or nonhazardous drinking water treatment residuals. A single statewide GP covering all qualifying Class I injection wells that meet the permit's performance standards for injection of nonhazardous desalination concentrate and nonhazardous drinking water treatment residuals will expedite the processing of authorizations for wells used solely for these purposes. The GP will require safeguards to protect groundwater and surface water.

This project supports initiatives by the Governor's Office and the Texas Water Development Board to promote desalination technology in Texas and to address the need for public water supply systems to dispose of drinking water treatment residuals.

The time frame for processing an individual Class I UIC permit application is approximately 13 months. Implementation of a GP for Class I wells disposing of nonhazardous desalination concentrate or nonhazardous drinking water treatment residuals will greatly reduce the time required for authorization of these wells. Entities disposing of nonhazardous desalination concentrate and other water treatment residuals from public water systems in Class I nonhazardous waste disposal wells will be the primary beneficiaries of the GP.

The GP will benefit the public by facilitating the production of public water supplies via desalination. The regulated community, the TCEQ, and public water systems that must treat water to meet standards for constituent levels and dispose of the residuals will also benefit from the option of a GP and standards for authorization of Class I wells disposing of nonhazardous desalination concentrate or nonhazardous drinking water treatment residuals which are equivalent to federal standards for nonhazardous Class I wells.

The permit is proposed under the statutory authority of: 1) TWC, §27.011, which makes it unlawful to use an injection well to dispose of industrial and municipal waste without first obtaining a permit from the commission; 2) TWC, §27.025, which authorizes the commission to issue a GP authorizing the use of a Class I injection well to inject nonhazardous brine from a desalination operation or to inject nonhazardous drinking water treatment residuals; and 3) Texas Health and Safety Code, §361.086, which exempts activities authorized by a GP issued under TWC, §27.025 from the requirement for a separate permit for each solid waste facility.

Notice of the proposed UIC GP and an announcement of the public meeting for this permit were published in the *Austin American-Statesman, Corpus Christi Caller-Times, Dallas Morning News, El Paso Times, Houston Chronicle, and San Antonio Express News* on April 20, 2009, and in the *Texas Register* (34 TexReg 2615) on April 24, 2009.

The commission held a public meeting in Austin on June 2, 2009. The comment period ended at the close of the public meeting. Two stakeholders attended the meeting; however, no oral comments were submitted during the meeting. Written comments expressing general support for the project were received from Travis County and WEAT. Specific additional comments from Travis County are addressed below. Some comments have resulted in changes to the permit as identified in the respective responses. Several non-substantive corrections were also made to the GP for clarification purposes.

COMMENTS AND RESPONSES

Comment 1:

Travis County emphasized that the GP must be adequately stringent to ensure practices at a UIC facility do not result in adverse impacts to surface water quality and near surface groundwater resources.

Response 1:

No changes to the proposed GP were made in response to this comment. The technical standards for Class I wells authorized under the GP are substantially equivalent to United States Environmental Protection Agency (EPA) standards for Class I wells disposing of nonhazardous industrial or municipal waste. The regulations governing Class I waste disposal wells provide multiple layers of protection for human health and the environment, including underground sources of drinking water (USDWs). Class I wells inject waste into deep isolated rock formations that are separated from the lowermost USDWs by layers of impermeable clay and rock. TCEQ rules set minimum design, construction, operation, and siting requirements to ensure that Class I wells are a safe means of waste disposal and that waste does not migrate to a USDW. Class I injection wells, including those authorized under the GP, must be designed and constructed to prevent potential leaks from the well and to prevent the movement of fluids along the well bore into or between USDWs. After a well is constructed, a permittee must comply with ongoing requirements for monitoring, testing, recordkeeping, and reporting. Prior to abandoning an injection well at the end of its useful life, the well must be plugged with cement in a manner which will not allow the movement of fluids into or between USDWs.

Comment 2:

Additionally, Travis County stated that statewide and general authorization should be restricted to only those UIC activities that support drinking water treatment waste streams, consistent with the enabling legislation.

Response 2:

No changes to the proposed GP were made in response to this comment. The enabling legislation, HB 2654, 80th Legislature, 2007, amends TWC, §27.021 to allow the commission to issue a GP authorizing the use of a Class I injection well to inject nonhazardous brine from a desalination operation or to inject nonhazardous drinking water treatment residuals. The legislation does not restrict authorization for injection of nonhazardous desalination concentrate under the GP to UIC activities that support *drinking* water treatment waste streams.

Comment 3:

Travis County listed three specific concerns in reference to GP Part III.20.b.iii (relating to Technical Standards and Requirements). Part III.20.b.iii requires applicants seeking authorization under the GP to submit information for each pre-injection unit demonstrating compliance with the applicable design criteria of 30 TAC Chapter 217, Design Criteria for Domestic Wastewater Systems. Travis County's first concern is that it is unclear what UIC operations must implement this provision. It is the opinion of Travis County that the criteria of Chapter 217 are not adequately protective of ground and surface water resources. One of Travis County's specific concerns is that Chapter 217 is identified in the rule as *domestic* wastewater systems, and this appears to mean that the GP has no design criteria for pre-injection units handling *industrial* solid waste.

Travis County's second specific concern is that Chapter 217 design criteria do not establish requirements necessary for the safe management of solid waste because the criteria in the rule only address wastewater treatment so that an effluent into water in the state will achieve TWC, Chapter 26 requirements.

Response 3:

The draft permit has been amended in response to this comment. Part III.20.b.iii has been revised to specify the design criteria stated in 30 TAC §§331.5(c), 331.17(d), and 331.18(b)(6) for pre-injection units used in conjunction with Class I wells. It is the intent of the GP to specify the same design criteria for Class I wells authorized under the GP as for Class I wells authorized under individual permits. Section 331.5(c) states that pre-injection units shall be designed, constructed, operated, maintained, monitored, and closed so as not to cause: 1) the

discharge or imminent threat of discharge of waste into or adjacent to the waters in the state without obtaining specific authorization for such a discharge from the commission; 2) the creation or maintenance of a nuisance; or 3) the endangerment of the public health and welfare. Section 331.17(d) states that pre-injection units shall be designed in such a manner as to: 1) protect USDWs, fresh water, and surface water from pollution; 2) enable the authorized injection well to meet all permit conditions and applicable rules and law; 3) meet the design standards contained in 30 TAC Chapter 317, Design Criteria for Sewerage Systems, (Chapter 317 was repealed and superseded by Chapter 217 effective August 28, 2008 (33 TexReg 6843)), which apply to the type of unit being proposed; and 4) line all ponds according to the requirements of 30 TAC §331.47, relating to Pond Lining. 30 TAC §331.18(b)(6) contains two requirements: 1) the submission of plans and specifications of the pre-injection units which have the seal of a professional engineer licensed in the State of Texas; and 2) certification by the engineer that the submission meets the applicable technical requirements of Chapter 317.

Applicable technical standards in Chapter 317 were specified as standards for pre-injection units in revised Chapter 331 rules effective January 9, 2003 (33 TexReg 5342). The references to Chapter 317 in Chapter 331 are expected to be updated in a future rulemaking to reflect the current Chapter 217 design criteria.

Comment 4:

In its third specific concern related to pre-injection units, Travis County stated that historically both Class I and Class II UIC operations in Texas have had unauthorized discharges that caused significant surface and groundwater contamination resulting from pre-injection activities and unloading/waste transfer. Travis County noted that the UIC GP appears to authorize both single waste generator UIC operations as well as commercial UIC operations that would provide services to multiple waste generation sources. Travis County opined that to control such a broad range of activities and sites throughout the state, it is appropriate to establish more stringent criteria in this GP to address pre-injection unit secondary containment for tanks, treatment units, unloading areas, piping, and similar activities; construction material standards for tanks, treatment units, and piping used in the handling of corrosive wastes and other anticipated waste characteristics; and requirements for initial and periodic integrity testing and certification of pre-injection units.

Response 4:

The draft permit has been amended in response to this comment as outlined in the response to Comment 3. As previously stated, Part III.20.b.iii has been revised to specify the design criteria stated in §§331.5, 331.17(d) and 331.18(b)(6) for pre-injection units used in conjunction with Class I wells.

Travis County is correct in stating that the legislation being implemented by the UIC GP (HB 2654, 80th Legislature, 2007) does not limit the applicability of the GP to noncommercial waste generation sources. Regarding Travis County's comment that it is appropriate to establish more stringent criteria in this GP to address pre-injection units, the executive director notes that, for surface units used in conjunction with the processing and disposal of nonhazardous industrial solid waste (and not used in conjunction with a Class I well), the executive director has no specific detailed criteria to address design, construction, operation, and testing as listed in the comment. However, §331.5(c) and §331.17(d) (which the GP references in Part III.20.b.iii), contain performance standards that necessitate the use of stringent technical standards to protect USDW, fresh water, and surface water from pollution and to enable the authorized injection well to meet all permit conditions and applicable rules and law.

Without specific data and information from the commenter, the executive director disagrees with the statement that Class I UIC operations in Texas have had unauthorized discharges that caused significant surface and groundwater contamination resulting from pre-injection activities and unloading/waste transfer. This response does not address comments pertaining to Class II UIC operations because Class II wells fall within the jurisdiction of the Railroad Commission of Texas (§331.11(b)).

Comment 5:

Regarding Part II, Section B (Limitations on Coverage), Travis County recommended that Provision 2 explicitly identify that waste streams associated with the exploration, development, or production of oil, gas, and geothermal resources are prohibited from injection under the GP.

Response 5:

The draft permit has been amended in response to this comment. New Part II.B.2.e has been added to the list of waste streams prohibited from injection, stating "waste streams associated with the exploration, development, or production of oil, gas and geothermal resources, and other wastes regulated by the Railroad Commission of Texas." Punctuation in Part II.B.2.d and text in Part II.B.3 have been updated accordingly.

Comment 6:

With respect to Part II.C.3.j (relating to Obtaining Authorization) and Part III.3 (relating to Public Interest), Travis County stated that these parts have an ambiguous intent. Travis County pointed out that these parts cross reference §331.121(b), but §331.121(b)(2) - (4) pertain to hazardous wastes which are prohibited wastes under this GP.

Response 6:

The draft permit has been amended in response to this comment. Travis County is correct in pointing out that §331.121(b)(2) - (4) pertain to hazardous wastes which are prohibited wastes under this GP. For clarity, Part II.C.3.j and Part III.3 have been revised to reference only §331.121(b)(1), within §331.121(b).

Comment 7:

Travis County commented that it is unclear why Part II.C.3.n.i. refers to hazardous waste treatment, storage, and disposal facilities that would be prohibited activities under this GP.

Response 7:

No changes to the proposed GP were made in response to this comment. It is true that hazardous waste treatment, storage and disposal facilities would not be authorized under the GP. However, it is possible that a facility could be authorized to dispose of nonhazardous desalination concentrate or nonhazardous drinking water treatment residuals under the GP while having separate authorization to treat, store, or dispose of hazardous waste.

Si desea información en Español, puede llamar al 1-800-687-4040.

TRD-200905845
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: December 15, 2009

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Notice of Water Quality Applications

The following notices were issued on November 5, 2009 through December 4, 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

THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY (TCEQ) has initiated a minor amendment of the Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0010998001 issued to Brookeland Fresh Water Supply District to change the sampling method from Instantaneous to Totalizing Meter. The existing permit authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 65,000 gallons per day. The facility is located approximately 400 feet south of Recreational Road 255 and approximately five miles west of the intersection of Recreational Road 255 and U.S. Highway 96 in Jasper County, Texas.

SEASIDE AQUACULTURE INC which operates the Seaside Aquaculture facility, has applied for a renewal of TPDES Permit No. WQ0003660000, which authorizes the discharge of processed wastewater (aquaculture pond effluent) at a combined daily average flow not to exceed 6,000,000 gallons per day via Outfalls 001 through 009. The facility is located on the eastern side of Farm-to-Market Road 3280 where Farm-to-Market Road 3280 terminates at Matagorda Bay, approximately 6 miles south-southwest of the City of Palacio, Matagorda County, Texas 77465.

MICHAEL HOWARD HENSARLING has applied for a renewal of TCEQ Permit No. WQ0011920001, which authorizes the disposal of treated domestic wastewater at a daily average flow not to exceed 13,000 gallons per day via surface irrigation of 7 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 are located approximately 1 mile due west of the intersection of Farm-to-Market Road 2154 and McCullough Road, approximately six miles south-southeast of Kyle Field in Brazos County, Texas 77881.

UNIMIN CORPORATION which operates Voca Facility, a silica sand mining and processing facility, has applied for a renewal of TPDES Permit No. WQ0003911000, which authorizes the discharge of processed wastewater and storm water on intermittent and flow variable basis via Outfalls 001 and 002. The facility is located south of State Highway 71, approximately 2,000 feet east of the intersection of State Highway 1851 and State Highway 71 near the City of Voca, McCulloch County, Texas 76887.

ALTIVIA CORPORATION which operates a chemical manufacturing facility, has applied for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No.WQ0004884000, to authorize the discharge of storm water on an intermittent and variable basis. The facility is located at 1632 Haden Road, Harrris County, Texas, 77015

CITY OF BROWNWOOD has applied for a major amendment to TPDES Permit No. WQ0010565001 to authorize the removal of effluent limitations and monitoring requirements for Hexachlorocyclohexane (Lindane) in the existing permit. The current permit authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 4,540,000 gallons per day. The facility is located north of Willis Creek at the southeast end of Hoover Avenue in the City of Brownwood in Brown County, Texas 76804.

GUADALUPE BLANCO RIVER AUTHORITY has applied to the Texas Commission on Environmental Quality (TCEQ) for a renewal of TCEQ Permit No. WQ0011751001, which authorizes the disposal of treated domestic wastewater at a daily average flow not to exceed 300,000 gallons per day via surface irrigation of 117 acres of public access golf course land. This permit will not authorize a discharge of pollutants into waters in the State. The wastewater treatment facility and disposal site are located at 22330 Interstate Highway 35 South, New Braunfels, approximately 1,200 feet northeast of the intersection of Farm-to-Market Road 1103 and Interstate Highway 35 in Comal and Guadalupe Counties, Texas 78130. The wastewater treatment facility and disposal site are located in the drainage basin of Comal River in Segment No. 1811 of the Guadalupe River Basin.

FORT BEND COUNTY MUNICIPAL UTILITY DISTRICT NO 124 has applied for a minor amendment to the Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0014134001 to authorize addition of interim II phase which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 300,000 gallons per day. The existing permit 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 16,000 feet southeast of the intersection of Interstate Highway 10 and Buffalo Bayou in Fort Bend County County, Texas 77494.

BASTROP INDEPENDENT SCHOOL DISTRICT has applied for a renewal of TCEQ Permit No. WQ0014200003, which authorizes the disposal of treated domestic wastewater at a daily average flow not to exceed 0.01 million gallons per day via non-public access subsurface drip irrigation system with a minimum area of 2.78 acres. This permit will not authorize a discharge of pollutants into waters in the State. The wastewater treatment facility and disposal site are located approximately 750 feet northwest of the intersection of County Road 248 and Farm-to-Market Road 1209 in Bastrop County, Texas 78602.

CITY OF GEORGETOWN has applied for a major amendment to TCEQ Permit No. WQ0014232001, to authorize an increase in the daily average flow from 200,000 gallons per day to 480,000 gallons per day and to increase the acreage irrigated from 100 acres to 152.8 acres. The draft permit authorizes the disposal of treated domestic wastewater at a daily average flow not to exceed 460,000 gallons per day via surface irrigation of 152.8 acres of public access (golf course and frontage) land. This permit will not authorize a discharge of pollutants into waters in the State. The wastewater treatment facility and disposal site are located approximately 5.8 miles west of Interstate Highway 35 and 1.05 miles north of State Highway 29 in Williamson County, Texas.

CYPRESS RANCH LTD has applied for a renewal of TCEQ Permit No. 14368-001, which authorizes the disposal of treated domestic wastewater at a daily average flow not to exceed 200,000 gallons per day via subsurface drip irrigation of 45.92 acres of public access landscape land. This permit will not authorize a discharge of pollutants into waters in the State. The wastewater treatment facility is located at 5116 Cypress Ranch Boulevard, approximately 6,000 feet northwest of the intersection of State Highway 71 and Reimers Ranch Road in Travis County, Texas 78669. The disposal site is located 5,000 feet southwest of the intersection of State Highway 71 and Hazy Hills Drive in Travis County, Texas 78669.

GRASON VOLENTE INVESTMENTS LTD has applied for a renewal of TCEQ Permit No. WQ0014563001, which authorizes the disposal of treated domestic wastewater at a daily average flow not to exceed 175,000 gallons per day via non-public access subsurface drip irrigation with a minimum area of 1,742,400 square feet 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 will be located six miles west of the intersection of Ranch Road 620 and Farm-to-Market Road 2769 and 1.5 miles north of Farm-to-Market Road 2769 (Volente Road) in Travis County, Texas 78613.

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-200905717
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: December 10, 2009

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Notice of Water Quality Applications

The following notices were issued on December 2, 2009 through December 11, 2009.

The following notices 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

TEXAS PARKS AND WILDLIFE DEPARTMENT has applied for a renewal of TPDES Permit No. WQ0011722001 which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 30,000 gallons per day. The facility is located 4,000 feet northwest of the intersection of Farm-to-Market Road 3126 and State Park Road 65, and 500 feet west of Farm-to-Market Road 3126 in Polk County, Texas 77351.

SYNAGRO OF TEXAS - CDR, INC. has applied for a new permit, Proposed TCEQ Permit No. WQ0004888000, to authorize the land application of sewage sludge for beneficial use on 137.7 acres. This permit will not authorize a discharge of pollutants into waters in the State. The sewage sludge land application site is located approximately seven miles east of Austin Bergstrom International Airport, off of Richards Drive, 300 feet south of Highway 71, in Travis County, Texas 78617.

CYPRESS RANCH, LTD., has applied for a renewal of TCEQ Permit No. 14368-001, which authorizes the disposal of treated domestic wastewater at a daily average flow not to exceed 200,000 gallons per day via subsurface drip irrigation of 45.92 acres of public access landscape land. This permit will not authorize a discharge of pollutants into waters in the State. The wastewater treatment facility is located at 5116 Cypress Ranch Boulevard, approximately 6,000 feet northwest of the intersection of State Highway 71 and Reimers Ranch Road in Travis County, Texas 78669. The disposal site is located 5,000 feet southwest of the intersection of State Highway 71 and Hazy Hills Drive in Travis County, Texas 78669.

MAGELLAN TERMINALS HOLDINGS, which operates the Gelena Park Terminal, has applied to the Texas Commission on Environmental Quality (TCEQ) for a major amendment to TPDES Permit No. WQ0000671000, to authorize a reduction in the monitoring frequency for total organic carbon and oil and grease at Outfalls 002 and 003 from twice per day to once per day; to authorize the discharge of hydrostatic test water from the fire protection system via Outfalls 001, 002, and 003; to authorize the discharge of offsite storm water from a pipe vault via Outfall 001; and to require effluent monitoring for lead from hydrostatic discharges only when the vessel tested contained a product with lead or lead additives. The current permit authorizes the discharge of storm water run off, tank draw-down water, wastewater from tank washes, boiler blowdown, wastewater from a vehicle wash rack and wash rack hoses, and hydrostatic test water at a daily average flow not to exceed 730,000 gallons per day via Outfall 001 and storm water runoff and hydrostatic test water on an intermittent and flow variable basis via Outfalls 002 and 003.The facility is located on company property abutting the north shore of the Houston Ship Channel at a point approximately 1/2 mile downstream from the Washburn Tunnel and approximately 1 mile south of Interstate Highway 10, Harris County, Texas.

NORTH ALAMO WATER SUPPLY CORPORATION, which operates the Lasara Reverse Osmosis Water Tretment 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.

SYNAGRO OF TEXAS-CDR, INC. has applied for a new permit, Proposed TCEQ Permit No. WQ0004890000, to authorize the land application of sewage sludge for beneficial use on 135.8 acres. This permit will not authorize a discharge of pollutants into waters in the State. The sewage sludge land application site will be located approximately 7 miles east of Austin Bergstrom International Airport off of Richards Drive, 300 feet south of Highway 71, in Travis County, Texas 78617.

CITY OF BRADY has applied for a major amendment to TPDES Permit No. WQ0010132001 to authorize the removal of effluent limitations and monitoring requirements for Total Silver and Cyanide. The current permit authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 1,103,000 gallons per day. The facility is located 5,000 feet east of the intersection of U.S. Highway 87 and 7th Street in the City of Brady, on the west bank of Brady Creek in McCulloch County, Texas 76825.

CITY OF BASTROP has applied for a renewal of TPDES Permit No. WQ0011076002, which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 4,000,000 gallons per day. The facility will be located approximately 1.5 miles south of the intersection of State Highway 71 and State Highway 304, on the north bank of the confluence of Spring Branch and the Colorado River in Bastrop County, Texas.

CITY OF KYLE AND AQUA OPERATIONS, INC. has applied to the Texas Commission on Environmental Quality (TCEQ) for a renewal of TPDES Permit No. WQ0011041002 which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 4,500,000 gallons per day. The facility is located at 941 New Bridge Drive, approximately 2.7 miles northwest of the intersection of State Route 21 and Farm-to-Market Road 2720 in Hays County, Texas 78640.

WINTER GARDEN PARK CORPORATION has applied for a renewal of TPDES Permit No. WQ0011628001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 11,000 gallons per day. The facility is located at 9101 West Business 83, Lot 44, approximately 850 feet due west from the intersection of U.S. Highway 83 and Farm-to-Market Road 800, 85 feet south of U.S. Highway 83 in Cameron County, Texas 78552.

TEXAS PARKS AND WILDLIFE DEPARTMENT has applied for a renewal of TPDES Permit No. WQ0011722001 which authorizes the

discharge of treated domestic wastewater at a daily average flow not to exceed 30,000 gallons per day. The facility is located 4,000 feet northwest of the intersection of Farm-to-Market Road 3126 and State Park Road 65, and 500 feet west of Farm-to-Market Road 3126 in Polk County, Texas 77351.

U.S. DEPARTMENT OF THE ARMY has applied for a renewal of TPDES Permit No. WQ0012074001 which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 12,500 gallons per day. The facility is located approximately 3,300 feet east of Farm-to-Market Road 306 and 2,500 feet north of Jacob Creek Park Road in Comal County, Texas 78133.

AQUA UTILITIES, INC. has applied for a renewal of TPDES Permit No. WQ0012563001, 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 approximately 1.3 miles west of the intersection of Farm-to-Market Road 729 and Farm-to-Market Road 1969 and approximately 4 miles southwest of the intersection of State Highway 49 and Farm-to-Market Road 1969 in Marion County, Texas 78640.

BARTON CREEK WEST WATER SUPPLY CORPORATION has applied for a renewal of TCEQ Permit No. WQ0012786001, which authorizes the disposal of treated domestic wastewater at a daily average flow not to exceed 126,000 gallons per day via surface irrigation of 53.3 acres of non-public access land. The wastewater treatment facility and disposal site are located adjacent to and south of Farm-to-Market Road 2244, approximately 3 miles east of the intersection of Farm-to-Market Road 2244 and State Highway 71 in Travis County, Texas 78733.

JAMES WAYNE ROBINSON has applied for a renewal of TPDES Permit No. WQ0012830001 which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 6,000 gallons per day. The facility is located at the end of Northwinds Street, approximately 1,590 feet south of the intersection of Northwinds Street and Farm-to-Market Road 529 in Harris County, Texas 77041.

AQUA UTILITIES, INC. has applied for a renewal with changes of TCEQ Permit No. WQ0013337001, which authorizes the disposal of treated domestic wastewater at a daily average flow not to exceed 22,500 gallons per day to 15,000 gallons per day via subsurface soil absorption-disposal (low pressure dosing system) on 45,000 square feet 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 are located approximately 6.5 miles northwest of the intersection of Farm-to-Market Roads 1431 and 2243 and 2.5 miles west of the intersection of Farm-to-Market Road 2243 and Round Mountain Road in Travis County, Texas 78641.

TEXAS DEPARTMENT OF TRANSPORTATION has applied for a renewal of TPDES Permit No. WQ0013412001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 380 gallons per day. The facility is located approximately 3,000 feet northwest of the intersection of U.S. Highway 181 and Farm-to-Market Road 1074 and approximately 1.5 miles southeast of the intersection of the U.S. Highway 181 and Farm-to-Market Road 881 at the Texas Department of Transportation Area Engineering and Maintenance Office Site in San Patricio County, Texas 78387.

THE TEXAS DEPARTMENT OF TRANSPORTATION has applied for a renewal of TPDES Permit No. WQ0014768001 which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 10,000 gallons per day. The facility is located at 4080 Interstate Highway 37, approximately 9.6 miles north of the intersection of Interstate Highway 37 and U.S. Highway 281 near the City of Three Rivers in Live Oak County, Texas 78075.

MISCHER INVESTMENTS, L.P. has applied for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0014954001, to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 300,000 gallons per day. The facility was previously permitted under TPDES Permit No. WQ0014588001, which expired May 01, 2009. The facility will be located approximately 2.3 miles south and 2.4 miles west of the intersection of U.S. Highway 290 and Barker-Cypress Road in Harris County, Texas 77433.

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-200905858
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: December 16, 2009

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Notice of Water Rights Application

Notices issued November 18, 2009 through December 4, 2009.

APPLICATION NO. 3808C; Don Clark, Mary Frazier Clark, and Donna Clark Jones, Applicants, P.O. Box 947, Comanche, Texas, 76442, have applied for an amendment to Water Use Permit No. 3808 (Application No. 4087) to extend the expiration date of their water right to divert and use water from a reservoir on Copperas (Rush) Creek, and a point on Copperas (Rush) Creek, Brazos River Basin in Comanche County. More information on the application and how to participate in the permitting process is given below. The application and a portion of the fees were received on April 30, 2009. Additional information and fees were received on August 19, 2009, and additional information August 28, and September 3, 2009. The application was accepted for filing and declared administratively complete on September 11, 2009. Written public comments and requests for a public meeting should be submitted to the Office of Chief Clerk, at the address provided in the information section below, within 30 days of the date of newspaper publication of the notice.

APPLICATION NO. 08-5097A; Houston County Water Control and Improvement District No. 1, Applicant, P.O. Box 1246, Crockett, Texas 75835, has applied to amend Certificate of Adjudication No. 08-5097 to divert and use an additional 3,500 acre-feet of water per year for municipal purposes from a authorized reservoir located on Little Elkhart Creek, Trinity River Basin, and to add industrial use in Houston County. More information on the application and how to participate in the permitting process is given below. The application and partial fees were received February 17, 2009. Additional information and fees were received on April 29, May 4, May 21, and October 5, 2009. The application was declared administratively complete and accepted for filing on June 2, 2009. Written public comments and requests for a public meeting should be received in the Office of Chief Clerk, at the address provided in the information section below, within 30 days of the date of newspaper publication of the notice.

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-200905718
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: December 10, 2009

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Notice of Water Rights Application

Notice issued December 9, 2009.

APPLICATION NO. 14-1538A; W. E. Hooks, Jr., Applicant, P.O. Box 111, Waring, Texas 78074, has applied to amend Certificate of Adjudication No. 14-1538 to add a place of use in Kimble County and relocate a diversion point upstream on the South Llano River, Colorado River Basin, in Kimble County. More information on the application and how to participate in the permitting process is given below. The Commission will review the application as submitted by the applicant and may or may not grant the application as requested. Written public comments and requests for a public meeting should be submitted to the Office of the Chief Clerk, at the address provided in the information section below by December 28, 2009.

INFORMATION SECTION

To view the complete issued notice, view the notice on our web site at www.tceq.state.tx.us/comm_exec/cc/pub_notice.html or call the Office of the Chief Clerk at (512) 239-3300 to obtain a copy of the complete notice. When searching the web site, type in the issued date range shown at the top of this document to obtain search results.

A public meeting is intended for the taking of public comment, and is not a contested case hearing.

The Executive Director can consider approval of an application unless a written request for a contested case hearing is filed. To request a contested case hearing, you must submit the following: (1) your name (or for a group or association, an official representative), mailing address, daytime phone number, and fax number, if any: (2) applicant's name and permit number; (3) the statement "[I/we] request a contested case hearing;" and (4) a brief and specific description of how you would be affected by the application in a way not common to the general public. You may also submit any proposed conditions to the requested application which would satisfy your concerns. Requests for a contested case hearing must be submitted in writing to the TCEQ Office of the Chief Clerk at the address provided in the information section below.

If a hearing request is filed, the Executive Director will not issue the requested permit and may forward the application and hearing request to the TCEQ Commissioners for their consideration at a scheduled Commission meeting.

Written hearing requests, public comments or requests for a public meeting should be submitted to the Office of the Chief Clerk, MC 105, TCEQ, P.O. Box 13087, Austin, TX 78711-3087. For information concerning the hearing process, please contact the Public Interest Counsel, MC 103, at the same address. For additional information, individual members of the general public may contact the Office of Public Assistance at 1-800-687-4040. General information regarding the TCEQ can be found at our web site at www.tceq.state.tx.us. Si desea información en Español, puede llamar al 1-800-687-4040.

TRD-200905859
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: December 16, 2009

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Proposal for Decision

The State Office of Administrative Hearings issued a Proposal for Decision and Order to the Texas Commission on Environmental Quality on December 11, 2009, in the matter of the Executive Director of the Texas Commission on Environmental Quality, Petitioner v. Dale Werlinger; SOAH Docket No. 582-09-3658; TCEQ Docket No. 2008-1684-WQ-E. The commission will consider the Administrative Law Judge's Proposal for Decision and Order regarding the enforcement action against Dale Werlinger on a date and time to be determined by the Office of the Chief Clerk in Room 201S of Building E, 12100 N. Interstate 35, Austin, Texas. This posting is Notice of Opportunity to Comment on the Proposal for Decision and Order. The comment period will end 30 days from date of this publication. Written public comments should be submitted to the Office of the Chief Clerk, MC-105, TCEQ, P.O. Box 13087, Austin, Texas 78711-3087. If you have any questions or need assistance, please contact Melissa Chao, Office of the Chief Clerk, (512) 239-3300.

TRD-200905861
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: December 16, 2009

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Public Hearing on the Proposed Revision to 30 TAC Chapter 101

The Texas Commission on Environmental Quality (commission) will conduct a public hearing to receive testimony regarding a proposed revision to 30 Texas Administrative Code (TAC) Chapter 101, General Air Quality Rules.

The proposed rulemaking would simplify the applicability requirements for determining if the owner or operator of regulated entity is

subject to being assessed an emissions fee and would simplify the rule language establishing the basis for determining the amount of the emissions fee.

The commission will hold a public hearing on this proposal in Austin on January 15, 2010, at 10:00 a.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.

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 2008-025-101-EN. The comment period closes January 25, 2010. 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 Mr. Michael De La Cruz, Air Quality Division, (512) 239-0259.

TRD-200905764
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: December 11, 2009

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Public Hearings on Proposed Revisions to 30 TAC Chapter 101

The Texas Commission on Environmental Quality (commission) will conduct public hearings to receive testimony regarding proposed revisions to 30 Texas Administrative Code (TAC) Chapter 101, General Air Quality Rules.

The proposed rulemaking would implement House Bill 1526 from the 80th Legislature, 2007, Regular Session, relating to incentives for owners or operators implementing a voluntary supplemental leak detection program using innovative technology.

The commission will hold a public hearing on this proposal in Irving on January 19, 2010 at 10:00 a.m. in the Irving Central Library Auditorium located at 801 West Irving Boulevard; in Austin on January 20, 2010, at 10:00 a.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle; and in Houston on January 21, 2010, at 10:00 a.m. in Conference Room B at the Houston-Galveston Area Council located at 3555 Timmons Lane, Suite 120. 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 the hearing should contact Charlotte Horn, Office of Legal Services at (512) 239-0779. Requests should be made as far in advance as possible.

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 2007-040-101-CE. The comment period closes January 25, 2010. 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 Joseph A. Janecka, P.E., Field Operations Support Division, at (512) 239-1353 or e-mail *jjanecka@tceq.state.tx.us*.

TRD-200905766
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: December 11, 2009

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Public Hearing on Proposed Revisions to 30 TAC Chapter 115 and Revisions to the State Implementation Plan

The Texas Commission on Environmental Quality (commission) will conduct public hearings to receive testimony regarding proposed revisions to 30 Texas Administrative Code (TAC) Chapter 115, Control of Air Pollution from Volatile Organic Compounds, §§115.322 - 115.326, 115.352 - 115.357, 115.781, 115.782, and 115.786 - 115.788; proposed new §115.358 and §115.784; and proposed 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) regulations concerning SIPs.

The proposed rulemaking would revise the Chapter 115 leak detection and repair rules in Subchapter D, Divisions 2 and 3, and Subchapter H, Division 3 to allow an optional alternative work practice to detect fugitive emission leaks using optical gas imaging instruments.

The commission will hold public hearings on this proposal in Irving on January 19, 2010, at 2:00 p.m. at the Irving Central Library Auditorium located at 801 West Irving Boulevard; in Austin on January 20, 2010, at 2:00 p.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle; and in Houston on January 21, 2010, at 2:00 p.m. in Conference Room A at the Houston-Galveston Area Council located at 3555 Timmons Lane, Suite 120. 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 each hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearings should contact Charlotte Horn, Office of Legal Services at (512) 239-0779. Requests should be made as far in advance as possible.

Written 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 2009-030-115-EN. The comment period closes January 25, 2010.

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 Robert Gifford of the Air Quality Division at (512) 239-3149.

TRD-200905758
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: December 11, 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 Transmittal Number 09-039, Amendment Number 885, to the Texas State Plan for Medical Assistance, under Title XIX of the Social Security Act.

The amendment is being submitted at the direction of H.B. 2030, 81st Legislature, Regular Session, 2009. The purpose of this amendment is to modify the prescribed drugs benefit to extend the allowable number of refills to eleven refills when dispensed within twelve months of the date of the original prescription. The amendment also modifies the criteria for a drug's inclusion on the preferred drug list (PDL) to include drugs provided by a manufacturer or labeler that has not reached a supplemental rebate agreement with the state if its inclusion will have no negative cost impact. The requested effective date for the proposed amendment is June 1, 2010.

The proposed amendment will have no fiscal impact on state or federal budgets.

To obtain copies of the proposed amendment, interested parties may contact Leslie Weems by mail at P.O. Box 13247, MC:600; by telephone at (512) 491-1331; by facsimile at (512) 491-1953; or by e-mail at leslie.weems@hhsc.state.tx.us. Copies of the proposal will also be made available for public review at the local offices of the Texas Department of Aging and Disability Services.

TRD-200905720
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Filed: December 10, 2009

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Public Notice

The Texas Health and Human Services Commission announces its intent to submit Transmittal Number 09-043, Amendment Number 889, to the Texas State Plan for Medical Assistance, under Title XIX of the Social Security Act.

The purpose of this amendment is to extend the $25 capitation rate for Cost Sharing Obligations for Dual Eligible Members of Participating Medicare Advantage Health Plans. The proposed amendment is effective January 1, 2010.

The proposed amendment will have no impact on state or federal budgets.

To obtain copies of the proposed amendment, interested parties may contact David Palmer by mail at P.O. Box 85200, Mail Code H-400, Austin, TX 78708-5200; by telephone at (512) 491-1420; by facsimile at (512) 491-1998; or by e-mail at David.Palmer@hhsc.state.tx.us. Copies of the proposal will also be made available for public review at the local offices of the Texas Department of Health and Human Services.

TRD-200905744
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Filed: December 10, 2009

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Heart of Texas Council of Governments

Request for Proposal

The Heart of Texas Council of Governments (HOTCOG) is soliciting sealed proposals for the following:

Medical and Prescription Drug Coverage under a Preferred Provider Network and/or Health Maintenance Organization (HMO) Program.

Proposal packets may be picked up on Monday, December 14, 2009 at HOTCOG, 1514 S. New Road, Waco, Texas 76711. Requests can be made by e-mail to: mary.mcdow@hot.cog.tx.us or by calling (254) 292-1830.

HOTCOG reserves the right to reject any and/or all proposals or to accept any proposal advantageous to HOTCOG.

HOTCOG is an equal opportunity organization, which does not discriminate on the basis of race, color, religion, national origin, gender, age, or disability.

TRD-200905767
Mary McDow
Personnel Manager
Heart of Texas Council of Governments
Filed: December 11, 2009

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Texas Department of Insurance

Company Licensing

Application to change the name of AIG LIFE INSURANCE COMPANY to AMERICAN GENERAL LIFE INSURANCE COMPANY OF DELAWARE, a foreign life company. The home office is in Wilmington, Delaware.

Application to change the name of RENAISSANCE LIFE AND HEALTH INSURANCE COMPANY to MEMBERS HEALTH INSURANCE COMPANY, a foreign life company. The home office is in Indianapolis, Indiana.

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-200905869
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: December 16, 2009

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Notice of Proposed Amendments to the Texas Health Reinsurance System Plan of Operation

Notice is given to the public of proposed amendments to the Texas Health Reinsurance System (System) Plan of Operation pursuant to Insurance Code §1501.306.

The System was created by the Legislature in 1993 to engage in the reinsurance of small employer group health benefit plans issued by members of the System. The Insurance Code §1501.306 requires the Board of Directors to adopt a plan of operation. The Commissioner approved the original Plan of Operation on September 6, 1995. The Commissioner approved the first restated Plan of Operation on June 21, 2007, to be effective October 1, 2007. Section 1501.306 provides that proposed amendments to the Plan of Operation be submitted to the Commissioner, and the Commissioner, after notice and hearing, may approve them.

The System Board of Directors considered a number of changes to the Plan of Operation at its May 13, 2009 meeting, August 12, 2009 meeting and December 1, 2009 meeting. The Board, at its August 12, 2009 meeting, voted to recommend to the Commissioner approval of certain amendments to the Plan of Operation. At its December 1, 2009 meeting it voted to make two revisions to its August 12, 2009 recommendation. The proposed Plan of Operation amendments recommended to the Commissioner by the Board include both substantive changes to various operational activities of the System set out in the Plan document, as well as a number of amendments to existing definitions, and new definitions.

A full text copy of the Plan of Operation in its entirety with all proposed amendments is available by electronic mail, facsimile transmission, or USPS from Nick Hoelscher, Commissioner's representative. Mr. Hoelscher may be contacted by mail at the Texas Department of Insurance, Mail Code 110-1A, P.O. Box 149104, Austin, Texas 78714-9104; by telephone at (512) 475-1821; or by e-mail at nick.hoelscher@tdi.state.tx.us.

The Commissioner will consider written comments on the proposed amendments submitted no later than 5:00 p.m. on January 25, 2010 to Gene C. Jarmon, General Counsel and Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. An additional copy of the comment must be simultaneously submitted to Nick Hoelscher, Staff Attorney, Legal Division, Texas Department of Insurance, Mail Code 110-1A, P.O. Box 149104, Austin, Texas 78714-9104. For further information contact Nick Hoelscher at (512) 322-4316.

The Commissioner will consider the proposed amended Plan of Operation in a public hearing under Docket Number 2710, scheduled for 9:30 a.m. on February 3, 2010, in Room 100 of the William P. Hobby, Jr. State Office Building, 333 Guadalupe Street, Austin, Texas. Written and oral comments on the proposed amendments presented at the hearing also will be considered.

TRD-200905849
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: December 15, 2009

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Third Party Administrator Applications

The following third party administrator (TPA) applications have been filed with the Texas Department of Insurance and are under consideration.

Application of JOHN T. PARKER CLAIMS-LONGVIEW, INC., a domestic third party administrator. The home office is LONGVIEW, TEXAS.

Application of JOHN T. PARKER CLAIMS-HOUSTON, INC., a domestic third party administrator. The home office is LONGVIEW, TEXAS.

Application of FCE BENEFIT ADMINISTRATORS, INC., a foreign third party administrator. The home office is BURLINGAME, CALIFORNIA.

Application of MITSUI SUMITOMO MARINE MANAGEMENT (USA), INC., a foreign third party administrator. The home office is NEW YORK, NEW YORK.

Application of BENEFIT BUCKS, INC., a domestic third party administrator. The home office is DALLAS, TEXAS.

Any objections must be filed within 20 days after this notice is published in the *Texas Register,* addressed to the attention of David Moskowitz, MC 305-2E, 333 Guadalupe, Austin, Texas 78701.

TRD-200905868
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: December 16, 2009

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Texas Lottery Commission

Instant Game Number 1229 "Crazy Wild 5's"

1.0 Name and Style of Game.

A. The name of Instant Game No. 1229 is "CRAZY WILD 5'S". The play style is "key number match with auto win & 5x".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 1229 shall be $5.00 per ticket.

1.2 Definitions in Instant Game No. 1229.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - The printed data under the latex on the front of the instant ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black play symbols are: 1, 2, 3, 4, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, DOLLAR BILL SYMBOL, 5X SYMBOL, $5.00, $10.00, $15.00, $20.00, $25.00, $40.00, $50.00, $100, $500, $1,000, and $50,000.

D. Play Symbol Caption - The printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 1229 - 1.2D

PLAY SYMBOL	CAPTION
1	ONE
2	TWO
3	THR
4	FOR
6	SIX
7	SVN
8	EGT
9	NIN
10	TEN
11	ELV
12	TLV
13	TRN
14	FTN
15	FFN
16	SXN
17	SVT
18	ETN
19	NTN
20	TWY
21	TWON
22	TWTO
23	TWTH
24	TWFR
25	TWFV
26	TWSX
27	TWSV
28	TWET
29	TWNI
30	TRTY
31	TRON
32	TRTO
33	TRTH
34	TRFR
35	TRFV
36	TRSX
37	TRSV
38	TRET
39	TRNI
40	FRTY
DOLLAR BILL SYMBOL	$BILL
5X SYMBOL	WINX5
$5.00	FIVE$
$10.00	TEN$
$15.00	FIFTN
$20.00	TWENTY
$25.00	TWY FIV

$40.00	FORTY
$50.00	FIFTY
$100	ONE HUND
$500	FIV HUND
$1,000	ONE THOU
$50,000	50 THOU

E. Serial Number - A unique 14 (fourteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There will be a four (4)-digit "security number" which will be individually boxed and randomly placed within the number. The remaining ten (10) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 00000000000000.

F. Low-Tier Prize - A prize of $5.00, $10.00, $15.00 or $20.00.

G. Mid-Tier Prize - A prize of $50.00, $100 or $500.

H. High-Tier Prize - A prize of $1,000, $5,000 or $50,000.

I. Bar Code - A 24 (twenty-four) character interleaved two (2) of five (5) bar code which will include a four (4) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the ten (10) digit Validation Number. The bar code appears on the back of the ticket.

J. Pack-Ticket Number - A 14 (fourteen) digit number consisting of the four (4) digit game number (1229), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 001 and end with 075 within each pack. The format will be: 1229-0000001-001.

K. Pack - A pack of "CRAZY WILD 5'S" Instant Game tickets contains 075 tickets, packed in plastic shrink-wrapping and fanfolded in pages of one (1). The packs will alternate. One will show the front of ticket 001 and back of 075 while the other fold will show the back of ticket 001 and front of 075.

L. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401.

M. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "CRAZY WILD 5'S" Instant Game No. 1229 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule 401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "CRAZY WILD 5'S" Instant Game is determined once the latex on the ticket is scratched off to expose 45 (forty-five) Play Symbols. If the player matches any of YOUR NUMBERS play symbols to any of the WILD NUMBERS play symbols, the player wins the PRIZE shown for that number. If the player reveals a "DOLLAR BILL" play symbol, the player wins the PRIZE shown for that symbol instantly. If the player reveals a "5X" play symbol, the player wins 5 TIMES the PRIZE shown for that symbol. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 45 (forty-five) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 45 (forty-five) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 45 (forty-five) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;

17. Each of the 45 (forty-five) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets in a pack will not have identical play data, spot for spot.

B. The "DOLLAR BILL" (auto win) play symbol will never appear more than once on a ticket.

C. The "5X" (win x 5) play symbol will only appear on intended winning tickets and only as dictated by the prize structure.

D. No more than three (3) matching non-winning prize symbols will appear on a ticket.

E. No duplicate WILD NUMBERS play symbols on a ticket.

F. No duplicate non-winning YOUR NUMBERS play symbols on a ticket.

G. Non-winning prize symbols will never be the same as the winning prize symbol(s).

H. No prize amount in a non-winning spot will correspond with the YOUR NUMBERS play symbol (i.e. 5 and $5).

I. The top prize symbol will appear on every ticket unless otherwise restricted.

2.3 Procedure for Claiming Prizes.

A. To claim a "CRAZY WILD 5'S" Instant Game prize of $5.00, $10.00, $15.00, $20.00, $50.00, $100, or $500, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, if appropriate, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not required, to pay a $50.00, $100 or $500 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim a "CRAZY WILD 5'S" Instant Game prize of $1,000, $5,000 or $50,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "CRAZY WILD 5'S" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General;

3. delinquent in reimbursing the Texas Health and Human Services Commission for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resources Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "CRAZY WILD 5'S" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "CRAZY WILD 5'S" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code §466.408. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed. An Instant Game ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 6,000,000 tickets in the Instant Game No. 1229. The approximate number and value of prizes in the game are as follows:

Figure 2: GAME NO. 1229 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in**
$5	480,000	12.50
$10	640,000	9.38
$15	180,000	33.33
$20	160,000	37.50
$50	80,000	75.00
$100	7,500	800.00
$500	800	7,500.00
$1,000	150	40,000.00
$5,000	20	300,000.00
$50,000	6	1,000,000.00

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.

**The overall odds of winning a prize are 1 in 3.87. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 1229 without advance notice, at which point no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 1229, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401, and all final decisions of the Executive Director.

TRD-200905807

Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: December 14, 2009

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Instant Game Number 1231 "Maybe It's Your Lucky Day™"

1.0 Name and Style of Game.

A. The name of Instant Game No. 1231 is "MAYBE IT'S YOUR LUCKY DAY™". The play style for this game is "row/column/diagonal".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 1231 shall be $1.00 per ticket.

1.2 Definitions in Instant Game No. 1231.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - The printed data under the latex on the front of the instant ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black play symbols are: HORSESHOE SYMBOL, CLOVER SYMBOL, STAR SYMBOL, $1.00, $2.00, $3.00, $4.00, $5.00, $6.00, $10.00, $20.00, $50.00 and $300.

D. Play Symbol Caption - The printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 1231 - 1.2D

PLAY SYMBOL	CAPTION
HORSESHOE SYMBOL	
CLOVER SYMBOL	
STAR SYMBOL	
$1.00	ONE$
$2.00	TWO$
$3.00	THREE$
$4.00	FOUR$
$5.00	FIVE$
$6.00	SIX$
$10.00	TEN$
$20.00	TWENTY
$50.00	FIFTY
$300	THR HUND

E. Serial Number - A unique 14 (fourteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There will be a four (4)-digit "security number" which will be individually boxed and randomly placed within the number. The remaining ten (10) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 00000000000000.

F. Low-Tier Prize - A prize of $1.00, $2.00, $3.00, $4.00, $5.00, $6.00, $10.00 or $20.00.

G. Mid-Tier Prize - A prize of $50.00 or $300.

H. Bar Code - A 24 (twenty-four) character interleaved two (2) of five (5) bar code which will include a four (4) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the ten (10) digit Validation Number. The bar code appears on the back of the ticket.

I. Pack-Ticket Number - A 14 (fourteen) digit number consisting of the four (4) digit game number (1231), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 001 and end with 150 within each pack. The format will be: 1231-0000001-001.

J. Pack - A pack of "MAYBE IT'S YOUR LUCKY DAY™" Instant Game tickets contains 150 tickets, packed in plastic shrink-wrapping and fanfolded in pages of five (5). Tickets 001 to 005 will be on the top page; tickets 006 to 010 on the next page; etc.; and tickets 146 to 150 will be on the last page with backs exposed. Ticket 001 will be folded over so the front of ticket 001 and 010 will be exposed.

K. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401.

L. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "MAYBE IT'S YOUR LUCKY DAY™" Instant Game No. 1231 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule 401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "MAYBE IT'S YOUR LUCKY DAY™" Instant Game is determined once the latex on the ticket is scratched off to expose 9 (nine) Play Symbols. If a player reveals three (3) "horseshoe" play symbols, three (3) "clover" play symbols or three (3) "star" play symbols in any one row, column or diagonal, the player wins the PRIZE shown. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 9 (nine) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 9 (nine) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 9 (nine) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;

17. Each of the 9 (nine) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets within a pack will not have identical patterns.

B. A ticket will win as indicated by the prize structure.

C. A ticket can win once and will win by having three (3) like symbols appear consecutively in a horizontal, vertical or diagonal row.

D. Tickets will not contain four (4) of any symbol in all 4 corners.

E. On all tickets, there will be at least one clover symbol, at least one horseshoe symbol and at least one star symbol.

F. On winning tickets, wins should appear equally among the three (3) types of wins (row, column, diagonal).

2.3 Procedure for Claiming Prizes.

A. To claim a "MAYBE IT'S YOUR LUCKY DAY™" Instant Game prize of $1.00, $2.00, $3.00, $4.00, $5.00, $6.00, $10.00, $20.00, $50.00 or $300, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, if appropriate, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not required, to pay a $50.00 or $300 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. As an alternative method of claiming a "MAYBE IT'S YOUR LUCKY DAY™" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General;

3. delinquent in reimbursing the Texas Health and Human Services Commission for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resources Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code.

D. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "MAYBE IT'S YOUR LUCKY DAY™" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "MAYBE IT'S YOUR LUCKY DAY™" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code §466.408. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed. An Instant Game ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 480,000 tickets in the Instant Game No. 1231. The approximate number and value of prizes in the game are as follows:

Figure 2: GAME NO. 1231 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in**
$1	89,600	5.36
$2	19,200	25.00
$3	16,000	30.00
$4	4,800	100.00
$5	3,200	150.00
$6	3,200	150.00
$10	3,200	150.00
$20	800	600.00
$50	100	4,800.00
$300	16	30,000.00

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.

**The overall odds of winning a prize are 1 in 3.43. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 1231 without advance notice, at which point no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 1231, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401, and all final decisions of the Executive Director.

TRD-200905808
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: December 14, 2009

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Instant Game Number 1233 "Mother Lode!"

1.0 Name and Style of Game.

A. The name of Instant Game No. 1233 is "MOTHER LODE!". The play style is "key symbol match with win all".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 1233 shall be $1.00 per ticket.

1.2 Definitions in Instant Game No. 1233.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - The printed data under the latex on the front of the instant ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black play symbols are: SADDLE SYMBOL, VAULT SYMBOL, NUGGET SYMBOL, CACTUS SYMBOL, SKULL SYMBOL, TRAIN SYMBOL, SHOVEL SYMBOL, GOLD BAR SYMBOL, BARREL SYMBOL, BOOT SYMBOL, TUMBLE WEED SYMBOL, PICK SYMBOL, HORSE SHOE SYMBOL, CAMP FIRE SYMBOL, POT OF GOLD SYMBOL, STACK OF COINS SYMBOL, HORSE SYMBOL, HAT SYMBOL, SPUR SYMBOL, BANDANA SYMBOL, ROPE SYMBOL, CHEST SYMBOL, SUN SYMBOL, DIAMOND SYMBOL, MOON SYMBOL, BADGE SYMBOL, SNAKE SYMBOL, TENT SYMBOL, WAGON SYMBOL, $1.00, $2.00, $4.00, $5.00, $10.00, $20.00, $40.00, $100 and $1,000.

D. Play Symbol Caption - The printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 1233 - 1.2D

PLAY SYMBOL	CAPTION
SADDLE SYMBOL	SADDLE
VAULT SYMBOL	VAULT
NUGGET SYMBOL	WINALL
CACTUS SYMBOL	CACTUS
SKULL SYMBOL	SKULL
TRAIN SYMBOL	TRAIN
SHOVEL SYMBOL	SHOVEL
GOLD BAR SYMBOL	GLDBAR
BARREL SYMBOL	BARRL
BOOT SYMBOL	BOOT
TUMBLE WEED SYMBOL	TBLWD
PICK SYMBOL	PICK
HORSE SHOE SYMBOL	HSHOE
CAMP FIRE SYMBOL	CMFIR
POT OF GOLD SYMBOL	POTGLD
STACK OF COINS SYMBOL	COINS
HORSE SYMBOL	HORSE
HAT SYMBOL	HAT
SPUR SYMBOL	SPUR
BANDANA SYMBOL	BNDANA
ROPE SYMBOL	ROPE
CHEST SYMBOL	CHEST
SUN SYMBOL	SUN
DIAMOND SYMBOL	DIAMD
MOON SYMBOL	MOON
BADGE SYMBOL	BADGE
SNAKE SYMBOL	SNAKE
TENT SYMBOL	TENT
WAGON SYMBOL	WAGON
$1.00	ONE$
$2.00	TWO$
$4.00	FOUR$
$5.00	FIVE$
$10.00	TEN$
$20.00	TWENTY
$40.00	FORTY
$100	ONE HUND
$1,000	ONE THOU

E. Serial Number - A unique 14 (fourteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There will be a four (4)-digit "security number" which will be individually boxed and randomly placed within the number. The remaining ten (10) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 00000000000000.

F. Low-Tier Prize - A prize of $1.00, $2.00, $4.00, $5.00, $10.00 or $20.00.

G. Mid-Tier Prize - A prize of $40.00 or $100.

H. High-Tier Prize - A prize of $1,000.

I. Bar Code - A 24 (twenty-four) character interleaved two (2) of five (5) bar code which will include a four (4) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the ten (10) digit Validation Number. The bar code appears on the back of the ticket.

J. Pack-Ticket Number - A 14 (fourteen) digit number consisting of the four (4) digit game number (1233), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 001 and end with 150 within each pack. The format will be: 1233-0000001-001.

K. Pack - A pack of "MOTHER LODE!" Instant Game tickets contains 150 tickets, packed in plastic shrink-wrapping and fanfolded in pages of five (5). Tickets 001 to 005 will be on the top page; tickets 006 to 010 on the next page; etc.; and tickets 146 to 150 will be on the last page with backs exposed. Ticket 001 will be folded over so the front of ticket 001 and 010 will be exposed.

L. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401.

M. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "MOTHER LODE!" Instant Game No. 1233 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule 401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "MOTHER LODE!" Instant Game is determined once the latex on the ticket is scratched off to expose 11 (eleven) Play Symbols. If player matches any of YOUR SYMBOLS play symbols to the WINNING SYMBOL play symbol, the player wins the PRIZE shown for that symbol. If the player reveals a "NUGGET" symbol, the player WINS ALL 5 PRIZES instantly. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 11 (eleven) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 11 (eleven) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 11 (eleven) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;

17. Each of the 11 (eleven) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets will not have identical play data, spot for spot.

B. No duplicate non-winning prize symbols.

C. Non-winning prize symbols will never be the same as the winning prize symbol(s).

D. No duplicate non-winning YOUR SYMBOLS play symbols.

E. The "NUGGET" (win all) play symbol will only appear on winning tickets as dictated by the prize structure.

F. When the "NUGGET" (win all) play symbol appears, there will be no occurrence of any of YOUR SYMBOLS matching the WINNING SYMBOL.

G. The top prize symbol will appear once on every ticket unless otherwise restricted.

2.3 Procedure for Claiming Prizes.

A. To claim a "MOTHER LODE!" Instant Game prize of $1.00, $2.00, $4.00, $5.00, $10.00, $20.00, $40.00 or $100, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, if appropriate, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not required, to pay a $40.00 or $100 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim a "MOTHER LODE!" Instant Game prize of $1,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "MOTHER LODE!" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General;

3. delinquent in reimbursing the Texas Health and Human Services Commission for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resources Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "MOTHER LODE!" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "MOTHER LODE!" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code §466.408. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed. An Instant Game ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 8,160,000 tickets in the Instant Game No. 1233. The approximate number and value of prizes in the game are as follows:

Figure 2: GAME NO. 1233 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in**
$1	816,000	10.00
$2	652,800	12.50
$4	204,000	40.00
$5	54,400	150.00
$10	54,400	150.00
$20	23,800	342.86
$40	13,260	615.38
$100	680	12,000.00
$1,000	68	120,000.00

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.

**The overall odds of winning a prize are 1 in 4.48. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 1233 without advance notice, at which point no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 1233, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401, and all final decisions of the Executive Director.

TRD-200905809
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: December 14, 2009

♦ ♦ ♦

Instant Game Number 1234 "Cool Cash Tripler"

1.0 Name and Style of Game.

A. The name of Instant Game No. 1234 is "COOL CASH TRIPLER". The play style is "key number match with tripler".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 1234 shall be $5.00 per ticket.

1.2 Definitions in Instant Game No. 1234.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - The printed data under the latex on the front of the instant ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black play symbols are: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, MONEY BAG SYMBOL, $5.00, $10.00, $15.00, $20.00, $25.00, $50.00, $100, $500, $1,000 and $50,000.

D. Play Symbol Caption - The printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 1234 - 1.2D

PLAY SYMBOL	CAPTION
1	ONE
2	TWO
3	THR
4	FOR
5	FIV
6	SIX
7	SVN
8	EGT
9	NIN
10	TEN
11	ELV
12	TLV
13	TRN
14	FTN
15	FFN
16	SXN
17	SVT
18	ETN
19	NTN
20	TWY
21	TWON
22	TWTO
23	TWTH
24	TWFR
25	TWFV
26	TWSX
27	TWSV
28	TWET
29	TWNI
30	TRTY
31	TRON
32	TRTO
33	TRTH
34	TRFR
35	TRFV
36	TRSX
37	TRSV
38	TRET
39	TRNI
40	FRTY
MONEY BAG SYMBOL	MBAG
$5.00	FIVE$
$10.00	TEN$
$15.00	FIFTN
$20.00	TWENTY
$25.00	TWY FIV

$50.00	FIFTY
$100	ONE HUND
$500	FIV HUND
$1,000	ONE THOU
$50,000	50 THOU

E. Serial Number - A unique 14 (fourteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There will be a four (4)-digit "security number" which will be individually boxed and randomly placed within the number. The remaining ten (10) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 00000000000000.

F. Low-Tier Prize - A prize of $5.00, $10.00, $15.00 or $20.00.

G. Mid-Tier Prize - A prize of $30.00, $50.00, $100 or $500.

H. High-Tier Prize - A prize of $1,000, $5,000 or $50,000.

I. Bar Code - A 24 (twenty-four) character interleaved two (2) of five (5) bar code which will include a four (4) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the ten (10) digit Validation Number. The bar code appears on the back of the ticket.

J. Pack-Ticket Number - A 14 (fourteen) digit number consisting of the four (4) digit game number (1234), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 001 and end with 075 within each pack. The format will be: 1234-0000001-001.

K. Pack - A pack of "COOL CASH TRIPLER" Instant Game tickets contains 075 tickets, packed in plastic shrink-wrapping and fanfolded in pages of one (1). The pack will alternate. One will show the front of ticket 001 and back of 075 while the other fold will show the back of ticket 001 and front of 075.

L. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401.

M. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "COOL CASH TRIPLER" Instant Game No. 1234 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule 401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "COOL CASH TRIPLER" Instant Game is determined once the latex on the ticket is scratched off to expose 43 (forty-three) Play Symbols. If a player matches any of YOUR NUMBERS play symbols to any of the WINNING NUMBERS play symbols, the player wins the PRIZE shown for that number. If the player reveals a "MONEY BAG" play symbol, the player wins TRIPLE the PRIZE shown for that symbol. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 43 (forty-three) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 43 (forty-three) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 43 (forty-three) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;

17. Each of the 43 (forty-three) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets in a pack will not have identical play data, spot for spot.

B. The "MONEYBAG" (tripler) play symbol will only appear on intended winning tickets and only as dictated by the prize structure.

C. No more than three (3) matching non-winning prize symbols will appear on a ticket.

D. No duplicate WINNING NUMBERS play symbols on a ticket.

E. No duplicate non-winning YOUR NUMBERS play symbols on a ticket.

F. Non-winning prize symbols will never be the same as the winning prize symbol(s).

G. No prize amount in a non-winning spot will correspond with the YOUR NUMBERS play symbol (i.e. 5 and $5).

H. The top prize symbol will appear on every ticket unless otherwise restricted.

2.3 Procedure for Claiming Prizes.

A. To claim a "COOL CASH TRIPLER" Instant Game prize of $5.00, $10.00, $15.00, $20.00, $30.00, $50.00, $100 or $500, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, if appropriate, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not required, to pay a $30.00, $50.00, $100 or $500 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim a "COOL CASH TRIPLER" Instant Game prize of $1,000, $5,000 or $50,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "COOL CASH TRIPLER" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General;

3. delinquent in reimbursing the Texas Health and Human Services Commission for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resources Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "COOL CASH TRIPLER" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "COOL CASH TRIPLER" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code §466.408. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed. An Instant Game ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 6,000,000 tickets in the Instant Game No. 1234. The approximate number and value of prizes in the game are as follows:

Figure 2: GAME NO. 1234 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in**
$5	480,000	12.50
$10	640,000	9.38
$15	160,000	37.50
$20	160,000	37.50
$30	13,000	461.54
$50	80,000	75.00
$100	6,250	960.00
$500	800	7,500.00
$1,000	200	30,000.00
$5,000	17	352,941.18
$50,000	6	1,000,000.00

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.

**The overall odds of winning a prize are 1 in 3.90. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 1234 without advance notice, at which point no further tickets in that game may be sold. The determination of the closing date and reasons for closing the game will be made in accordance with the instant game closing procedures and the Instant Game Rules, 16 TAC §401.302(j).

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 1234, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401, and all final decisions of the Executive Director.

TRD-200905810

Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: December 14, 2009

♦ ♦ ♦

Texas Parks and Wildlife Department

Notice of Proposed Real Estate Transactions

Land Acquisition

Fort Parker State Park--Limestone County

In a meeting on January 28, 2010, the Texas Parks and Wildlife Commission (the Commission) will consider acquiring varying interests in a number of land tracts totaling approximately 41 acres in Limestone County as an addition to Fort Parker State Park. Before taking action, the Commission will take public comment regarding the proposed transaction. 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.

Acceptance of Conservation Easement

San Saba and Lampasas counties--Colorado Bend State Park

In a meeting on January 28, 2010, the Commission will consider trading a 1,470 foot road easement through Colorado Bend State Park in San Saba and Lampasas counties to an adjacent landowner in return for a 750-foot by 9,100-foot conservation easement (i.e., "no build zone") along and adjacent to a portion of the park boundary. Before taking action, the Commission will take public comment regarding the proposed transaction. 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 Corky Kuhlmann, Land Conservation, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744 or by email at corky.kuhlmann@tpwd.state.tx.us.

Land Sale--Travis County

In a meeting on January 28, 2010, the Commission will consider the sale of approximately 0.71 acres on Stassney Lane to the City of Austin in Travis County. Before taking action, the Commission will take public comment regarding the proposed transaction. 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 Corky Kuhlmann, Land Conservation, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744 or by email at corky.kuhlmann@tpwd.state.tx.us.

Land Acquisition

Estero Llano Grande--World Birding Center Hidalgo County

In a meeting on January 28, 2010, the Commission will consider the acquisition of approximately 30 acres in Hidalgo County as an addition to the Estero Llano Grande-World Birding Center. Before taking action, the Commission will take public comment regarding the proposed transaction. 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 Corky Kuhlmann, Land Conservation, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744 or by email at corky.kuhlmann@tpwd.state.tx.us.

Land Acquisition

Garner State Park--Uvalde County

In a meeting on January 28, 2010, the Commission will consider the acquisition of approximately 178 acres in Uvalde County as an addition to Garner State Park. Before taking action, the Commission will take public comment regarding the proposed transaction. 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 Corky Kuhlmann, Land Conservation, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744 or by email at corky.kuhlmann@tpwd.state.tx.us.

Conveyance of Easement

Buescher State Park--Bastrop County

In a meeting on January 28, 2010, the Commission will consider conveying an easement approximately 20 feet wide by 715 yards (130 rods) long across Buescher State Park to Bluebonnet Electric Cooperative. Before taking action, the Commission will take public comment regarding the proposed transaction. 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.

TRD-200905862
Ann Bright
General Counsel
Texas Parks and Wildlife Department
Filed: December 16, 2009

♦ ♦ ♦

Public Utility Commission of Texas

Announcement of Application for Amendment to a State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas received an application on December 8, 2009, for an amendment to a state-issued certificate of franchise authority (CFA), pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act (PURA).

Project Title and Number: Application of Time Warner Cable for an Amendment to a State-Issued Certificate of Franchise Authority; to Add La Coste and New Braunfels, Project Number 37745 before the Public Utility Commission of Texas.

The requested amendment is to expand the service area footprint to include La Coste and New Braunfels, 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 use Relay Texas (toll free) (800) 735-2989. All inquiries should reference Project Number 37745.

TRD-200905792
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: December 11, 2009

♦ ♦ ♦

Announcement of Application for Amendment to a State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas received an application on December 8, 2009, for an amendment to a state-issued certificate of franchise authority (CFA), pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act (PURA).

Project Title and Number: Application of Time Warner Cable for an Amendment to a State-Issued Certificate of Franchise Authority; to Add Lumberton, Rose Hill Acres and San Marcos, Project Number 37746 before the Public Utility Commission of Texas.

The requested amendment is to expand the service area footprint to include Lumberton, Rose Hill Acres and San Marcos, 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 use Relay Texas (toll free) (800) 735-2989. All inquiries should reference Project Number 37746.

TRD-200905794
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: December 11, 2009

♦ ♦ ♦

Announcement of Application for Amendment to a State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas received an application on December 11, 2009, for an amendment to a state-issued certificate of franchise authority (CFA), pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act (PURA).

Project Title and Number: Application of Windjammer Communications, LLC for an Amendment to its State-Issued Certificate of Franchise Authority; to add the city limits of Blanco and Granger and the county limits of Clay County, Texas, Project Number 37759 before the Public Utility Commission of Texas.

The requested amendment is to expand the service area footprint to include the city limits of Blanco and Granger and the county limits of Clay County, Texas.

Information on the application may be obtained by contacting the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll free) 1-800-735-2989. All inquiries should reference Project Number 37759.

TRD-200905876
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: December 16, 2009

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Announcement of Application for Amendment to a State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas received an application on December 11, 2009, for an amendment to a state-issued certificate of franchise authority (CFA), pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act (PURA).

Project Title and Number: Application of Northland Cable Ventures LLC to amend its State-Issued Certificate of Franchise Authority; to add the city of Seven Points, Texas, Project Number 37761 before the Public Utility Commission of Texas.

The requested amendment is to expand the service area footprint to include the city of Seven Points, Texas.

Information on the application may be obtained by contacting the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll free) 1-800-735-2989. All inquiries should reference Project Number 37761.

TRD-200905877
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: December 16, 2009

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Announcement of Application for Amendment to a State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas received an application on December 14, 2009, for an amendment to a state-issued certificate of franchise authority (CFA), pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act (PURA).

Project Title and Number: Application of Arklaoktex, LLC d/b/a Reach Broadband to Amend its State-Issued Certificate of Franchise Authority, Project Number 37768 before the Public Utility Commission of Texas.

The requested amendment is to expand the service area footprint (SAF) to include municipal boundaries of the city of Celeste and to reduce the SAF to remove the cities of Aspermont, Caddo Mills, Ladonia, Leonard, Lone Oak, Naples, Panorama Estates, Rule, Stamford, and West Tawakoni, Texas. Also in Hunt County, to remove the unincorporated areas known as Brinwood Estates, Panorama Estates Subdivision, Rolling Oaks Subdivision and South Tawakoni; and in Van Zandt County remove the unincorporated area known as Waco Bay (Home Owners Association), 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 use Relay Texas (toll free) (800) 735-2989. All inquiries should reference Project Number 37768.

TRD-200905880
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: December 16, 2009

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Announcement of Application for Amendment to a State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas received an application on December 14, 2009, for an amendment to a state-issued certificate of franchise authority (CFA), pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act (PURA).

Project Title and Number: Application of RB3, LLC d/b/a Reach Broadband to Amend its State-Issued Certificate of Franchise Authority, Project Number 37769 before the Public Utility Commission of Texas.

The requested amendment is to expand the service area footprint (SAF) to include municipal boundaries of Encinal, and to reduce the SAF to remove the cities of Crowell, Haskell, Knox City and O'Brien, 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 use

Relay Texas (toll free) (800) 735-2989. All inquiries should reference Project Number 37769.

TRD-200905879
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: December 16, 2009

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Announcement of Application for a State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas received an application on December 11, 2009, for an application for 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 WESTEX Telecom for State-Issued Certificate of Franchise Authority, Project Number 37763 before the Public Utility Commission of Texas.

The requested CFA service area includes the county of Glasscock, as well as portions of the counties of Borden, Dawson, Howard, Midland, Martin and Reagan, Texas.

Information on the application may be obtained by contacting the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll free) 1-800-735-2989. All inquiries should reference Project Number 37763.

TRD-200905878
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: December 16, 2009

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Notice of Application for Waiver of Denial of Numbering Resources

Notice is given to the public of the filing with the Public Utility Commission of Texas an application on December 9, 2009, for waiver of denial by the Pooling Administrator (PA) of Verizon Southwest's (Verizon) request for assignment of additional numbering resources to provide three hundred consecutive DID numbers on behalf of its customer, Trans-Trade Inc., in the Dallas Forth Worth Airport rate center.

Docket Title and Number: Petition of Verizon Southwest for Waiver of Denial of Numbering Resources for Trans Trade Inc. at DFW Airport, Docket Number 37754.

The Application: Verizon submitted an application to the PA for the requested block in accordance with the current guidelines. The PA denied the request because Verizon did not meet the months-to-exhaust and utilization criteria established by the Federal Communications Commission.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than January 5, 2010. Hearing and speech impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 37754.

TRD-200905795
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: December 11, 2009

♦ ♦ ♦

Notice of Application for Waiver of Denial of Numbering Resources

Notice is given to the public of the filing with the Public Utility Commission of Texas an application on December 9, 2009, for waiver of denial by the Pooling Administrator (PA) of Verizon Southwest (Verizon) request for assignment of three (3) thousand blocks on behalf of its customer, J.P.Morgan Chase & Co. in the Carrollton rate center.

Docket Title and Number: Petition of Verizon Southwest for Waiver of Denial of Numbering Resources for J.P.Morgan Chase & Co. in the Carrollton Rate Center, Docket Number 37755.

The Application: Verizon submitted an application to the PA for the requested blocks in accordance with the current guidelines. The PA denied the request because Verizon did not meet the months-to-exhaust and utilization criteria established by the Federal Communications Commission.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than January 5, 2010. Hearing and speech impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 37755.

TRD-200905796
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: December 11, 2009

♦ ♦ ♦

Notice of Application for Waiver of Denial of Numbering Resources

Notice is given to the public of the filing with the Public Utility Commission of Texas an application on December 11, 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 assignment of ten thousand-blocks of numbers on behalf of its customer, Texas Children's Hospital 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 for Barker Rate Center, Docket Number 37764.

The Application: AT&T Texas submitted an application to the PA for the requested blocks in accordance with the current guidelines. The PA denied the request because AT&T Texas did not meet the months-to-exhaust and utilization criteria established by the Federal Communications Commission.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than January 6, 2010. Hearing and speech impaired individuals with text telephones (TTY) may contact the com-

mission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 37764.

TRD-200905851
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: December 15, 2009

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Notice of Application to Amend a Certificate of Convenience and Necessity for a Proposed Transmission Line

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) an application on December 11, 2009, to amend a certificate of convenience and necessity for a proposed transmission line in El Paso County, Texas.

Docket Style and Number: Application of El Paso Electric Company to Amend a Certificate of Convenience and Necessity for a Proposed Transmission Line Within El Paso County, Docket Number 37733.

The Application: The application of El Paso Electric Company (EPE) to amend a certificate of convenience and necessity for a proposed 115-kV transmission line in El Paso County, Texas is designated the Pipeline Tap to Picante to Global Reach 115-kV Transmission Line Project. EPE stated that the proposed project will be located entirely on the Ft. Bliss Military Reservation. The proposed project is needed to address projected load growth in the area. The miles of right-of-way for this project will be approximately 13.2 miles (preferred route). The estimated date to energize facilities is September 2010. The total estimated cost is $12,256,404.

Persons wishing to intervene or comment on the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. The deadline for intervention in this proceeding is January 25, 2010. 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 37733.

TRD-200905866
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: December 16, 2009

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Notice of Application to Relinquish a Service Provider Certificate of Operating Authority

On December 14, 2009, Voicepaq Prepaid, LLC, filed an application with the Public Utility Commission of Texas (commission) to amend its service provider certificate of operating authority (SPCOA) granted in SPCOA Certificate Number 60800. Applicant intends to relinquish its certificate.

The Application: Application of Voicepaq Prepaid, LLC to Relinquish its Service Provider Certificate of Operating Authority, Docket Number 37770.

Persons wishing to comment on the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than January 11, 2010. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 37770.

TRD-200905867
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: December 16, 2009

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Notice of Workshop

The Public Utility Commission of Texas (commission) will hold a workshop on Friday, January 22, 2010, to discuss issues related to the regulatory treatment of Voice over Internet Protocol services. The workshop will begin at 9:30 a.m. in the Commissioners' Hearing Room, located on the 7th floor of the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701. Project Number 37614, *Rulemaking Related to the Regulatory Treatment of Voice over Internet Protocol Services*, has been established for this proceeding.

Questions concerning the workshop or this notice should be referred to Mark Bryant, Competitive Markets Division, at (512) 936-7279 or at mark.bryant@puc.state.tx.us. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136.

TRD-200905712
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: December 9, 2009

♦ ♦ ♦

Railroad Commission of Texas

Notice of New LPG Form 30, Texas School LP-Gas Leakage Test Report

The Railroad Commission of Texas gives notice that it has adopted new Safety Division form, LPG Form 30, as part of adopted amendments to 16 TAC §9.3 and §9.41, relating to LP-Gas Forms, and Testing of LP-Gas Systems in School Facilities, published in this issue of the *Texas Register*. The amendments, pursuant to House Bill 3918, 81st Legislature (Regular Session, 2009), change the testing method of LP-gas systems in school facilities from pressure testing to leakage testing.

LPG Form 30, Texas School LP-Gas Leakage Test Report.

RAILROAD COMMISSION OF TEXAS
Safety Division
TEXAS SCHOOL LP-GAS LEAKAGE TEST REPORT

Name of School District: _____

Printed Name of School/School District Representative: _____

Signature of School/ School District Representative: _____

Title of Representative:_____ _____ **Date:** _____

SCHOOL DISTRICT FACILITY

[USE SEPARATE SHEET FOR EACH BUILDING OR INSTALLATION TESTED]

(RRC Use Only)

Site ID No.

Inspector's Initials

Date

Building Name or Number: _____

Physical Address of Building: _____

Serial Number of Container(s) Supplying the Building: _____

NORMAL OPERATING PRESSURE OF SCHOOL LP-GAS SYSTEM

From container(s) to building(s): _____ **psig or ounces (Circle one)**

Piping inside building(s): _____**psig and/or**_____ **ounces or inches w.c. (Circle one)**

INDICATE THE TEST PROCEDURE UTILIZED

Leakage tests must be conducted pursuant to Tex. Admin. Code (TAC), Title 16, Chapter 9, LP-Gas Safety Rules, § 9.41

A. Pressure gauge inserted between container shutoff valve and first stage regulator (psi test) ☐

B. Pressure gauge inserted between the first and the second stage regulator (psi test) ☐

C. Water manometer or pressure gauge inserted at an appliance (inches w.c. or ounces/sq.in. test) ☐

TEST DURATION: _____ **(Minutes) DATE OF TEST:** _____ **TEST RESULTS:** ☐ **PASS** ☐ **Fail**

THE PERSON CONDUCTING THE LEAKAGE TEST IS:

(CHECK ONE)

☐ *CERTIFIED WITH THE TEXAS RAILROAD COMMISSION TO PERFORM LP-GAS LEAKAGE TESTS AS A REPRESENTATIVE OR EMPLOYEE OF AN LP-GAS LICENSEE (Print name of person conducting test, last 4 digits of SSN & License number of licensee)*

_____

☐ *REGISTERED WITH THE TEXAS RAILROAD COMMISSION AS A LICENSED PLUMBER OR HVAC LICENSEE (Print name of person conducting test & Plumbing or HVAC License number)*

_____

☐ *AN EMPLOYEE OF THE SCHOOL WHO IS CERTIFIED WITH THE TEXAS RAILROAD COMMISSION TO CONDUCT LEAKAGE TESTING OF LP-GAS SYSTEMS (Print name and last 4 digits of employee's social security number):*

_____

Telephone Number for Person who Performed Testing: ( ) _____

Signature of Person Performing Leakage Testing: _____

The LP-Gas Safety Rules may be reviewed on the Commission's website at:
http://www.rrc.state.tx.us/safety/lpg/index.php

LPG FORM 30
12/2009

Issued in Austin, Texas, on December 8, 2009.

TRD-200905719
Mary Ross McDonald
Managing Director
Railroad Commission of Texas
Filed: December 10, 2009

♦ ♦ ♦

Supreme Court of Texas

Order Adopting Amended Texas Rule of Civil Procedure 737

Misc. Docket No. 09-9195

ORDERED that:

1. As required by the Act of May 27, 2009, 81st Leg., R.S., ch. 225, §1, 2009 Tex. Gen. Laws 623 (SB 1448), and in accordance with its mandatory deadlines, the Supreme Court of Texas amends Rule 737 of the Texas Rules of Civil Procedure as follows, effective January 1, 2010.

2. To facilitate the proper filing of a suit brought under SB 1448 and Rule 737, the Supreme Court of Texas also promulgates a form petition that tenants may use in these suits. This form petition should be appended, as Appendix A, to the end of the Texas Rules of Civil Procedure.

3. The Clerk is directed to:

a. file a copy of this Order with the Secretary of State;

b. cause a copy of this Order to be mailed to each registered member of the State Bar of Texas by publication in the *Texas Bar Journal;*

c. send a copy of this Order to each elected member of the Legislature; and

d. submit a copy of the Order for publication in the *Texas Register.*

3. These amendments may be changed in response to comments received on or before April 1, 2010. Any interested party may submit written comments directed to Kennon L. Peterson, Rules Attorney, at P.O. Box 12248, Austin, TX 78711, or kennon.peterson@courts.state.tx.us.

SIGNED this 14th day of December, 2009.

_____

Wallace B. Jefferson, Chief Justice

_____

Nathan L. Hecht, Justice

_____

Harriet O'Neill, Justice

_____

Dale Wainwright, Justice

_____

David M. Medina, Justice

_____

Paul W. Green, Justice

_____

Phil Johnson, Justice

_____

Don R. Willett, Justice

_____

Eva M. Guzman, Justice

PART VII

RULES RELATING TO SPECIAL PROCEEDINGS

SECTION 2. JUSTICE COURT PROCEEDINGS TO ENFORCE LANDLORD'S DUTY TO REPAIR OR REMEDY RESIDENTIAL RENTAL PROPERTY

Rule 737.1. Applicability of Rule

This rule applies to a suit filed in a justice court by a residential tenant under Chapter 92, Subchapter B of the Texas Property Code to enforce the landlord's duty to repair or remedy a condition materially affecting the physical health or safety of an ordinary tenant. Rules 523-574b also apply to the extent they are not inconsistent with this rule.

Rule 737.2. Contents of Petition; Copies; Forms and Amendments

(a) *Contents of Petition.* The petition must be in writing and must include the following:

(1) the street address of the residential rental property;

(2) a statement indicating whether the tenant has received in writing the name and business street address of the landlord and landlord's management company;

(3) to the extent known and applicable, the name, business street address, and telephone number of the landlord and the landlord's management company, on-premises manager, and rent collector serving the residential rental property;

(4) for all notices the tenant gave to the landlord requesting that the condition be repaired or remedied:

(A) the date of the notice;

(B) the name of the person to whom the notice was given or the place where the notice was given;

(C) whether the tenant's lease is in writing and requires written notice;

(D) whether the notice was in writing or oral;

(E) whether any written notice was given by certified mail, return receipt requested, or by registered mail; and

(F) whether the rent was current or had been timely tendered at the time notice was given;

(5) a description of the property condition materially affecting the physical health or safety of an ordinary tenant that the tenant seeks to have repaired or remedied;

(6) a statement of the relief requested by the tenant, including an order to repair or remedy a condition, a reduction in rent, actual damages, civil penalties, attorney's fees, and court costs;

(7) if the petition includes a request to reduce the rent:

(A) the amount of rent paid by the tenant, the amount of rent paid by the government, if known, the rental period, and when the rent is due; and

(B) the amount of the requested rent reduction and the date it should begin;

(8) a statement that the total relief requested does not exceed $10,000, excluding interest and court costs but including attorney's fees; and

(9) the tenant's name, address, and telephone number.

(b) *Copies.* The tenant must provide the court with copies of the petition and any attachments to the petition for service on the landlord.

(c) *Forms and Amendments.* A petition substantially in the form promulgated by the Supreme Court is sufficient. A suit may not be dismissed for a defect in the petition unless the tenant is given an opportunity to correct the defect and does not promptly correct it.

Rule 737.3. Citation: Issuance; Appearance Date

(a) *Issuance.* When the tenant files a written petition with a justice court, the justice must immediately issue citation directed to the landlord, commanding the landlord to appear before such justice at the time and place named in the citation.

(b) *Appearance Date.* The appearance date on the citation must not be earlier than the sixth day nor later than the tenth day after the date of service of the citation. For purposes of this rule, the appearance date on the citation is the trial date.

Rule 737.4. Service and Return of Citation; Alternative Service of Citation

(a) *Service and Return of Citation.* The sheriff, constable, or other person authorized by Rule 536 who receives the citation must serve the citation by delivering a copy of it, along with a copy of the petition and any attachments, to the landlord at least six days before the appearance date. At least one day before the appearance date, the person serving the citation must return the citation, with the action written on the citation, to the justice who issued the citation. The citation must be issued, served, and returned in like manner as ordinary citations issued from a justice court.

(b) *Alternative Service of Citation.*

(1) If the petition does not include the landlord's name and business street address, or if, after making diligent efforts on at least two occasions, the sheriff, constable, or other person authorized by Rule 536 is unsuccessful in serving the citation on the landlord under (a), the sheriff, constable, or other person authorized by Rule 536 must serve the citation by delivering a copy of the citation, petition, and any attachments to:

(A) the landlord's management company if the tenant has received written notice of the name and business street address of the landlord's management company; or

(B) if (b)(1)(A) does not apply and the tenant has not received the landlord's name and business street address in writing, the landlord's authorized agent for service of process, which may be the landlord's management company, on-premise manager, or rent collector serving the residential rental property.

(2) If the sheriff, constable, or other person authorized by Rule 536 is unsuccessful in serving citation under (b)(1) after making diligent efforts on at least two occasions at either the business street address of the landlord's management company, if (b)(1)(A) applies, or at each available business street address of the landlord's authorized agent for service of process, if (b)(1)(B) applies, the sheriff, constable, or other person authorized by Rule 536 must execute and file in the justice court a sworn statement that the sheriff, constable, or other person authorized by Rule 536 made diligent efforts to serve the citation on at least two occasions at all available business street addresses of the landlord and, to the extent applicable, the landlord's management company, on-premises manager, and rent collector serving the residential rental property, providing the times, dates, and places of each attempted service. The justice may then authorize the sheriff, constable, or other person authorized by Rule 536 to serve citation by:

(A) delivering a copy of the citation, petition, and any attachments to someone over the age of sixteen years, at any business street address listed in the petition, or, if nobody answers the door at a business street address, either placing the citation, petition, and any attachments through a door mail chute or slipping them under the front door, and if neither of these latter methods is practical, affixing the citation, petition, and any attachments to the front door or main entry to the business street address;

(B) within 24 hours of complying with (b)(2)(A), sending by first class mail a true copy of the citation, petition, and any attachments addressed to the landlord at the landlord's business street address provided in the petition; and

(C) noting on the return of the citation the date of delivery under (b)(2)(A) and the date of mailing under (b)(2)(B).

The delivery and mailing to the business street address under (b)(2)(A)-(B) must occur at least six days before the appearance date. At least one day before the appearance date, the citation, with the action written thereon, must be returned to the justice who issued the citation. It is not necessary for the tenant to request the alternative service authorized by this rule.

Rule 737.5. Representation of Parties

Parties may represent themselves. A party may also be represented by an authorized agent, but nothing in this rule authorizes a person who is not an attorney licensed to practice law in this state to represent a party before the court if the party is present.

Rule 737.6. Docketing and Trial; Failure to Appear; Continuance

(a) *Docketing and Trial.* The case shall be docketed and tried as other cases. The justice may develop the facts of the case in order to ensure justice.

(b) *Failure to Appear.*

(1) If the tenant appears at trial and the landlord has been duly served and fails to appear at trial, the justice may proceed to hear evidence. If the tenant establishes that the tenant is entitled to recover, the justice shall render judgment against the landlord in accordance with the evidence.

(2) If the tenant fails to appear for trial, the justice may dismiss the suit.

(c) *Continuance.* The justice may continue the trial for good cause shown. Continuances should be limited, and the case should be reset for trial on an expedited basis.

Rule 737.7. Discovery

Reasonable discovery may be permitted. Discovery is limited to that considered appropriate and permitted by the justice and must be expedited. In accordance with Rule 215, the justice may impose any appropriate sanction on any party who fails to respond to a court order for discovery.

Rule 737.8. Judgment: Amount; Form and Content; Issuance and Service; Failure to Comply

(a) *Amount.* Judgment may be rendered against the landlord for failure to repair or remedy a condition at the residential rental property if the total judgment does not exceed $10,000, excluding interest and court costs but including attorney's fees. Any party who prevails in a suit brought under these rules may recover the party's court costs and reasonable attorney's fees as allowed by law.

(b) *Form and Content.*

(1) The judgment must be in writing, signed, and dated and must include the names of the parties to the proceeding and the street address

of the residential rental property where the condition is to be repaired or remedied.

(2) In the judgment, the justice may:

(A) order the landlord to take reasonable action to repair or remedy the condition;

(B) order a reduction in the tenant's rent, from the date of the first repair notice, in proportion to the reduced rental value resulting from the condition until the condition is repaired or remedied;

(C) award a civil penalty of one month's rent plus $500;

(D) award the tenant's actual damages; and

(E) award court costs and attorney's fees, excluding any attorney's fees for a cause of action for damages relating to a personal injury.

(3) If the justice orders the landlord to repair or remedy a condition, the judgment must include in reasonable detail the actions the landlord must take to repair or remedy the condition and the date when the repair or remedy must be completed.

(4) If the justice orders a reduction in the tenant's rent, the judgment must state:

(A) the amount of the rent the tenant must pay, if any;

(B) the frequency with which the tenant must pay the rent;

(C) the condition justifying the reduction of rent;

(D) the effective date of the order reducing rent;

(E) that the order reducing rent will terminate on the date the condition is repaired or remedied; and

(F) that on the day the condition is repaired or remedied, the landlord must give the tenant written notice, served in accordance with Rule 21a, that the condition justifying the reduction of rent has been repaired or remedied and the rent will revert to the rent amount specified in the lease.

(c) *Issuance and Service.* The justice must issue the judgment. The judgment may be served on the landlord in open court or by any means provided in Rule 21a at an address listed in the citation, the address listed on any answer, or such other address the landlord furnishes to the court in writing. Unless the justice serves the landlord in open court or by other means provided in Rule 21a, the sheriff, constable, or other person authorized by Rule 536 who serves the landlord must promptly file a certificate of service in the justice court.

(d) *Failure to Comply.* If the landlord fails to comply with an order to repair or remedy a condition or reduce the tenant's rent, the failure is grounds for citing the landlord for contempt of court under Section 21.002 of the Government Code.

Rule 737.9. Counterclaims

Counterclaims and the joinder of suits against third parties are not permitted in suits under these rules. Compulsory counterclaims may be brought in a separate suit. Any potential causes of action, including a compulsory counterclaim, that are not asserted because of this rule are not precluded.

Rule 737.10. Post-Judgment Motions: Time and Manner; Disposition; Number

(a) *Time and Manner.* A party may file a motion for new trial, a motion to amend the judgment, or a motion to set aside a default judgment or a dismissal for want of prosecution. The motion must be in writing and filed within ten days after the date the justice signs the judgment or dismissal order.

(b) *Disposition.*

(1) If the justice grants a motion for new trial or a motion to set aside a default judgment or a dismissal for want of prosecution, the resulting trial must occur within ten days after the date the justice signs the order granting the motion.

(2) If the justice grants a motion to amend the judgment, the justice must amend the judgment within fifteen days after the date the justice signs the original judgment.

(3) If the justice does not rule on a motion for new trial, a motion to amend the judgment, or a motion to set aside a default judgment or a dismissal for want of prosecution with a written, signed order within fifteen days after the justice signs the judgment or dismissal order, the motion is considered overruled by operation of law on expiration of that period.

(c) *Number.* A party may file only one motion for new trial, one motion to amend the judgment, and one motion to set aside a default judgment or a dismissal for want of prosecution.

Rule 737.11. Plenary Power

The justice court's plenary power expires when a party perfects an appeal. If a party does not perfect an appeal, the justice court has plenary power to grant a new trial, amend or vacate the judgment, or set aside a default judgment or a dismissal for want of prosecution within fifteen days after the date the justice signs the judgment or dismissal order.

Rule 737.12. Appeal: Time and Manner; Perfection; Effect; Costs; Trial on Appeal

(a) *Time and Manner.* Either party may appeal the decision of the justice court to a statutory county court or, if there is no statutory county court with jurisdiction, a county court or district court with jurisdiction by filing a written notice of appeal with the justice court within twenty days after the date the justice signs the judgment. If the judgment is amended in any respect, any party has the right to appeal within twenty days after the date the justice signs the new judgment, in the same manner set out in this rule.

(b) *Perfection.* The posting of an appeal bond is not required for an appeal under these rules, and the appeal is considered perfected with the filing of a notice of appeal. Otherwise, the appeal is in the manner provided by law for appeal from a justice court.

(c) *Effect.* The timely filing of a notice of appeal stays the enforcement of any order to repair or remedy a condition or reduce the tenant's rent, as well as any other actions.

(d) *Costs.* The appellant must pay the costs on appeal to a county court in accordance with Rule 143a.

(e) *Trial on Appeal.* On appeal, the parties are entitled to a trial de novo. Either party is entitled to trial by jury on timely request and payment of a fee, if required. An appeal of a judgment of a justice court under these rules takes precedence in the county court and may be held at any time after the eighth day after the date the transcript is filed in the county court.

Rule 737.13. Effect of Writ of Possession

If a judgment for the landlord for possession of the residential rental property becomes final, any order to repair or remedy a condition is vacated and unenforceable.

Comment to 2010 change: The heading of repealed Rule 737, regarding bills of discovery, is deleted. New Rule 737 is promulgated pursuant to Senate Bill 1448 to provide procedures for a tenant's request for relief in a justice court under Section 92.0563(a) of the Property Code. Except when otherwise specifically provided, the terms in Rule

737 are defined consistent with Section 92.001 of the Property Code. All suits must be filed in accordance with the venue provisions of Chapter 15 of the Civil Practice and Remedies Code.

TRD-200905864
Kennon L. Peterson
Rules Attorney
Supreme Court of Texas
Filed: December 16, 2009

♦ ♦ ♦

Order Adopting Amendments to Texas Rules of Disciplinary Procedure 2.16 and 6.08

IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 09-9191

ORDER ADOPTING AMENDMENTS TO TEXAS RULES OF DISCIPLINARY PROCEDURE 2.16 AND 6.08

ORDERED that:

1. The Supreme Court of Texas adopts the following amendments to Rules 2.16 and 6.08 of the Texas Rules of Disciplinary Procedure.

2. By Order dated September 9, 2009, in Misc. Docket No. 09-9150, the Court proposed amendments to Rules 2.16 and 6.08 of the Texas Rules of Disciplinary Procedure and invited public comment. This Order contains the final version of the amended rules.

3. Amended Rules 2.16 and 6.08 of the Texas Rules of Disciplinary Procedure take effect on January 1, 2010.

4. The Clerk is directed to:

a. file a copy of this Order with the Secretary of State;

b. cause a copy of this Order to be mailed to each registered member of the State Bar of Texas by publication in the *Texas Bar Journal;* and

c. cause a copy of this Order to be posted on the website of the Supreme Court of Texas at http://www.supreme.courts.state.tx.us.

SIGNED this 7th day of December, 2009.

_____

Wallace B. Jefferson, Chief Justice

_____

Nathan L. Hecht, Justice

_____

Harriet O'Neill, Justice

_____

Dale Wainwright, Justice

_____

David M. Medina, Justice

_____

Paul W. Green, Justice

_____

Phil Johnson, Justice

_____

Don R. Willett, Justice

_____

Eva M. Guzman, Justice

TEXAS RULES OF DISCIPLINARY PROCEDURE

2.16. Confidentiality

A. ~~Disciplinary Proceedings are strictly confidential and not subject to disclosure, except by court order or as otherwise provided in this Rule 2.16.~~ All members and staff of the Office of Chief Disciplinary Counsel, Board of Disciplinary Appeals, Committees, and Commission shall maintain as confidential all Disciplinary Proceedings and associated records, except that:

1. the pendency, subject matter, status of an investigation, and final disposition, if any, may be disclosed by the Office of Chief Disciplinary Counsel or Board of Disciplinary Appeals if the Respondent has waived confidentiality, the Disciplinary Proceeding is based on conviction of a serious crime, or disclosure is ordered by a court of competent jurisdiction;

2. if the Evidentiary Panel finds that professional misconduct occurred and imposes any sanction other than a private reprimand,

a. the Evidentiary Panel's final judgment is a public record from the date the judgment is signed; and

b. once all appeals, if any, have been exhausted and the judgment is final, the Office of Chief Disciplinary Counsel shall, upon request, disclose all documents, statements, and other information relating to the Disciplinary Proceeding that came to the attention of the Evidentiary Panel during the Disciplinary Proceeding;

3. the record in any appeal to the Board of Disciplinary Appeals from an Evidentiary Panel's final judgment, other than an appeal from a judgment of private reprimand, is a public record; and

4. facts and evidence that are discoverable elsewhere are not made confidential merely because they are discussed or introduced in the course of a Disciplinary Proceeding.

~~B. The pendency, subject matter and status of a Disciplinary Proceeding may be disclosed by Complainant, Respondent or Chief Disciplinary Counsel if the Respondent has waived confidentiality or the Disciplinary Proceeding is based upon a conviction for a serious crime.~~

~~C. While Disciplinary Proceedings are confidential, facts and evidence that are discoverable elsewhere are not made confidential merely because they are discussed or introduced in the course of a disciplinary proceeding.~~

B.~~D.~~ The deliberations and voting of an Evidentiary Panel are strictly confidential and not subject to discovery. No person is competent to testify as to such deliberations and voting.

~~E. If the Evidentiary Panel finds that professional misconduct has occurred and imposes any sanction other than a private reprimand, all information, documents, statements and other information coming to the attention of the Evidentiary Panel shall be, upon request, made public. However, the Chief Disciplinary Counsel may not disclose work product or privileged attorney-client communications without the consent of the client.~~

C. Rule 6.08 governs the provision of confidential information to authorized agencies investigating qualifications for admission to practice, attorney discipline enforcement agencies, law enforcement agencies, the State Bar's Client Security Fund, the State Bar's Lawyer Assistance Program, the Supreme Court's Unauthorized Practice of Law Committee and its subcommittees, and the Commission on Judicial Conduct.

6.08. Access to Confidential Information

No officer ~~(except the General Counsel when acting in the capacity of Chief Disciplinary Counsel)~~ or Director of the State Bar or any appointed adviser to the Commission shall have access to any confidential ~~records,~~ information~~, or proceedings~~ relating to any Disciplinary Proceeding, Disciplinary Action, or Disability suspension. The Office of Chief Disciplinary Counsel may provide ~~appropriate~~ this information to authorized agencies investigating qualifications for admission to practice, attorney discipline enforcement agencies, law enforcement agencies, the State Bar's Client Security Fund, the State Bar's Lawyer Assistance Program, ~~the Commission on Judicial Conduct and~~ the Supreme Court's Unauthorized Practice of Law Committee and its subcommittees, and the Commission on Judicial Conduct.

TRD-200905690
Kennon L. Peterson
Rules Attorney
Supreme Court of Texas
Filed: December 9, 2009

♦ ♦ ♦

University of North Texas System

Public Notice - Amendment and Extension of Major Consulting Contract

Description of Activities Consultant Will Conduct:

The selected consulting firm is responsible for assisting University of North Texas System (UNT System) and its member institutions in: developing and executing a government relations strategy to attract support for research facilities, equipment, technology, and programs through federal initiatives pertaining, but not limited to, the United States Congress, federal agencies, and related entities; evaluating research resources, developing concepts and themes for agreed upon research initiatives, developing objectives and strategies in presenting opportunities to utilize the available resources of UNT Institutions for existing and new initiatives, formulating strategies and timetables for presentation of research initiatives, assisting in preparation of supporting documentation, coordinating meetings with pertinent representatives and their staff, serving as a liaison to all federal entities, and preparing testimony for presentation; developing legislative and other strategies; and monitoring and reporting on government and other programs relevant to research initiatives and other areas of interest to UNT System and UNT Institutions.

Name and Business Address of Consultant:

Congressional Solutions, Inc.

1530 N. Key Blvd., Suite 523

Arlington, Virginia 22209

Total Value and Beginning and Ending Dates of Contract:

Value: $362,000.00

Beginning Date: September 1, 2008

Ending Date: August 31, 2011

Dates on Which Documents, Films, Recordings, or Reports that Consultant is required to present are due:

Date: Various dates - Monthly reports and any updates as needed by UNT

TRD-200905793
Carrie Stoeckert
Director of PPS
University of North Texas System
Filed: December 11, 2009

♦ ♦ ♦

Public Notice - Award of Major Consulting Contract

Description of Activities Consultant Will Conduct:

Firm is assisting UNT System in the formation and development of the University of North Texas at Dallas College of Law. The consulting services include facilitating the development of facilities, faculty, accreditation and student recruiting.

Name and Business Address of Consultant:

American Law Foundation, LLC

P.O. Box 2846

Tuscaloosa, Alabama 35401

Total Value and Beginning and Ending Dates of Contract:

Value: $72,500.00

Beginning Date: October 1, 2008

Ending Date: November 1, 2010

Dates on Which Documents, Films, Recordings, or Reports that Consultant is required to present are due:

Date: Various dates - as requested by Chancellor and in any event not less that quarterly.

TRD-200905797
Carrie Stoeckert
Director of PPS
University of North Texas System
Filed: December 11, 2009

♦ ♦ ♦

Sam Houston State University

Public Notice - Award of Major Consulting Contract

Description of the Activities that the Consultant will Conduct:

ERP Project Manager will assist with the overall management and coordination of the ERP implementation.

In this role, the ERP Project Manager typically participates in a number of activities that may include:

• Assist in the development of various project resource plans, budgets and schedules for the ERP implementation including a weekly update of plans, budgets and schedules

• Monitor progress of module teams against key project dates and benchmarks to support go-live activities and dates

• Identify and communicate potential and known project risks to the University ERP Steering Committee and Executive Co-Sponsors in a timely manner

• Provide support to the University's Information Technology staff and ERP Implementation Committees

• Act as liaison as necessary with SunGard and other third party integration vendors on behalf of University

• Develop or review and monitor existing project plans and schedules

• Participate as necessary on the Executive Steering Committee and implementation work teams

• Report issues and problems in a timely manner to the Executive Co-sponsors for resolution, as per the Communications Plan

• Assist University in developing a plan for a successful transition from implementation to go-live for each University function of the project

• Identify resources needed for consultants on third party applications, functional module consultants and technical consultants

Name and Business Address of the Consultant:

Strata Information Group

3935 Harney Street

Suite 203

San Diego, CA 92110

Total Value and the Beginning and Ending Dates of the Contract:

Total Value: $474,700.00

Beginning Date: December 2, 2009

Ending Date: December 31, 2011

Dates on which Documents, Films, Recordings, or Reports that the Consultant is Required to Present to the Agency are Due:

Date: For the weeks on campus, the consultant will provide weekly project updates or reports with other reports as needed.

TRD-200905854
John Hitzeman
Director of Procurement Services
Sam Houston State University
Filed: December 16, 2009

♦ ♦ ♦

Stephen F. Austin State University

Notice of Consultant Contract Award

In compliance with the provisions of Chapter 2254, Subchapter B, Texas Government Code, Stephen F. Austin State University furnishes this notice of contract award to University's contract with Mark Lewis, 1431 Frostwood Dr., Tyler, TX 75703. The contract is in the sum of $26,400. The original contract availability notice was published in the October 23, 2009, issue of the *Texas Register* (34 TexReg 7428).

Contractor is required to submit report in such quantity and frequency as determined reasonable appropriate by the Project Director. A minimum of one written progress report shall be required every month for the duration of the project detailing the progress made toward achievement of the project objectives and any deviation from schedules, methods and task established in the proposal and work plan.

For further information, please call Dr. Kimberly Childs, Professor and Project Investigator in the Department of Mathematics and Statistics at (936) 468-3805.

TRD-200905842
R. Yvette Clark
General Counsel
Stephen F. Austin State University
Filed: December 15, 2009

♦ ♦ ♦

Texas Veterans Commission

Request for Letters of Interest Concerning the Texas Veterans Commission Fund for Veterans' Assistance Grant

Filing Authority. The availability of grant funds is authorized by Texas Government Code, §434.017.

Eligible Applicants. The Texas Veterans Commission (TVC) is requesting applications from 501(c)(3) charitable organizations, from 501(c)(19) Posts/Organizations Members of the Armed Forces, or from local governmental entities that have as their primary purpose the provision of services to veterans and to their families at no cost or at a reduced charge. Eligible applicants must have the organizational capacity to provide assistance statewide.

Description. The purpose of this grant is to provide for the unmet needs of veterans and their families through: emergency financial support for eligible needs; employment training/job placement assistance that supplements and does not supplant existing funding or services; transportation services for veterans; assistance to counties for veterans programs; financial support to assist the formation of community support groups for veterans, spouses, and children; funding to provide counseling for family members of veterans; financial support for peer-to-peer groups of veterans for issues that relate to Post-Traumatic Stress Syndrome and Traumatic Brain Injury; and other allowable services that meet the needs of veterans. These grant funds must not be used to supplement, not supplant, existing funds and/or services.

Dates of Project. Grants shall be made for a project period not to exceed twelve months. The estimated project period will be March 1, 2010 through February 28, 2011. TVC will require periodic program and expenditure reports.

Project Amount. TVC estimates that a total of $1,000,000 will be available for this solicitation to fund at least one project. This project is funded 100% from state funds.

Selection Criteria. This solicitation is a two-part process. Applicants must submit a Letter of Interest along with supporting materials. Applicants with Letters of Interest that meet all specified criteria will be eligible to compete for the grant award will be invited to submit a grant application.

Applications will be selected based on the ability of each applicant to carry out all requirements contained in the solicitation. Reviewers from the TVC Fund for Veterans' Assistance Advisory Committee will evaluate applications based on the overall quality and validity of the proposed project and the extent to which they address the primary objectives and intent of the project. Applications must address all requirements to be considered for funding. TVC reserves the right to select from the highest-ranking applications those that address all requirements.

TVC is not obligated to approve an application, provide funds, or endorse any application submitted in response to this solicitation. This solicitation does not commit TVC to pay any costs before an application is approved. This issuance does not obligate TVC to award a grant or pay any costs incurred in preparing a response.

Requesting the Application. All information needed to respond to this solicitation will be posted on the TVC website at http://www.tvc.state.tx.us.

Further Information. For clarifying information about the solicitation, contact David Nobles, Grant Coordinator, Texas Veterans Commission, (512) 463-6380. In order to assure that no prospective applicant may obtain a competitive advantage because of acquisition of information unknown to other prospective applicants, any and all questions must be submitted via email to grants@tvc.state.tx.us. All questions and the

written answers will be posted on the TVC website in the format of Frequently Asked Questions (FAQs).

Deadline for Receipt of Letters of Interest. Letters of Interest must be received by TVC by 5:00 p.m. (Central Time), January 8, 2010 to be eligible to be considered for funding.

TRD-200905836

David Nobles
Grant Coordinator
Texas Veterans Commission
Filed: December 14, 2009

♦ ♦ ♦

How to Use the Texas Register

Information Available: The 14 sections of the ***Texas Register*** represent various facets of state government. Documents contained within them include:

Governor - Appointments, executive orders, and proclamations.

Attorney General - summaries of requests for opinions, opinions, and open records decisions.

Secretary of State - opinions based on the election laws.

Texas Ethics Commission - summaries of requests for opinions and opinions.

Emergency Rules- sections adopted by state agencies on an emergency basis.

Proposed Rules - sections proposed for adoption.

Withdrawn Rules - sections withdrawn by state agencies from consideration for adoption, or automatically withdrawn by the Texas Register six months after the proposal publication date.

Adopted Rules - sections adopted following public comment period.

Texas Department of Insurance Exempt Filings - notices of actions taken by the Texas Department of Insurance pursuant to Chapter 5, Subchapter L of the Insurance Code.

Texas Department of Banking - opinions and exempt rules filed by the Texas Department of Banking.

Tables and Graphics - graphic material from the proposed, emergency and adopted sections.

Transferred Rules- notice that the Legislature has transferred rules within the *Texas Administrative Code* from one state agency to another, or directed the Secretary of State to remove the rules of an abolished agency.

In Addition - miscellaneous information required to be published by statute or provided as a public service.

Review of Agency Rules - notices of state agency rules review.

Specific explanation on the contents of each section can be found on the beginning page of the section. The division also publishes cumulative quarterly and annual indexes to aid in researching material published.

How to Cite: Material published in the ***Texas Register*** is referenced by citing the volume in which the document appears, the words "TexReg" and the beginning page number on which that document was published. For example, a document published on page 2402 of Volume 34 (2009) is cited as follows: 34 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 "34 TexReg 2 issue date," while on the opposite page, page 3, in the lower right-hand corner, would be written "issue date 34 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 ***Index of Rules***. The *Index of Rules* 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 the ***Texas Register*** page number and a notation indicating the type of filing (emergency, proposed, withdrawn, or adopted) as shown in the following example.

TITLE 1. ADMINISTRATION
Part 4. Office of the Secretary of State
Chapter 91. Texas Register
40 TAC §3.704.....950 *(P)*

The ***Table of TAC Titles Affected*** is cumulative for each volume of the ***Texas Register*** (calendar year).